



STATE OF WASHINGTON
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March 22, 2019

Parents
[REDACTED]

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In re: **Northshore School District**
OSPI Cause No. 2018-SE-0044
OAH Docket No. 04-2018-OSPI-00508

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,

Anne Senter
Administrative Law Judge

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

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

MAILED
MAR 22 2019
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IN THE MATTER OF:

OSPI CAUSE NO. 2018-SE-0044

NORTHSHORE SCHOOL DISTRICT

OAH DOCKET NO. 04-2018-OSPI-00508

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter in Bothell, Washington, on August 6, 7, 8, 9, 10, and 15, 2018. The Mother of the Student whose education is at issue¹ appeared and the Parents were represented by Angela M. Shapow, attorney at law. The Northshore School District (the District) was represented by Carlos Chavez, attorney at law. Kim Durkin, District elementary special education director, also appeared.

STATEMENT OF THE CASE

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on April 17, 2018. The Complaint was assigned Cause No. 2018-SE-0044 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered April 19, 2018, which assigned the matter to ALJ Anne Senter. The District filed its Response to the Complaint on April 27, 2018.

A prehearing conference was held on May 23, 2018. Prehearing orders were entered on May 25, June 22, and July 17, 2018.

An Order Setting Due Date for Post-Hearing Briefs was entered August 17, 2018, setting forth the parties' agreement that they would submit post-hearing briefs by October 22, 2018. The parties timely submitted post-hearing briefs on that date. The parties submitted supplemental briefing at the ALJ's request. The District's supplemental briefing was received, as requested, on December 3, 2018. The Parents submitted their supplemental briefing on that date as well and also submitted a "corrected" brief, which was received by OAH by facsimile after 5:00 p.m. Accordingly, it is deemed to be filed on December 4, 2018. See Washington Administrative Code (WAC) 10-08-110(1)(b)(ii).

Due Date for Written Decision

As set forth in the first Prehearing Order, the due date for a written decision in this matter is 30 days after the record of the hearing closes. As the record closed with the receipt of the Parents' "corrected" supplemental post-hearing brief on December 4, 2018, the due date for the written decision in this case is **January 3, 2019**.

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

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 - D14, D16 - D22, and D24 - D33; and

Parents' Exhibits: P1 - P17, P20, P22 - P25, P26 (pages 1 - 3 only), P27 - P29, and P30 (pages 1 - 66 only).

Witnesses Heard (in order of appearance):

Shelby Hemp, District special education teacher;
Susan Monette Czarnecki, District school nurse;
Taylor Hollingsworth, District special education teacher;
Dr. Leihua Edstrom, Ph.D., school neuropsychologist, private practice;
Shannon Phanhtavilay, District board certified behavior analyst;
Jennifer Ross, District speech-language pathologist;
Dr. Angela Calhoun, board certified behavior analyst, Calhoun Consulting;
Janet Dolan, director, Dolan Academy;
Ali Airhart, District assistant principal;
Kim Durkin, District elementary special education director;
Andre Lannertone, jiu jitsu instructor, Gracie Jiu Jitsu;
Karen Rogers, District occupational therapist;
The Student's Mother;
Dr. Clayton Ray Cook, Ph.D., licensed psychologist, University of Minnesota;
Katherine Jewell, reading specialist/tutor;
Dr. Jack M. Fletcher, Ph.D., clinical psychologist;
Allison Wells (formerly Bennett), District school psychologist; and
Dr. Jervis Belarmino, M.D., pediatrician, Allegro Pediatrics.

ISSUES

As set forth in the Second Prehearing Order, the issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Improvement Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
 - i. Failing to comply with procedural requirements:
 - A. Not holding an individualized education program (IEP) meeting in January 2018 after the Student had 10 consecutive absences;
 - B. Not reevaluating the Student when informed that medical and psychological providers recommended home/hospital services multiple times during the 2017-2018 school year;
 - C. Not considering the Student's need for home/hospital services during the 2017-2018 school year;

- D. Not appropriately evaluating the Student in October 2016;
 - E. Not providing an IEP that conformed with the requirements of WAC 392-172A-03090 from April 17, 2016, to the present;
 - F. Not complying with the requirements of WAC 392-172A-03095 for the Student's IEP teams between April 17, 2016, and the present;
 - G. Not complying with the requirements of WAC 392-172A-03090 for the Student's IEPs between April 17, 2016, to the present;
 - H. Not allowing parental participation by withholding records and data that the District members of the IEP team relied on in making placement and IEP decisions during the 2017-2018 school year;
 - I. Providing a behavioral intervention program (BIP) outside of the guidelines of his agreed-upon BIP and without parental participation from April 17, 2016, to the present;
- ii. Failing to provide an appropriate and accessible program between January 2018 and the present;
 - iii. Failing to provide an IEP tailored to the Student's individual needs between April 17, 2016, and the present;
 - iv. Failing to implement the Student's IEP in his least restrictive environment (LRE) from April 17, 2016, to the present;
 - v. Failing to provide a program that addressed the Student's specific learning disability from April 17, 2016, to the present;
 - vi. Failing to appropriately and fully address the Student's language needs from April 17, 2016, to the present;
 - vii. Failing to identify a need for and failing to provide extended school year services from June 2016 to the present;
 - viii. Failing to consider or investigate the impact of harassment and bullying in the educational environment on the Student's receipt of FAPE during the 2017-2018 school year;
 - ix. Failing to implement the Student's agreed-upon BIP from April 17, 2016, to the present;
 - x. Failing to offer or provide an appropriate behavioral program between April 17, 2016, and the present;

- xii. Failing to consider the impact of anxiety on the Student's learning and behavior from April 17, 2016, to the present;
- b. And, whether the Parents are entitled to their requested remedies:
 - i. Compensatory education;
 - ii. Declaratory relief;
 - iii. Reimbursement;
 - iv. Prospective relief;
 - v. And/or other equitable remedies, as appropriate.

FINDINGS OF FACT

Background

1. The Student was nine years old at the time of the due process hearing. The Student's identical twin, the Sibling, also attended school in the District. See Mother, Tr. 713.²
2. A Missouri school district originally qualified the Student for special education and related services under the developmental delay eligibility category in January 2013. Exhibit D1, p. 1. The evaluation recommended that he receive specially designed instruction (SDI) in motor skills and social/emotional skills. *Id.* The Student moved into the District in September 2013 and attended Sorenson Early Childhood Center. *Id.* The District conducted its own evaluation of the Student, including a functional behavioral assessment (FBA), in October of that year. Exhibit D1. The evaluation team concluded that the Student continued to be eligible under the developmental delay category, and recommended SDI in behavior and social/emotional skills. *Id.* at 1 - 2. The Student was assessed with respect to his motor skills, and it was determined that he no longer qualified for continued motor services. *Id.* at 11-12.

First Grade at Canyon Creek Elementary

3. Beginning in first grade, during the 2015-2016 school year, the Student attended Canyon Creek Elementary School (Canyon Creek) in the mid-level social/emotional program, a largely

² Citations to the hearing record are to the name of the witness followed by the page number(s) in the hearing transcript on which the testimony appears. For example, the citation above refers to the testimony of the Mother found on page 713 of the transcript.

self-contained special education program. Exhibit D2; Hemp, Tr. 28-29. His special education teacher was Shelby Hemp.³ Hemp, Tr. 28.

4. The mid-level social/emotional program serves students with clinically significant social, emotional, and behavioral needs. Exhibit D2. The program uses general education materials as much as possible but teachers modify curriculum or provide alternate curriculum for students with academic goals on their individualized education programs (IEPs). Students are primarily served in a self-contained special education classroom with inclusion in the general education setting based on performance data. *Id.* The program's focus includes improving students' social skills and executive functioning skills. Hemp, Tr. 78-80, 139-40; Cook, Tr. 809-10.

5. The social/emotional program includes access to mental health services. Durkin, Tr. 630. Kim Durkin, District elementary special education director, understood that the mental health services provider, Lisa Kieffer, had offered those services to the Parents and they had declined to access them for the Student. Durkin, Tr. 630. The Mother was aware of the mental health services offered as part of the social/emotional program. She testified that she submitted paperwork for the Student to receive the services in first grade and was told by Ms. Kieffer that the Student did not qualify for them. Parent, Tr. 684. As all testimony about Ms. Kieffer's statements about mental health services in first grade are hearsay, no finding is made about what took place.

6. The mid-level social/emotional program includes expectations in three core behavior areas – being safe, responsible, and respectful. Hemp, Tr. 37, 131; Cook, Tr. 809-10. Safe means being safe, keeping one's hands and body to oneself, using tools safely, and staying in the classroom or other assigned location. Hemp, Tr. 44. Respectful means following directions, using respectful language and kind words, using a respectful tone of voice, and raising a hand. *Id.* at 43. It can vary depending on the setting and context. *Id.* Responsible means completing work, complying with the task at hand, and doing what is expected at any given time. *Id.* at 44.

7. Student performance in the three core behavior areas is tracked with a points system. Hemp, Tr. 37. Students start out with four points in each of the three areas. *Id.* If a student requires minimal interventions or redirections in an area, he earns a three. *Id.* The more intensely staff have to intervene with a student to elicit the appropriate behaviors, the lower the points the student receives, down to zero. *Id.*

8. A response sequence guides staff interactions with the students. Hemp, Tr. 37. It starts with minimally invasive redirection, such as a nonverbal or visual cue. *Id.* at 38. If that is not successful, staff moves to the next tier, a verbal reminder of the expectations, including expected behavior, the student's options for better choices, and the consequences of continuing the inappropriate choice. *Id.* at 39. If this is not successful, staff assigns a consequence. *Id.* If the student chooses not to comply, he gets a zero and the consequence. *Id.* at 40. Consequences vary and might include being required to finish work before accessing "technology time," fixing materials the student destroyed, doing homework, or earning "time away." *Id.* Time away is when

³ Ms. Hemp has a bachelor's degree from Western Washington University, holds endorsements in elementary and special education, and has taught special education in learning center formats and in the social/emotional program for approximately six years. Hemp, Tr. 28.

a student is sent to a private space in the classroom to self-regulate. *Id.* Ultimately, a student might engage in a re-boot process, a debrief and problem-solving protocol in which a student first has to be calm for five minutes. *Id.* at 135. Then staff and the student debrief the situation, discussing what happened and why, what the consequences were for the student and his classmates, and alternatives that could be tried the next time. *Id.* After that, the student writes a retribution plan to make up for the behavior. *Id.* at 135-36. As an example of this is, a student who destroyed another student's property might plan to repair it. *Id.* at 136.

