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STATE OF WASHINGTON
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June 17, 2015

Adult Student

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Fircrest, WA 98466

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Parent

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In re: Tacoma School District
OSPI Cause No. 2014-SE-0073
OAH Docket No. 12-2014-OSPI-00016

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
Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator

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

SEATTLE-OAH

IN THE MATTER OF:

TACOMA SCHOOL DISTRICT

OSPI CAUSE NO. 2014-SE-0073

OAH DOCKET NO. 12-2014-OSPI-00016

**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 Tacoma, Washington, on April 6 and 7, 2015. The Adult Student whose education is at issue¹ appeared for a portion of the hearing and was represented by Angela Shapow, attorney at law. The Tacoma School District (the District) was represented by Carlos Chavez, attorney at law. Jonathon Bell, District assistant director of student services, also appeared.

STATEMENT OF THE CASE

The Adult Student filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on September 15, 2014. The Complaint was assigned Cause No. 2014-SE-0073 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered September 16, 2014, which assigned the matter to ALJ Anne Senter. The District filed its Response to the Complaint on September 25, 2014.

Prehearing conferences were held on October 14 and December 19, 2014, January 9, February 12, and March 24, 2015. Prehearing orders were entered October 15 and December 19, 2014, January 12 and 26, February 12, and March 30, 2015.

An order granting in part and denying in part the Adult Student's motion for partial summary judgment was entered on March 24, 2015.

The parties timely submitted post-hearing briefs, which were received by the ALJ on May 18, 2015.

Due Date for Written Decision

As set forth in the Prehearing Order dated October 15, 2014, the due date for a written decision in this matter was continued to 30 days after the record closes at the request of the Adult Student. As the record closed with the receipt of the parties' briefs on May 18, 2015, the due date for a written decision is June 17, 2015.

¹In the interests of preserving the family's privacy, this decision does not name the parent or student. Instead, they are each identified as "Parent," "Mother," and/or "Adult Student."

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 – D17; and

Adult Student's Exhibits: S1 – S31.

Witnesses Heard (in order of appearance):

The Adult Student's Parent;
Clifford Aziz, former District general education teacher;
Stacy Kidd, District special education teacher/tutor;
The Adult Student;
Allen Albertson, Psy.D., consulting school psychologist;
Leonard Aron, Yellow Wood Academy, director of special services; and
Jonathon Bell, District assistant director of student services.

ISSUES

1. As set forth in the Fifth Prehearing Order, the issues for the due process hearing are:
 - a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Adult Student a free appropriate public education (FAPE) by:
 - i. Failing to have a properly developed individualized education program (IEP) in place between April 15 and June 12, 2014;