9. In the first grade, Ms. Hemp used general education curriculum materials with the Student and she recalled that he was working near grade level as he started the school year. Hemp, Tr. 33-34.

10. The Student was not assigned to a general education classroom during first grade. Hemp, Tr. 47. He attended music and went to the library in the general education setting but the only other students present were special education students. *Id.* at 49. His special education class attended physical education (PE) with students from a general education class. *Id.* His special education class ate lunch in the lunchroom where general education students were present but sat at their own table without any general education students. The Student participated in the Families program, in which younger Canyon Creek students are teamed with older students to engage in community-building activities. Phanhthavilay, Tr. 409-10. The groups meet monthly for approximately half an hour and stay with the same family group throughout their years at Canyon Creek. *Id.* at 409-10, 438. The Families program includes both general and special education students.

11. An annual IEP was developed for the Student in November 2015. Exhibits D4, P2. That IEP provided that he would participate in the general education setting 21.1% of the time, which would be 365 minutes per week. Exhibit D4, p. 11. It provided that he would participate in general education PE and in general education "specialist" classes and that he would be able to participate in any other nonacademic or extracurricular activities. *Id.* at 12. The IEP provided for SDI in behavior and social/emotional skills. *Id.* at 11.

12. The Student's present levels of performance noted that he struggled with using his words appropriately to ask for help or express his feelings and needs. Exhibit D4, p. 6. Likewise, it stated that, with both peers and adults, he struggled to initiate conversations, use a full voice, and respond appropriately when spoken to. *Id.*

13. A behavioral intervention plan (BIP) was also developed, which individualized the mid-level social/emotional program's behavior system for the Student and targeted his withdrawal and noncompliance. Exhibits D5, P7. This BIP was implemented with the Student. Hemp, Tr. 137.

14. An advanced education planning and emergency response protocol (ERP) addendum to the IEP was developed in February 2016 when the Student began to display unsafe behaviors on a consistent basis. Exhibits D6, P8; Hemp, Tr. 51. It authorized the restraint or isolation of the Student under specified circumstances. *Id.*

15. The November 2015 IEP was revised in June 2016 to address the Student's allergy needs. Exhibit D7. The Parents agreed that an IEP team meeting was not necessary to incorporate the Student's allergy information from a prior 504 plan into the IEP. *Id.* at 12; Mother, Tr. 743.

16. There were 21 incidents during the 2015-2016 school year when the Student was isolated and/or restrained, resulting in him being isolated 12 times and restrained 27 times. Exhibit D28, pp. 7 - 16.

17. The Student's report card for first grade noted in the general comments for the second semester that the Student had made some great gains in his awareness of program expectations and routines and that "although [staff had] seen regression in the most recent months he [was] still a more active and engaged member of [the] community than earlier in the year." Exhibit P2, p. 2. The report card showed that the Student was reading at level C at the end of the first semester and at level B independently at the end of second semester. Exhibit P2, p. 3. The report does not reflect whether the level identified for the first semester was his instructional or his independent level, but the comments for the second semester stated that he had regressed in his willingness to read and attempt to read independently, needing more support and guidance than earlier in the year. *Id.* The reports reflect that the target for first semester was level C and the target for second semester was level I/J. *Id.*

18. With respect to writing, the Student's report card rated him as being significantly below standard. Exhibit P2, p. 3. The comments stated that his writing was below grade level at the end of the first semester and that his skills placed him "closer to a kindergarten level." *Id.* At the end of second semester, the comments stated that he was writing "at a kindergarten level" and that his writing was continuing to improve, although he needed a lot of teacher direction to produce writing. *Id.*

19. The Student's IEP team determined that he did not qualify for extended school year (ESY) services for the summer of 2016. Exhibit D4, p. 13. The record does not contain any regression or recoument data from the first grade.

Second Grade at Canyon Creek Elementary

20. The Student remained at Canyon Creek in the mid-level social/emotional program with Ms. Hemp as his teacher during the 2016-2017 school year. Hemp, Tr. 28-29. There were approximately ten students and four adults in the classroom. *Id.* at 132.

21. As in the first grade, the Student did not spend time in a general education classroom during this year. Hemp, Tr. 47. He attended music and went to the library in the general education setting but the only other students present were special education students. *Id.* at 49-50. His special education class attended PE with students from a general education class and he continued to participate in Families with general education students. *Id.*; Phanthavilay, Tr. 409-10, 438. He ate lunch in the lunchroom with general education students present but sat at a table with his special education classmates.

22. During the second grade, Ms. Hemp used the first grade general education math curriculum with the Student. Hemp, Tr. 34. For reading, she used a combination of two programs. One of these, Reading Mastery, is a program for students struggling with basic reading skills that focuses on phonics, blending, segmenting of words, and foundational, decoding skills. *Id.* at 34-35. The other curriculum, LLI kits, provides whole reading instruction through sets of books leveled to reading ability that include sight word work, comprehension, writing components, and reading a full text. *Id.*

23. The District completed the Student's triennial reevaluation in October 2016. Exhibit D11. Allison Wells, District school psychologist, led the Student's evaluation team.⁴ The evaluation team, including the Mother, met before testing began to plan for the reevaluation. Exhibit D11, p. 24; Wells, Tr. 874, Mother, Tr. 745. The Mother reported to the team that the Student would soon be privately evaluated to determine the effects of his ADHD. Exhibit D11, p. 24.

24. The team determined the reevaluation would include the following areas: review of existing data; general education teacher report; communication; medical-physical; social/emotional; behavior; academic; motor; and student observation. Exhibit D11, p. 24. The team also considered including a cognitive assessment of the Student but agreed not to because of concerns about obtaining valid results. Exhibit D11, p. 24. The team discussed adding a cognitive assessment based on the Student's willingness to engage during the academic assessment. *Id.* The Mother provided signed consent for the evaluation without suggesting additional areas for assessment where provided the opportunity on the consent form. *Id.* at 25. She had requested a cognitive assessment at the meeting and the record does not reflect whether she expressed disagreement with the team decision not to conduct such testing. Mother, Tr. 692-93, 745 - 47. With respect to communication, the team agreed to assess the Student's articulation because the Mother and teacher reported at the planning meeting that he could express himself and use lots of words so there were no other concerns with language. Ross, Tr. 450, 454.

25. The team did not assess for a specific learning disability (SLD) because of the concerns about getting valid cognitive scores due to the Student's distractibility and inability to attend. Wells, Tr. 889-90. Academic testing was done to determine whether the Student had deficits in reading, writing, and math. *Id.* at 890.

26. The team, including the Mother, did not propose assessing the Student's executive functioning. Ms. Hemp did not have concerns in this area because the social/emotional program's routine and structure supported students in this area. Hemp, Tr. 78.

27. The medical-physical portion of the evaluation included information received from Dr. Jervis Belarmino, the Student's pediatrician. Exhibit D11, p. 5. The Student had been diagnosed with attention-deficit/hyperactivity disorder (ADHD) and anxiety and was on medication for both conditions. *Id.* Dr. Belarmino did identify any specific educational impact related to the Student's anxiety. *Id.*; Wells, Tr. 877.

28. The District administered the Behavior Assessment System for Children – Third Edition (BASC-3), which gathers information on emotional and social disorders. Exhibit D11, p. 6. Ms. Hemp completed the teacher rating scale and the Mother completed the parent rating scale. *Id.* With respect to anxiety, the Mother's score was not elevated and Ms. Hemp's score was in the at-risk range. *Id.* The at-risk range indicates a behavior of concern that warrants monitoring. Wells, Tr. 877. Only scores in the clinically significant range, which is higher than at-risk, warrant further investigation. Exhibit D11, p. 6; Wells, Tr. 878.

⁴ Ms. Wells used the last name Bennett at the time. Wells, Tr. 871. She holds a master's degree in education with a school psychology specialty from Central Washington University. *Id.* at 872. She had been a school psychologist for nine years at the time of the hearing. *Id.* at 871.

29. With respect to functional communication, the Mother's score was in the at-risk range and Ms. Hemp's was in the clinically significant range. Exhibit D11, p. 8. They both provided responses indicating some level of deficit in the Student's ability to express ideas and communicate in a way that others can easily understand. *Id.* With respect to atypicality, Ms. Hemp noted that the Student often had confused or disorganized speech. *Id.* at 7.

30. The significant findings from the BASC-3 were that the Student demonstrated a delay in his social/emotional development that was adversely affecting his behavior and participation. Exhibit D11, p. 8. Recommended areas of support were cooperation, participation, self-advocacy, appropriate peer interactions, and emotion regulation. *Id.*

31. To assess the Student's academics, Ms. Wells used the Kaufman Test of Educational Achievement - Third Edition (KTEA-III). Exhibit D11, p. 12. She administered subtests in the areas of phonological processing, nonsense word decoding, letter and word identification, reading comprehension, math computation, math concepts and applications, written expression, and spelling. *Id.* at 21. The Student's scores placed him in the below average, low, or very low range for each subtest except for math computation, in which he scored in the average range. *Id.*

32. Jennifer Ross, speech-language pathologist (SLP), evaluated the Student with respect to communication.⁵ Exhibit D11, p. 14. She administered the Goldman Fristoe 2 Test of Articulation. *Id.* She concluded that his communication skills were within normal limits with the exception of articulation and that he had difficulty with numerous phonemes but that his voice and fluency were within normal limits. *Id.* She concluded that the Student qualified under the category of communication because of his articulation errors. *Id.* The report noted that language was not an area of concern. *Id.*

33. Karen Rogers, District occupational therapist (OT) conducted a motor assessment consisting of several tests, including a handwriting assessment using "The Quick Brown Fox" sentence.⁶ Exhibit D11, pp. 16-17. The Student's scores varied greatly from above average to just below average. *Id.* at 16. It was determined that his motor skills were not significantly impacting his ability to participate and make progress in his academic program, and motor services were not recommended. *Id.*

34. An FBA was conducted for the target behavior of "melt-down" behavior, described as the Student putting his head down and moaning or crying, sliding out of his chair and moving to a clear floor area and continuing to cry. Exhibit D11, p. 28. A BIP was recommended for the Student. *Id.* at 29.

35. The Parent testified that she asked about counseling services during the reevaluation process and was informed that mental health services were included as part of the Student's program so were not offered as part of the evaluation process. Mother, Tr. 685. She believed

⁵ Ms. Ross holds a bachelor's degree from Central Washington University and a master's of science degree from the University of Washington. Ross, Tr. 446-47. She has been a practicing SLP since 1975 and holds a Certificate of Clinical Competence from the American Speech and Hearing Association. *Id.* at 446 - 47.

⁶ Ms. Rogers holds a bachelor's degree in OT from St. Catherine University. Rogers, Tr. 654. She has been an OT for 38 years, including 18 with the District. *Id.* at 653-54.

that meant the Student would not get services because Ms. Kieffer had previously told her he did not qualify for them but there is no evidence that she asked the evaluation team about this or conferred with Ms. Kieffer. Mother, Tr. 744.

36. The Student was determined to be eligible for special education and related services under the "health impairments" eligibility category. Exhibit D11, p. 1. SDI was recommended in the areas of reading (basic reading skills), math (basic calculation skills and applying concepts to solve problems, written language (letter-sound correspondence, working towards creating well-composed sentences and paragraphs), social/emotional (strategies for emotional regulation and establishing and maintaining positive relationships), and behavior (positive strategies to replace maladaptive behaviors). *Id.* It was also recommended he receive related services in communication to address his articulation errors. *Id.* at 14.

37. Following the evaluation, the Student's IEP team developed a new IEP, BIP, and ERP. An IEP team meeting was held on November 2, 2016. Exhibit D12, p. 1. The meeting was attended by the Mother; Ms. Hemp; Karla Beavo, a librarian/general education teacher; and Kate Bradshaw as the District representative. *Id.*; Hemp, Tr. 83, 150. The Mother provided consent in writing excusing the SLP from attending. Exhibit D12, p. 19.

38. The November 2016 IEP provided for continued SDI in social/emotional skills and behavior. Exhibit D12, p. 13. Additionally, it provided for SDI in math 20 minutes four times weekly, SDI in reading 20 minutes five times weekly, SDI in written language 20 minutes five times weekly, and 30 minutes weekly of SLP services. *Id.* The IEP provided that the Student would spend 19.36% of the time in the general education setting, which was 335 minutes per week. *Id.* at 13. It provided that he would participate in general education PE and also general education "specialist" classes and in any other nonacademic or extracurricular activities. *Id.* The IEP did not provide for ESY services. *Id.* at 15.

39. The IEP contained one math goal:

By 11/06/2017, when given word problems requiring basic addition and subtraction facts up to 10 [the Student] will independently and accurately problem solve improving foundational math problem-solving skills from independently solving word problems with 0% accuracy to independently solving word problems with 50% accuracy as measured by teacher observation and teacher created assessments.

Exhibit D12, p. 5.

40. The IEP contained one reading goal:

By 11/06/2017, when given basic CVC words and words including consonant blends [the Student] will read words improving decoding skills from reading basic CVC words with 36% accuracy to reading basic CVC words and words including consonant blends with 80% accuracy as measured by teacher observation and teacher-created assessments.

Exhibit D12, p. 5. A "CVC word" is a consonant-vowel-consonant word like cat. Hemp, Tr. 84-85.

41. The IEP included one written language goal:

By 11/06/2017, when given basic CVC words and words including consonant blends [the Student] will write words improving phonetic awareness from writing basic CVC words with 0% accuracy to writing basic CVC words and words with blends with 50% accuracy as measured by teacher observation and teacher-created assessments.

Exhibit D12, p. 6.

42. The IEP included three communication goals:

By 11/06/2017, when given auditory and visual SLP directed materials [the Student] will produce targeted sounds: r (initial); r blends; th (voiced and unvoiced) and 'ng' improving overall intelligibility from 0% in words to 80% in words as measured by SLP data collected monthly.

By 11/06/2017, when given auditory and visual materials [the Student] will produce target sound[s]: r initial, r blends improving overall intelligibility/articulation from 0% in words to 80% in words and sentences as measured by SLP data collected monthly.

By 11/06/2017, when given auditory and visual materials [the Student] will produce target sounds: the voiced and unvoiced improving overall intelligibility/articulation from 0% in words to 80% in words and sentences as measured by SLP data collected monthly.

Exhibit D12, pp. 6, 8.

43. The IEP contained three social/emotional goals:

By 11/06/2017, when given a direction or a non-preferred task [the Student] will demonstrate respectful behavior (complying with teacher request and following directions) independently improving social/emotional skills from an average of 69% of the time to an average of 80% of the time as measured by daily point sheet data for respect using 4, 3, 2, 1, 0 scale of independence.

BY 11/06/2017, when given a non-preferred academic task or classroom routine [the Student] will demonstrate responsible behavior (working independently, attempting more challenging work, completing assigned classwork) independently improving social/emotional skills from an average of 65% of the time to an average of 80% of the time as measured by daily point sheet data for responsible using a 4, 3, 2, 1, 0 scale of independence.

By 11/06/2017, when given a set-back, frustration, or other strong emotion [the Student] will self-advocate (asks for help, a break, a compromise, or raises a hand to seek needed adult attention) independently improving social/emotional skills

from an average of 25% of the time to an average of 75% of the time as measured by daily point sheet data and teacher observation.

Exhibit D12, pp. 6 - 7.

44. The IEP includes one behavior goal:

By 11/06/2017, when given an undesired situation (situation that upsets/frustrates him, is non-preferred or is perceived as being "hard") [the Student] will safely self regulate by utilizing a break/compromise/help independently improving his behavior from an average 76% of the time to an average of 90% of the time as measured by daily point sheet data for safe using a 4, 3, 2, 1, 0 scale of independence.

Exhibit D12, p. 7.

45. The November 2016 BIP addressed one target behavior - the Student's inappropriate response to non-preferred tasks. Exhibit D13. The BIP described the target behavior as refusing to follow teacher directions, ignoring teacher requests or offers of support, moaning and crying, and often moving to an open space of carpet to lay down and continue crying. *Id.* at 2. It noted he sometimes became disruptive (calling out at students, screaming, banging items loudly) and destructive (ripping or throwing materials, breaking pencils, etc.). *Id.*

46. The behavior most often occurs in the classroom setting during reading, writing, or math activities. Exhibit D13, p. 2. Triggers for the behavior include being asked to complete a task perceived as difficult, to participate in a nonpreferred activity, or to discontinue a preferred activity, and being denied access to a desired object or activity. *Id.*

47. The hypothesis for the Student's behavior is that it is a means to avoid a non-preferred activity, gain access to a preferred task or object, and obtain attention. Exhibit D13, p. 2. As intervention strategies, the Student would be taught self-regulation skills and how to ask for help, ask for a compromise, ask for a break, and get adult attention appropriately. *Id.* The BIP includes setting event strategies to provide an environment to increase the replacement behavior, including cues before transitions, a consistent, posted routine, and pre-teaching and coaching ways to solve problems and get help. *Id.* at 3. The BIP has consequence strategies, including praise, receiving full points for the Student's points sheet, and a token system allowing him to earn access to preferred activities or a "treasure box." *Id.* It also has a response plan for when the Student engages in the target behavior, which includes reminding the Student of the expectations, consequences, and strategies he can use, receipt of a consequence, which could include being sent to a time away, being ignored until he is calm and compliant, or being required to make up missed work. *Id.*

48. The Mother did not raise any concerns with the November 2016 IEP at the time it was developed and she agreed with the November 2016 BIP at the time. Mother, Tr. 752-53. The November 2016 BIP was implemented with the Student. Hemp, Tr. 151.

49. An ERP was also prepared for the Student in November 2016. Exhibit D13, p. 5. The Mother provided consent for the use of isolation and restraint as described in the document. *Id.*

50. Dr. Mark Stein of Seattle Children's Hospital evaluated the Student in December 2016. Exhibits D14, P22. Dr. Stein concluded that the Student met the diagnostic criteria for attention deficit hyperactivity disorder (ADHD), combined type. Exhibit D, p. 8. Additionally he concluded that the Student met the criteria for a language disorder (which he alternately referred to as a learning disorder) with impairment in expressive ability. *Id.* He also diagnosed him with "developmental coordination disorder (fine motor)" and anxiety disorder "by history." *Id.* A designation that a diagnosis is "by history" means that the person evaluated has historically received that diagnosis but may not currently present with the symptoms for the diagnosis or that the diagnosis was not the focus of the evaluation. Edstrom, Tr. 351.

51. Dr. Stein administered the Multi-Dimensional Anxiety Screening for Children - 2 (MASC-2), which assesses self-reported levels of anxiety. Exhibit D14, p. 6. The Student's overall MASC-2 score was in the average range, although the Student's scores for separation anxiety/panic, avoidance, and anxious coping were clinically elevated, indicating "mild" self-reported anxiety within those domains. *Id.*

52. Dr. Stein's evaluation included administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), to address his cognitive functioning. Exhibit D14, p. 4. The Student's full scale IQ was determined to be in the low average range of cognitive ability, although it was determined not to be an adequate index of his intellectual potential because of significant variability in the index scores. *Id.*

53. Dr. Stein noted in his summary and recommendations that the Student:

meets criteria for a language disorder with impairment in expressive ability, and despite at least average nonverbal intellectual ability, is functioning 1-2 grade levels below his current placement. He has a reduced vocabulary, is limited in his ability to generate proper sentences in terms of rules of grammar, and has severe impairments in discourse. His nonverbal communication is adequate.

Exhibit D14, p. 8. Dr. Stein recommended the Student's IEP be revised to address his "verbal learning disorder." *Id.* at 9. He also made recommendations to improve the Student's focus and provide alternate ways to respond in the classroom, including providing immediate feedback on his behavior throughout the day, seating at the front of the classroom, and taking breaks. *Id.*

54. The Mother testified that Dr. Stein verbally informed her that the Student had dyslexia and dysgraphia. Mother, Tr. 682. As Dr. Stein's report does not include this information, Dr. Stein did not testify, and the Mother's testimony is hearsay, no finding can be made regarding Dr. Stein diagnosing the Student as having dyslexia or dysgraphia.

55. The District conducted a reevaluation of the Student in March 2017 to review and incorporate Dr. Stein's report. Exhibits D16, P23. Following the reevaluation, the District sent the Parents prior written notice (PWN) stating that the Student continued to qualify for special education under the health impairment category and to receive SDI in reading, math, written expression, social/emotional skills, and behavior. Exhibit D16, p. 20

56. Near the end of second grade, the Parents reported two incidents of allegedly inappropriate conduct by other students toward the Student. The first was that Classmate 5⁷ had called the Student and his Sibling the term commonly referred to as “the N-word” on the school bus. Mother, Tr. 700-01; Exhibit P26, p. 2. The record does not reflect the outcome of this report. The second was that Classmate 1 had intentionally pulled down his pants and exposed his genitals to the Student in class. Mother, Tr. 700-01; Exhibit P26. The Mother’s understanding is that the District investigated the allegation and determined that the incident had happened, and the Mother agreed with the District’s decision that neither student would be removed from the classroom because it was so close to the end of the year. Exhibit P26. The Parent communicated by email with Kate Bradshaw, assistant principal, requesting that Classmates 1 and 5 both be relocated away from the Student’s desk. *Id.* Ms. Bradshaw responded to the email but the record does not reflect the outcome of the request. Mother, Tr. 757.

57. The Student’s report cards for second grade state that he was significantly below standard, the lowest rating possible, at the end of second semester in all rated areas of reading and math and in all rated areas of writing except for “text types (option, information, and/or a narrative),” in which he was rated as “developing toward standard.” Exhibit D21, p. 2. He was rated as meeting standard in all areas of science. *Id.* The report reflected that he had made minimal growth in reading, writing and language, and math, and steady growth in science. *Id.*

58. The report cards reflect that the Student had recently read a level E book with decoding accuracy of 91% and with good comprehension. Exhibit D21, p. 2. The grade-level standard at the time was level M, demonstrating the Student was not reading at grade level. It also stated he was working at a kindergarten level in writing at the end of the second semester. *Id.* With respect to math, it stated that he was performing below standards and had worked in a first-grade curriculum to build confidence and was beginning to show perseverance and a willingness to attempt math work that appeared challenging to him. *Id.*

59. There were eight incidents during the 2016-2017 school year during which the Student was isolated and/or restrained, resulting in him being isolated eight times and restrained eight times. Exhibit D28, pp. 2 - 7.

60. Ms. Hemp recommended that the Student not qualify for ESY for the summer of 2017. Hemp, Tr. 108. She compiled regression and recoupment data and concluded he did not meet the requirements. Exhibit D18. An IEP team meeting was held in June 2017 to address the Parents’ concerns about the Student’s progress toward grade-level expectations, ESY, and concerns regarding FAPE. Exhibit D17. The team determined the Student would not receive ESY services because current data did not show signs of regression/recoupment problems with IEP goals, and there was not a lack of adequate progress toward IEP goals or evidence of a recent emergence of critical skills. *Id.* at 1. The team planned to meet later to address the Parents’ other concerns. *Id.* at 1. The record does not reflect whether this took place.

⁷ District students other than the Student and his Sibling are referred to by classmate numbers designated during the hearing to protect their privacy.

Third Grade at Canyon Creek Elementary

61. During the 2017-2018 school year, the Student remained at Canyon Creek in the mid-level social/emotional program with Taylor Hollingsworth as his special education teacher.⁸⁹

62. The Student's class attended library and music in the general education setting but without general education peers present. Hollingsworth, Tr. 175-76. They were paired with a general education class for PE. *Id.* at 176. They also participated in general education lunch, recess, and assemblies, although each class sat together so there were no general education peers at the same table with the Student's class. *Id.* at 175-76. The Student also continued to participate in the Families group. Phanthavilay, Tr. 438.

63. The Student's November 2017 IEP was developed over the course of four IEP meetings. Hollingsworth, Tr. 226. The first three meetings each lasted over an hour. *Id.* at 227. The fourth meeting lasted approximately four hours and was facilitated by a facilitator from Sound Options, a company that provides assistance in resolving disputes between school districts and families. *Id.*; Durkin, Tr. 612. The IEP team included Ms. Hollingsworth; Ali Airhart, assistant principal; and Kim Durkin, elementary special education director;¹⁰ as District representatives; Ms. Ross; and at least one of the Parents; and the Parents' and District's attorneys. Exhibit D25, p. 3. At the first meeting, Krista Fiser, a librarian who had been working with the Student, participated as the general education teacher. Hollingsworth, Tr. 227. Eeva Nikula, a third-grade general education teacher who had not worked with the Student, participated in another of the meetings because the Parents had requested a general education teacher more familiar with the curriculum. Hollingsworth, Tr. 202-3, 227. The Student's general education PE teacher participated in the final meeting. *Id.* at 228. The District provided records or data requested by the Parents during the IEP development process. Hollingsworth, Tr. 232-33; Durkin, Tr. 614.

64. No concerns were raised at the IEP meetings about harassment or bullying of the Student or about the Student's anxiety. Durkin, Tr. 613-14; Mother, Tr. 768; Hollingsworth, Tr. 230.

65. The November 2017 IEP provided for a greater amount of SDI in academics. Exhibit D24, p. 17. The Student would receive 165 minutes of SDI weekly in math, 180 minutes of SDI weekly in reading, 165 minutes of SDI weekly in written language, 415 minutes of SDI weekly in social/emotional skills, and 415 minutes of SDI weekly in behavior in the special education environment. *Id.* It also provided for 365 minutes weekly of SDI in social emotional to be provided in the general education environment. *Id.* The Student was to spend 21.04% of the time in the general

⁸⁹ Dr. Stein's signature reflects that he is a clinical psychologist, holds a doctoral degree, and is certified by the American Board of Professional Psychology (ABPP). As Dr. Stein did not testify, the record does not contain more information about his credentials.

⁹ Ms. Hollingsworth holds a bachelor's degree in elementary education from the University of Washington and is certificated to teach elementary education and special education. Hollingsworth, Tr. 222.

¹⁰ Ms. Durkin has a bachelor's of science in education from Bowling Green State University and a master's degree in educational leadership from Western Washington University. Durkin, Tr. 591. She holds certification in special education early childhood, special education K-12, and elementary education K-8. *Id.* She worked as a special education teacher for 15 years in a resource room setting. *Id.* at 591-92.

education setting, which was 365 minutes per week. *Id.* The IEP stated that he would have general education PE, participate in general education classes for 0 – 39% of the day without identifying those classes, and provided that he could participate in all extracurricular and nonacademic activities offered by the school. *Id.* at 18.

66. The IEP provided for a number of accommodations: access to sensory/self-regulation supports; additional time for assignments; additional time for tests; check for understanding of directions; flexible/alternate academic schedule; use of color coding for organization and differentiation in math; options/choices during academics (choice between two activities, which problems to complete, writing utensil type); oral tests; preferential seating; reduction of distractions (mat/visual barriers, headphones); shortened assignments; use of a scribe; use of a graphic organizer; and a visual schedule. *Id.* at 13 - 14.

67. The November 2017 IEP contained two math goals:

Skill: Calculation

By 12/10/2018, when given mixed addition and subtraction problems involving regrouping within 100 [the Student] will solve the problems improving math calculation from 50% accuracy to 80% accuracy as measured by student work samples, curriculum based measures, and staff collected data.

Skill: Problem-solving

By 12/10/2018, when given a word problem with basic addition and subtraction within 20 [the Student] will accurately identify the operation and solve the problem improving problem-solving skills from 0% accuracy to 50% accuracy as measured by classroom activities, teacher observations, curriculum based measures.

Exhibit D25, p. 9.

68. The IEP included three reading goals:

Skill: Basic Reading: Fluency

By 12/10/2018, when given a text at his instructional level [the Student] will read accurately improving basic reading (fluency) from 97% accuracy in a middle of first grade level text (Fountas and Pinnell level G) to 97% accuracy in a middle of second grade level text (Fountas and Pinnell level M) as measured by IRR test, informal reading, staff collected data.

Skill: Reading Comprehension

By 12/10/2018, when given a text at his instructional level [the Student] will answer text-based comprehension questions improving reading comprehension from 57% accuracy at a middle of first grade level (Fountas and Pinnell level G) to 57% accuracy at a middle of second grade level text (Fountas and Pinnell level M) as measured by IRR scores, classroom based measures, and teacher observations.

Skill: Basic Reading – decoding

By 12/10/2018, when given a list of 50 third grade words containing a mixture of phonemes [the Student] will decode the words improving basic reading skills from

0% accuracy to 80% accuracy as measured by classroom collected data, curriculum based measures, and teaching observations.

Exhibit D25, pp. 9 - 10.

69. The IEP includes two written language goals:

By 12/10/2018, when given a writing topic [the Student] will write complete sentences (minimum 5 words) improving writing production from 0 complete sentences in a 30 minute period to 3 complete sentences in a 30 minute period as measured by classroom assignments and data collection.

By 12/10/2018, when given a writing prompt [the Student] will use accurate conventions (punctuation and capitalization) improving convention skills from 72% of the time to 90% of the time as measured by classroom based measures, student work samples, teacher observations.

Exhibit D25, p. 10.

70. The IEP includes three communication goals:

By 12/10/2018, when given auditory and visual materials (audio/video recordings) [the Student] will produce target sounds: th voiced improving articulation from 33% accuracy in words to 80% accuracy in words and sentences as measured by data collected monthly.

By 12/10/2018, when given auditory and visual materials (audio/video recordings; apps) [the Student] will produce target sounds th unvoiced improving articulation from 0% in sentences to 80% sentences and reading activities as measured by data collected monthly.

By 12/10/2018, when given auditory and visual materials (audio/video records; apps) [the Student] will produce target sounds /r/ blends improving articulation from 0% in words to 80% accuracy in words and sentences as measured by data collected monthly.

Exhibit D25, p. 11.

71. The IEP contains two social emotional goals:

Skill: Self-regulation

By 12/10/2018, when given a stressful situation (challenging work tasks, non-preferred people or activities) [The Student] will select a coping strategy (a break, help, compromise, self-talk, breathing or visualizing) improving self-regulation skills from 0% of the time to 80% of the time as measured by classroom data collection and teacher observations.

Skill: Emotional awareness:

By 12/10/2018, when given a visual self-rating system (feelings thermometer, 5 point scale) [the Student] will accurately identify his feelings improving emotional awareness from 0% accuracy to 80% accuracy as measured by teacher observations and classroom collected data.

Exhibit D25, pp.11 - 12.

72. The IEP contains one behavior goal:

By 12/10/2018, when given a task [the Student] will begin the task within 1 minute and remain on task for a minimum of 25 minutes with no more than 2 adult prompts improving responsibility skills from 0 out of 10 consecutive occasions to 8 out of 10 consecutive occasions as measured by teacher observations and staff collected data.

Exhibit D25, p. 12.

73. A BIP was developed in November 2017 as well. Exhibit D26. The BIP identifies the Student's noncompliant, disruptive, and destructive behaviors when met with non-preferred tasks. *Id.* at 1. The BIP summarized data collection of the frequency and duration of these behaviors and identified that the Student successfully accesses replacement behaviors and self-regulation tools with a significant amount of adult direction and support but not independently. *Id.*

74. The BIP identifies the target behavior of disrespectful behavior, which includes noncompliance (the refusal to engage in academic tasks, accept adult support, participate in classroom activities, or follow adult instructions); disruptive behaviors (using classroom materials and tools as toys or play weapons, making unexpected noises, calling out or talking at inappropriate times, complaining, and crying); and destructive behaviors (crumpling and ripping papers and throwing materials). *Id.* at 2. The BIP hypothesizes that the Student seeks an escape from non-preferred tasks. *Id.*

75. The BIP identifies setting event strategies to establish an environment that will decrease the likelihood of the target behavior such as spaces for a variety of break options, a visual schedule, explicitly stated expectation sat the beginning of each activity, and access to positive adult attention. *Id.* at 3. Likewise, it identifies antecedent strategies to address the events that immediately precede the target behavior, such as the use of a timer, altering work load, such as by breaking assignments into smaller pieces, and a high ratio of positive to negative comments. *Id.* The BIP also includes teaching strategies for skills to be taught the Student, including teaching him to compromise and ask for help or a break, teaching by modeling, role-playing, repeated practice, and coaching to use a strategy in context, and pre-teaching, modeling, and practicing positive behaviors. *Id.* The BIP has consequence strategies, a reinforcement plan, including earning points on a points sheet and a token reward system, and a response sequence staff will follow when the target behavior occurs. *Id.* at 4.

76. Shortly before Thanksgiving break, the Mother believed that Classmate 1 verbally assaulted the Sibling. Mother, Tr. 710-11. As there is no evidence in the record that this assault took place other than the Mother's hearsay testimony, no finding is made as to whether the assault occurred. Although the Student did not observe the alleged verbal assault, the Mother believed the assault was negatively impacting him because he used the same negative words used in the alleged

verbal assault to describe himself and said he “just wanted to die.” *Id.* at 711-713. After taking the Student to see Dr. Belarmino, she kept him home from school the week of Thanksgiving. Mother, Tr. 711. This was before the facilitated IEP meeting, but there is no evidence the Parents reported this troubling behavior to the IEP team during that meeting or at any other time. The Mother did not raise concerns about incidents with peers at the meeting because Classmate 1 was in a different class than the Student, and the Parents hoped it was a one-time incident. Mother, Tr. 768.

77. At the beginning of December 2017, the Mother believed there was an altercation in the Sibling’s class that culminated in Classmate 1 throwing desks and books and trying to stab another classmate with a pencil. Mother, Tr. 714. As there is no evidence in the record that this assault took place other than the Mother’s hearsay testimony, no finding is made as to whether it did occur. She believed that the Sibling observed this altercation, was upset by it, and developed significant harmful behaviors as a result. *Id.* The Parents removed the Sibling from school beginning in early December 2017. *Id.* at 716, 764. The Sibling has never returned to school in the District as of the date of the hearing.

78. Classmate 1 was not in the same class as the Student. Hollingsworth, Tr. 234. The Mother perceived that the Student was fearful and anxious about going to school with Classmate 1 given what had happened with the Sibling and was anxious about going to school without the Sibling. Mother, Tr. 716. One time, when the Mother was dropping Student off at school, he did not want to walk down a hallway in which Classmate 1 was present with a paraeducator, and he wanted the Mother to walk with him. *Id.* at 717.

79. On January 9, 2018, the Mother sent an email to District staff asking what the District was going to do to keep the Student safe and away from Classmate 1. Mother, Tr. 717; Airhart, Tr. 585. In the email, the Mother stated that the Student had been informed that he was allowed to go to the school nurse as his safe place and that the Mother provided the Student with note cards to show staff if he was unable to make a request to see the nurse. Airhart, Tr. 585. This email is not in the record so it not known what concerns the Mother expressed to the District or whether she advised District staff of the Student’s fear and anxiety to which she testified.

80. Assistant Principal Airhart responded that because Student and Classmate 1 did not have classes together, there would be no interaction between them. Mother, Tr. 718. At some point during this time, Ms. Airhart proposed convening an IEP meeting to address the Parents’ concerns. Airhart, Tr. 587. The record does not reflect whether the Parents responded that they wished to schedule such a meeting.

81. On January 11, 2018, the Mother sent an email to Mr. Highsmith, the interim principal, because a field trip was approaching and both the Student’s and Classmate 1’s classes would be participating. Airhart, Tr. 585-86; Mother, Tr. 718. The Mother wanted to know if Classmate 1 was going on the field trip, and Mr. Highsmith informed her that that Classmate 1 was not. *Id.*

82. At some point, a plan was put in place involving the Mother and Susan Monette-Czarnecki, the school nurse, for the Student to use the health room as a safe place when he was upset. Monette-Czarnecki, Tr. 163. It is not clear from the record whether this was before or after the email of January 9, 2018, or whether other District staff were involved in the decision.

83. On January 17, 2018, the Student went to the nurse's office with his paraeducator and reported that a student had hit him on the back in the bathroom. *Id.* at 164; Mother, Tr. 718-19. Ms. Czarnecki observed that there was no mark and that the Student was not in a lot of distress or very much pain. *Id.* Ms. Monette-Czarnecki called the Mother and she came to pick him up. *Id.* at 168. The Mother believed that Classmate 1 had punched the Student in the back a few times in the bathroom. Mother, Tr. 718. Assistant Principal Airhart investigated the allegation but the Parents did not allow District staff to interview the Student as part of the investigation. Durkin, Tr. 629; Airhart, Tr. 578. The Parents never returned the Student to school in the District after January 17, 2018. Mother, Tr. 720; Durkin, Tr. 616.

84. On or about January 30, 2018, the Parents submitted a letter from Dr. Belarmino to the District, requesting the Student be approved for home/hospital services as of January 18, 2018, for a minimum of four weeks until an "appropriate placement can be secured that is safe and educationally appropriate." Exhibit P1, p. 2. The Parents also submitted a request for home/hospital instruction form signed by Dr. Belarmino, identifying the Student's diagnoses as generalized anxiety disorder, post-traumatic stress disorder (PTSD), and ADHD. *Id.* at 3.

85. The District sent a PWN proposing to hold an IEP team meeting to address the Parents' home/hospital request. Durkin, Tr. 617. At this point, the parties were already involved in negotiations related to the Parents' request for an independent educational evaluation (IEE) for the Student. *Id.* at 618. The parties agreed, through their attorneys, not to hold an IEP meeting to address the home/hospital request. Durkin, Tr. 618; Mother, Tr. 772. The Parents did not request that the Student be reevaluated. Mother, Tr. 772. The District did not provide home/hospital services as requested. Durkin, Tr. 625.

86. On March 16, 2018, the Parents notified the District by email that they planned to move both their children from the District with the intent of obtaining private services and seeking reimbursement. Exhibit P29.

87. Ms. Hollingsworth observed that the Student was doing well in her program before he was removed. Hollingsworth, Tr. 234. She observed he was making improvements academically and socially and that they had developed a much stronger bond in the last couple of months he was in school. *Id.* She observed that he was building relationships with other students and she was hearing his voice more as he told stories and used strategies more frequently. *Id.* She observed that he was requiring less scaffolding from staff. *Id.*

88. There were three incidents during the 2017-2018 school year where the Student was isolated and/or restrained, resulting in him being isolated three times and restrained three times. Exhibit D28, pp. 1 - 2. There were no incidents of isolation or restraint after October 31, 2017. *Id.* at 1.

89. After the Parents filed the due process hearing request in this case, the District convened an IEP team meeting as part of a resolution meeting on May 24, 2018. Exhibit D27; Durkin, Tr. 619. Although the District team members believed the Canyon Creek program was appropriate for the Student, they offered a program at a different school to address the Parents' concerns about other students at Canyon Creek. Durkin, Tr. 623. The IEP provided for a program at Arrowhead Elementary, with the addition of a one-on-one paraeducator to support the Student's transition to the new school, as well as mental health counseling services. Exhibit D27; Durkin,

Tr. 619-624. The Parents neither agreed to the proposed IEP nor amended their Complaint to challenge it as part of this hearing.

90. The Parents obtained an evaluation of the Student by Dr. Leihua Edstrom, a school neuropsychologist, in July 2018.¹¹ Exhibit P20. Dr. Edstrom found the Student continued to meet the diagnostic criteria for ADHD, combined type. She also identified a number of learning disorders – mixed dyslexia, mixed dysgraphia, and mixed dyscalculia. Dr. Edstrom acknowledged that she does not know how long the Student had these disorders prior to her testing. Edstrom, Tr. 284. Additionally, she diagnosed him as having selective mutism, which she described as a manifestation of a generalized anxiety disorder. Exhibit P20, p. 42.

91. Based on her evaluation, Dr. Edstrom concluded that the other health impairment eligibility category was appropriate for the Student even though he also has learning disabilities. Exhibit P20, p. 43. She made a number of recommendations about what type of educational program is appropriate for him. *Id.* at 43 - 47. As Dr. Edstrom's evaluation was conducted more than a year after the District's evaluations, her conclusions and recommendations are given limited weight in evaluating the District's earlier actions. Additionally, some of her conclusions and recommendations were inconsistent with those of Dr. Jack Fletcher.¹² Dr. Fletcher, an expert in learning disabilities, does not recognize the diagnosis of mixed dyslexia as a meaningful term, and does not recommend a balanced literacy approach as recommended by Dr. Edstrom. *Id.* at 852.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As the Parents are the party seeking relief in this case, they have the burden of proof.

¹¹ Dr. Edstrom holds a bachelor of science degree in psychology, a master's degree in education, and a doctoral degree in educational psychology, with a specialization in school psychology, from the University of Washington. Edstrom, Tr. 256-57. Dr. Edstrom has been in private practice providing school neuropsychological evaluations since 2012 and is the director of the doctoral program in counseling psychology at Northwest University. *Id.* at 258. She has also worked as a school psychologist for approximately ten years. *Id.* at 264-65.

¹² Dr. Fletcher holds a doctoral degree in clinical psychology from the University of Florida and is a psychology professor at the University of Houston. Fletcher, Tr. 844. He is a child neuropsychologist and specialized in children with disabilities. *Id.* at 846. He directs a national learning disability research center funded by the National Institute of Child Health and Human Development. *Id.* A focus of the center is evaluating interventions for children at risk for or displaying learning disabilities in reading. *Id.*

The IDEA

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

Id. at 206-07 (footnotes omitted).

4. 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.

Id. at 188-89.

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

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

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

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child

can “make progress in the general education curriculum,” taking into account the progress of his non-disabled peers, and the child’s potential.

M.C. v. Antelope Valley Union High Sch. Dist., 852 F.3d 840 (9th Cir. 2017)(citation omitted), *cert. denied*, 583 U.S. ___, 138 S. Ct. 556 (2017).

6. A district is not required to provide a “potential-maximizing” education in order to provide FAPE, but only a “basic floor of opportunity” that provides “some educational benefit” to the Student. *Rowley*, 486 U.S. at 200-01.

7. When determining whether an IEP is appropriate, the “question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Rowley*, U.S. at 206-07. The determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is “a snapshot, not a retrospective.” *Id.*

8. Procedural violations of the IDEA amount to a denial of FAPE only if they 1) impeded the child’s right to a free appropriate public education, 2) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child, or 3) caused a deprivation of educational benefits. WAC 392-172A-05105(2); 20 USC §1415(f)(3)(E)(ii).

Procedural Violations

Failure to convene an IEP meeting in January 2018 after ten consecutive absences.

9. The Parents identified the District’s failure to convene an IEP meeting in January 2018 after the Student had ten consecutive absences as an issue for hearing but did not address this issue in their closing brief.

10. School districts may have a duty to address a special education student’s absenteeism if it is affecting the student’s ability to access his education. *See, e.g., Lexington County Sch. Dist. v. Frazier*, 57 IDELR 190 (D.S.C. 2011)(IEP should have addressed student’s resistance to attending school where it was related to his disability and prevented him from benefitting from special education). The Parents have not identified any requirement, however, that a district must convene an IEP meeting simply because a student has ten consecutive absences outside of the discipline context. The Parents did not request an IEP team meeting at this time. Moreover, the District proposed to hold an IEP meeting after receiving the Parents’ request on or about January 30, 2018, for home/hospital services, but the parties agreed, through their attorneys, not to hold a meeting. Under these circumstances, the Parents have not proven a violation with respect to the District’s failure to convene an IEP team meeting to address the Student’s absences beginning January 18, 2018.

Not reevaluating the Student after the recommendation for home/hospital services during the 2017-2018 school year.

11. A reevaluation must be conducted at least every three years unless the parent and the district agree that a reevaluation is unnecessary. WAC 392-172A-03015(2)(b); 34 CFR 300.303(b)(2). A reevaluation must also be conducted if a district determines that the educational or related services needs, including improved academic achievement and functional

performance, of the student warrant a reevaluation or if the child's parent or teacher requests a reevaluation. WAC 392-172A-03015(1); 34 CFR 303.(a)(1)-(2).

12. At the time of the Parents' request for home/hospital services for the Student in January 2018, the Student was not due for a triennial evaluation as he had been reevaluated as recently as March 2017. The Parents did not request a reevaluation and there is no evidence that any teacher made such a request. While the IEP team might have determined that a reevaluation was appropriate to address the Parents' request for home/hospital services and related concerns about the Student's existing program, the parties agreed not to hold an IEP meeting to address that request after the District proposed convening such a meeting to discuss it. Accordingly, the Parents have not proven a violation with respect to failing to reevaluate the Student after the recommendation for home/hospital services.

Not considering the Student's need for home/hospital services during the 2017-2018 school year.

13. After receiving the Parents' request for home/hospital services in January 2018, the District proposed holding an IEP meeting to discuss the request but the parties agreed, through their attorneys, not to hold a meeting for that purpose. Because the District was prepared to address the request and the parties agreed not to convene a meeting while they were attempting to resolve the matter, the Parents have not proven a violation related to the District's failure to consider the Student's need for home/hospital services before the Parents filed their Complaint in this case.

October 2016 reevaluation.

14. An evaluation must gather information to determine 1) whether the student is eligible for special education and 2) the content of the student's IEP. WAC 392-172A-03020(2)(a). A student must be assessed in "all areas related to the suspected disability" and the evaluation must be "sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified." WAC 392-172A-03020(3)(e) and (g).

15. The Parents argue that the District was on notice that the Student might qualify under other categories instead of or in addition to other health impairment – developmental delay, emotional-behavior disability, specific learning disability (SLD), intellectual impairment, and language impairment – but "predetermined" that all of the Student's difficulties were attributable to the impact of ADHD without considering the impact of other suspected disabilities on his functioning. Parents' Closing Brief, p. 46. However, because labels do not determine services, the misidentification of a Student's eligibility category would not itself violate the IDEA:

Eligibility categories serve as gatekeepers for special education. Once eligible, a student is entitled to an IEP that meets all his disability-related needs, whether those needs would separately qualify him for eligibility or not. As a result, the IDEA and related laws do not entitle a student to eligibility under any particular category, nor do they regulate the addition of an eligibility category to the IEP of a student already eligible under another category.

San Rafael City Schs., 112 LRP 12088 (SEA CA 2012). Moreover, Dr. Edstrom agreed that other health impairment is the appropriate eligibility category for the Student at the time of her

evaluation. Accordingly, the Parents have not proven a violation with respect to the eligibility category adopted by the evaluation team.

16. Likewise, a district need not evaluate whether the Student would qualify for special education under different eligibility categories. So long as a district has determined a student has qualified for special education under any category, the district's other responsibility is to conduct sufficient testing to determine what services the student requires. This was recently explained by the U.S. Department of Education, Office of Special Education Programs (OSEP):

As we explained in our October 23, 2015 letter, while IDEA does not prohibit the use of the terms dyslexia, dyscalculia, and dysgraphia in eligibility determinations, there is no requirement under IDEA that a disability label or "diagnosis" be given to each student receiving special education and related services, *so long as the child is regarded as having a disability and receives needed special education and related services*. 34 CFR § 300.111(d). To ensure that this occurs, the public agency must ensure that each child is assessed in all areas related to the suspected disability, including as appropriate, academic performance. 34 CFR § 300.304(c)(4). There is no provision in the IDEA that gives a parent the right to dictate the specific areas that the public agency must assess as part of the comprehensive evaluation; the public agency is only required to assess the child in particular areas related to the child's suspected disability, as it determines appropriate.

Letter to Unnerstall, 68 IDELR 22 (OSEP 2016) (emphasis added). OSEP went on to state:

However, if a determination is made through the evaluation process that a particular assessment for dyslexia is needed to ascertain whether the child has a disability and the child's educational needs, including those related to the child's reading difficulties, then the public agency must conduct the necessary assessments.

Id. This is consistent with *Timothy O. v. Paso Robles Unified School District*, where the Ninth Circuit found an evaluation to be inappropriate because the district failed to assess the student not just for autism but also for "autistic-like behavior." 822 F.3d 1105, 1129 (9th Cir. 2016)(concluding the district failed to assess in all areas of specific disability because it "did not include any of the standard assessments for autism" or an "assessment for social/adaptive behavior"), *cert. denied*, 137 S. Ct. 1578 (2017).

17. The Parents argue that the District did not identify an SLD in reading, writing, or math, or identify the Student as having dyslexia, dysgraphia, or dyscalculia. The Parents also argue that the District did not follow procedures required to determine whether a student qualifies under the SLD eligibility category, including involving a general education teacher, observing the Student in class, or providing a compliant evaluation report. See WAC 392-172A-03045. As the Student qualified for special education under the other health impaired eligibility category, it was not necessary to determine whether he also qualified under the SLD category, only to determine his educational needs. The evaluation team did not determine that it was necessary to test for dyslexia, dysgraphia, or dyscalculia, or to determine whether the Student would qualify under the SLD category in order to determine his educational services. The Parents have not proven that

the academic testing conducted was not sufficiently comprehensive for the team to identify the Student's needs for SDI in reading, writing, and math.

18. The Parents argue the evaluation report does not address how the Student's ADHD impacts him. To the contrary, the report includes Dr. Belarmino's comments about the impact of the Student's ADHD as well as the results of the various areas tested, including academics, social/emotional, and behavior.

19. The Parents also argue that the report does not address how the Student's anxiety presents in the classroom, although it is "well documented" that it impacts his language abilities. There is no evidence this was documented at the time of the evaluation. To the contrary, Dr. Belarmino did not identify an impact related to the Student's anxiety diagnosis, the BASC-3 did not identify scores related to anxiety in the clinically significant range, and there is no evidence that other concerns about the Student's anxiety were raised as areas to address further in the evaluation beyond the consideration of the Student's desire to avoid non-preferred activities addressed in the FBA.

20. The Parents argue the team did not "address" the Student's language concerns but do not argue additional or different testing should have been done with respect to the Student's language needs. The team assessed the Student with respect to articulation, which was the only concern raised at the planning meeting, and explained the findings in the report. While the BASC-3 and a prior IEP raised other potential language issues that might have put the District on notice additional assessments should have been done, any failure in this regard would not be a denial of FAPE. This is because Dr. Edstrom concluded, following her 2018 evaluation, that the Student did not have language delays and did not recommended any additional testing or services for him beyond the articulation services he was already receiving. The only evaluator who identified additional language needs for the Student was Dr. Klein, whose report did not contain any SLP testing data and who did not testify at the hearing to explain his results.

21. The Parents argue that a general education teacher should have participated in the evaluation but did not. There is no requirement that a general education teacher be part of the evaluation team except when qualifying a student under the SLD category. WAC 392-172A-03020, -03040, - 03050. Although the evaluation plan called for a general education teacher report, the failure to include one was a procedural violation that did not deny the Student a FAPE as he spent the bulk of his school day in the special education setting.

22. The Parents also present arguments about what the District knew in March 2017, suggesting that it is contesting the March 2017 reevaluation. Because the appropriateness of that evaluation was not identified as an issue in the Complaint or the statement of the issues, it is not addressed.

*Compliance with WAC 392-172A-03090.*¹³

23. WAC 392-172A-03090 sets out the necessary components of an IEP, including the requirement for "a statement of measurable annual goals, including academic and functional goals," and "a description of "how the district will measure the student's progress toward meeting the annual goals. WAC 392-172A-03090(1)(b) and (c).

24. The Parents argue that the goals developed for the Student are not sufficiently specific to be measurable; that some of the goals are compound, meaning they address more than one skill; that they use vague or use inappropriate data collection techniques; and have baselines that are not comparable to the end goals.

25. The social/emotional and behavior goals in the 2016 IEP are not appropriately measured. Each of the goals requires that the Student take action after a triggering event, such as self-advocating after a set-back, frustration, or other strong emotion. However, none of the goals are measured based on how often the Student experiences the triggering event. Instead, they are measured based on the daily point sheets, under which a student would earn all possible points unless he needed to be directed by staff in various categories. Thus, the daily point sheets do not measure the Student's responses to the triggers identified in his goals.

26. The Student's reading and writing goals from the 2016 IEP are inappropriate as well because, for both of them, the baseline measurement is the Student's ability to read or write "a basic CVC word" but the goal is reading or writing CVC words *and* words involving consonant blends. Because there is no baseline data for the words involving consonant blends, these goals are not appropriate.

27. The Parents have not otherwise proven that the 2016 or 2017 goals are so vague or otherwise flawed as to be inappropriate.

IEP team membership.

28. The Parents identified the failure to comply with WAC 392-172A-03095 regarding the composition of IEP teams as an issue for hearing but did not address it in their closing brief.

29. Where a student may be participating in the general education environment, the required members of the student's IEP team are a general education teacher, a special education teacher or provider, a district administrative representative, the parents, and if appropriate, the student. WAC 392-172A-03095; 34 CFR §300.321. The district members of the team must include someone able to interpret the instructional implications of evaluation results. *Id.*

30. A required district member of the IEP team is not required to attend if the parent and the district agree in writing that the member's attendance is not necessary because the member's area of curriculum or related services is not at issue. WAC 392-172A-03095(5)(a); 34 CFR §300.321. For an IEP team member whose area of curriculum will be discussed to be excused

¹³ Two of the Parents' issues referenced compliance with WAC 392-172A-03090 without explanation as to how they were different. Accordingly, they are addressed together here.

from all or part of that meeting, the district must obtain written consent to the excusal from the parents and the member must submit written input into the development of the IEP prior to the meeting and provide that input to the parent and other IEP team members. *Id.*

31. The Student's IEP teams in both 2016 and 2017 included a general education teacher, a special education teacher, a district administrative representative, and at least one of the Parents. The Parents do not in their briefing explain how the IEP team membership did not comply with WAC 392-172A-03095 and, therefore, have not proven a violation.

Withholding records the District relied on in making placement and IEP decisions during the 2017-2018 school year.

32. The Parents identified the withholding of records the District relied on in decision-making as an issue for hearing but did not address it in their closing brief.

33. School districts must permit parents to inspect and review educational records upon their request prior to IEP meetings. WAC 392-172A-05190.

34. The Parents failed to present any evidence or argument related to the allegation that the District did not comply with a request for records, or to refute the District's testimony that the requested records were provided. Accordingly, they have not proven a violation with respect to access to the Student's educational records.

Procedural BIP issues.

35. 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).

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

37. The issue identified by the Parents is that the District provided a behavioral intervention program "outside the guidelines of [the Student's] agreed-upon BIP and without parental participation." The Parents' argument appears to be that the behavioral protocols related to consequences and rewards used with *all* students in the mid-level social/emotional program are not set forth in sufficient detail in the Student's BIPs for the Parents to have been included in the creation of his BIP as it was implemented in the class. See Parents' Closing Brief, p. 53. They also argue that specialized terms in the Student's BIPs are not defined.

38. The 2016 and 2017 BIPs both refer to the existence of points sheets, a token system, and consequences, including being sent to a time away or being required to make up missed work. And they both refer to the response sequence. While the details of these protocols are not set out with as much specificity in the BIPs as was provided in the hearing testimony, the Parents have not demonstrated that the District was providing a different program than was developed with the Parents' involvement or that the Parents did not understand the protocols or had questions that were not answered during the IEP meetings such that they did not have the opportunity to meaningfully participate. The only example in the record of the Parents' confusion is an email from Ms. Hollingsworth responding in great detail to a question from the Mother about a daily point sheet and inviting her to feel free to ask other questions. The Parents have not proven any procedural violations with respect to the development of the Student's BIPs.

Implementation of the Student's IEP in the least restrictive environment.

39. School districts must ensure that special education students are served in the "least restrictive environment" (LRE). WAC 392-172A-02050. This means they should be served "[t]o the maximum extent appropriate in the general education environment with students who are nondisabled" and that "special classes . . . or other removal of students eligible for special education from the general education environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.*

40. The Parents do not appear to be arguing that the Student's IEPs did not provide for him to be educated in the LRE. Rather, they argue that the District did not implement the IEPs in the general education setting as required by the IEPs themselves. See Parents' Closing Brief, pp. 51 - 52.

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

"[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.

Id. at 821 and 822 (italics in original).

42. The Parents argue the Student was not served in the general education setting as often as was called for in his IEPs because he was not assigned to a general education classroom for any academics, did not participate with any general education peers for library and music, and sat at a table with only special education peers at lunch. The IEPs did not provide that the Student be assigned to a general education class, although they did provide he would participate in

general education "specialist" classes, without identifying those classes. The Student's "specialist" classes were PE, library, and music. Attending library and music without any general education peers does not constitute time in a general education setting. However, there is no evidence in the record about how often PE, music, and library classes were offered or how long they were. Nor is there any evidence about the length of lunch and recess. Accordingly, regardless of whether eating lunch at a separate table constitutes a general education setting, a calculation cannot be made about how many minutes the Student spent in a general education setting to compare with how many minutes were called for in the IEPs. Nor can it be determined the proportion of time he received "specialist" classes in a general education setting. Accordingly, the Parents have not met their burden of demonstrating that any implementation failure was material and, therefore, have not proven a violation with respect to the least restrictive environment.

Specific Learning Disability.

43. The Parents identified the District's failure to provide a program that addressed the Student's SLD as an issue for hearing but did not address it in their closing brief.

44. The Student was not identified as having any SLD until Dr. Edstrom evaluated him in July 2018 after the time period at issue here. Nonetheless, the District addressed the Student's academic needs in reading, writing, and math by providing SDI in those areas in the 2016 IEP and increasing the amount of SDI as well as the number of goal areas in the 2017 IEP.

Language needs.

45. The Parents identified the District's failure to appropriately and fully address the Student's language needs as an issue for hearing but did not address it in their closing brief.

46. The District did not identify language needs other than articulation for the Student in the October 2016 IEP. And Dr. Edstrom concluded following her July 2018 evaluation that the Student did not have language delays and did not recommend any language services for him other than continued articulation SLP services, which the District was already providing. The only evaluator who identified additional language needs for the Student was Dr. Klein, whose report did not contain any SLP testing data and who did not testify at the hearing. Accordingly, the Parents have not proven a violation related to language needs.

Extended school year.

47. The Parents identified the failure to identify a need for and failure to provide ESY services as an issue for hearing but did not address it in their closing brief.

48. Districts must ensure that ESY services are available when necessary to provide FAPE to a student eligible for special education. WAC 392-172A-02020(2). But ESY must only be provided if the IEP team determines on an individual basis that they are necessary. WAC 392-172A-02020(3).

49. The purpose of ESY services is the maintenance of the student's skills or behaviors, not the teaching of new ones. WAC 392-172A-02020(5). ESY services are the exception and not the rule. *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2008). They are only

necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months. *Id.*

50. The criteria for determining the need for ESY services should include regression and recoupment time based on documented evidence or on the nature and severity of the student's disability, rate of progress, and emerging skills, with evidence to support the need. WAC 392-172A-02020(6). For this purpose, "regression" means a significant loss of skills or behaviors if educational services are interrupted, and "recoupment" means the recovery of skills or behaviors to a level demonstrated before the interruption of services. WAC 392-172A-02020(6) - (7).

51. The Parents did not present evidence of regression or recoupment related to the interruption of services for either year or otherwise demonstrate the Student's need for ESY.

Impact of harassment and bullying during the 2017-2018 school year.

52. In the Ninth Circuit, a three-part analysis applies to the determination of whether harassment or bullying constitutes a denial of FAPE. *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 650 (9th Cir. 2015), *cert. denied*, 454 U.S. 1128 (2015). See also *Kiona-Benton City Sch. Dist.*, 112 LRP 9581 (WA SEA 2012). A parent must prove 1) the student was the victim of bullying; 2) the school district was deliberately indifferent to the bullying; and 3) the bullying was so severe it caused the student to derive no educational benefit from the district's services. *M.L.*, 394 F.3d at 650.

53. Here, the only alleged act of bullying or harassment against the Student during the 2017-2018 school year took place on the last day the Student attended school before the Parents removed him, and the District was not allowed to fully investigate it by talking with the Student. As the only record evidence of the incident is the Mother's and school nurse's hearsay testimony that the Student reported Classmate 1 hit him, it cannot be found the incident took place. Moreover, the District responded to the Parents' requests and concerns about Classmate 1 by confirming he and the Student would not be together because they were in different classes, by confirming Classmate 1 would not be on a field trip, by allowing the Student to access the nurse's room as a safe place, and by proposing to schedule an IEP meeting to talk about the Parents' concerns. After the alleged incident on January 17, 2018, and Dr. Belarmino's letter raising concerns about anxiety and requesting home/health services, the District again proposed convening an IEP meeting and the Parents agreed, through counsel, not to hold one. The Parents have not met their burden of proving any of the three criteria for determining that the impact of bullying or harassment constitute a denial of FAPE.

Implementation of agreed-upon BIP.

54. The Parents have not presented any evidence or argument regarding the District's alleged failure to implement the Student's BIPs. Accordingly, they have not proven a violation of the IDEA with respect to BIP implementation.

Whether the BIPs are appropriate.

55. A BIP is a plan incorporated into a student's IEP if determined necessary by the IEP team to receive FAPE. WAC 392-172A-01031. At a minimum, it must describe the following:

1. The pattern of behavior(s) that impedes the student's learning or the learning of others;
2. The instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team;
3. The positive behavioral interventions and supports to:
 - a. Reduce the pattern of behavior(s) that impedes the student's learning or the learning of others and increases the desired prosocial behaviors;
 - b. Ensure the consistency of the implementation of the positive behavioral interventions across the student's school-sponsored instruction or activities;
4. The skills that will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior for the student.

Id.

56. The Parents argue that the BIPs are inappropriate because the District escalated to an ERP for the Student without first assessing the appropriateness of his BIP. The implementation of the Student's first ERP, however, was in February 2016, prior to the statute of limitations period in this case. Thus, the alleged failure of the District to take action at that time is not at issue in this case.

57. The Parents also argue that the BIPs are inappropriate because the escalation of the Student's negative behaviors began after the implementation of a new BIP that provided for attention to be given to the Student. This appears to be a reference to the BIP implemented in November 2015. See Parents' Closing Brief, p. 6. This BIP was also implemented outside the statute of limitations period and is therefore not addressed.

58. The Parents also argue that the Student's BIPs were substantially the same from first to third grade without changing the intervention strategies despite the Student's continuing need for isolation and restraint. However, the Student's need for isolation and restraint decreased dramatically during that time period from 21 incidents leading to isolation and/or restraint during the first grade to eight such incidents during the second grade to just three such incidents during the portion of the third grade the Student attended school. Accordingly, the Parents have not demonstrated the BIPs were inappropriate based on their failure to reduce the need for isolation and restraint. Moreover, the 2017 BIP contained numerous interventions not included in the 2016 BIP.

59. Additionally, the Parents argue the BIPs are inappropriate because they teach the Student to escalate his behavior in order to escape a situation, which is the hypothesized function for his behavior. This argument ignores that part of the BIP's de-escalation plan is to support the Student in accessing replacement behaviors such as asking for help, asking for a compromise, or asking for a break. Accordingly, the Student does not need to escalate his behaviors until he receives a consequence removing him from the classroom in order to escape a task or situation because he is supported in asking for a break.

60. The Parents also argue that the BIPs are "provocative of behaviors [they] are trying to reduce." As examples, they argue that one time the Student had to finish a "reboot" from the day before, which is not recommended and led his isolation and restraint, and that the teacher

response sequence "leads to a cascading of events that happens pretty regularly and ends in isolation." Parents' Closing Brief, p. 52. As explained above, the need to isolate and restrain the Student has reduced significantly during the time the November 2016 and November 2017 BIPs have been in place. Neither the Parents nor their witness explained how they concluded that the response sequence has the effect argued on the Student.

Counseling services.

61. The Parents identified the failure to offer or provide counseling services as an issue for hearing but did not address it in their closing brief.

There is no evidence that counseling was recommended for the Student by the District evaluation team or any outside provider until Dr. Edstrom. Dr. Edstrom's counseling recommendation appears to be based on her understanding of some trauma the Student is alleged, but has not been proven, to have experienced at school, and the anxiety referenced in Dr. Belarmino's letter. Even assuming for the sake of argument that the events at school took place and caused the Student anxiety, those events did not take place until just shortly before the Parents removed the Student from the District. There is no evidence to conclude the Student required any counselling services in his prior or then-current IEPs in order to obtain FAPE.

Impact of anxiety on the Student's learning and behavior.

62. The Parents identified the failure to consider the impact of anxiety on the Student's learning and behavior as an issue for hearing but did not address it in their closing brief.

63. The District considered the impact of the Student's anxiety in both the 2016 and 2017 reevaluations. Neither reevaluation, including the information provided from Dr. Belarmino and Dr. Klein, identified any impact on the Student's learning or behavior warranting further consideration. And the Parents agreed not to conduct an IEP meeting after the District received Dr. Belarmino's letter in January 2018 requesting home/hospital services and referencing the Student's anxiety. Accordingly, the Parents have not met their burden of proving any violation regarding the District's failure to consider the Student's anxiety.

Failing to provide an appropriate and accessible program beginning January 2018.

64. Neither the issue statement nor the Parents' closing brief explain how they believe the Student's program was inappropriate or inaccessible other than in the ways already addressed above. Because this issue identifies the time period beginning January 2018, when the Student stopped attending school, it presumably is intended to address the Student's programming needs when he was no longer attending Canyon Creek. But, as discussed above, the Parents agreed with the District not to hold an IEP team meeting after the request for home/hospital instruction in January. Accordingly, the Parents cannot now demonstrate a violation for failing to provide a program different than that set out in the November 2017 IEP during the time period prior to filing the Complaint.

Failing to provide an IEP tailored to the Student's individual needs beginning April 17, 2016.

65. The Parents proposed this statement of the issue without identifying in what ways they believed the IEPs were inappropriate other than those addressed above and provided no additional explanation in their closing brief. Accordingly, they have not proven a violation.

Other issues

66. The Parents also argued that the District improperly isolated and restrained the Student in violation of Washington law. Because these allegations were not contained in the Parents' Complaint or in the statement of the issues, they are not addressed.

Remedies

Reimbursement and Private Placement.

67. The Parents requested reimbursement and a prospective placement. Although they did not provide an explanation in their closing brief, presumably they are seeking reimbursement for the private educational services they obtained for the Student after they removed him from school in January 2018 and a prospective private placement for the Student at Dolan Academy.

68. Parents who unilaterally enroll a student in a private school are entitled to reimbursement only if 1) the district placement violated the IDEA, and 2) the parents' private school placement is proper under the IDEA. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Thus, parents who unilaterally change their child's placement do so at their own financial risk. *Burlington v. Dep't of Ed. of Mass.*, 471 U.S. 359, 374 (1985). The Supreme Court explained that reimbursement for a private placement is allowed because Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or bear the cost of a private education. *Id.* at 370.

69. Here, the District denied the Student FAPE based on goals in the 2016 IEP. The same violations were not identified in the 2017 IEP. Because the Parents did not prove the District placement available to the Student when he left the District and began receiving private services violated the IDEA, neither reimbursement for a private placement nor a prospective private placement is warranted. For this reason, it is not necessary to determine whether Dolan Academy or the Student's other private services constitute an appropriate placement for the Student.

Compensatory education.

70. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from the special education services the school district should have provided in the first place." *Reid v. Dist. of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). It is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. Flexibility rather than rigidity is called for. *Id.* at 523-24. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994). Students are generally able to progress much more rapidly when tutored one-to-one rather than receiving instruction in classrooms with other students. For that reason, an hour-for-hour award, without evidence to support such, is not appropriate.

71. The violations found in this case relate to the Student's reading, writing, social/emotional, and behavioral goals in the November 2016 IEP. The Student was to receive 100 minutes of SDI per week of both reading and writing instruction. Fifty minutes of instruction per week is adopted as the appropriate amount of instruction for reading and for writing because it will be delivered in a one-on-one setting. As there are approximately 36 weeks in a school year (180 days divided by five days per week), the Student is entitled to 30 hours of one-on-one SDI in reading and 30 hours of one-on-one SDI in writing as compensatory education (50 minutes per week times 36 weeks divided by 60 minutes per hour).

72. The Student was entitled to approximately 15 hours of social/emotional skills instruction and approximately nine hours of behavioral instruction per week. Five hours per week is adopted as the appropriate amount of instruction for social/emotional skills and behavior combined as one-on-one instruction in these areas is substantially different than providing behavior and social/emotional support throughout a student's school day. Accordingly, the Student is entitled to 180 hours of one-on-one SDI in social/emotional skills and/or behavior as compensatory education (5 hours per week times 36 weeks). Because of the nature of social/emotional skills and behavior, some or all of this instruction may instead be provided in a small group setting, if the Parents agree, to provide the Student opportunities to socialize and practice skills with other students.

73. The compensatory services ordered above shall be provided by fully certificated District staff with the education, training, and experience to provide such instruction. The compensatory education may be delivered at any time in the two calendar years following the entry of this decision, except that one half of the total number of hours must be delivered in the first year. The services shall be provided at the duration and frequency determined appropriate by the Parents. Once such a schedule is set, the Student shall, except in an emergency, give notice 24 hours in advance of a scheduled session. Without such notice and in the absence of an emergency, that session will count towards the compensatory education award. The services shall be provided at a District school or other District building unless the District agrees to provide the services at another place of the Parents' choosing.

ORDER

1. The District violated the IDEA and denied the Student a FAPE by including inappropriate reading, writing, social/emotional, and behavior goals in the 2016 IEP.
2. The District did not otherwise deny the Student a FAPE.
3. The District shall provide the Student with compensatory education services in the form of 30 hours of one-on-one SDI in reading, 30 hours of one-on-one SDI in writing, and 180 hours of one-on-one SDI in social/emotional skills and/or behavior to be delivered as set forth above. The Parents' other requested remedies are denied.

Signed at Seattle, Washington on March 22, 2019.

Anne E. Senter

Anne Senter
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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

lan

Parents



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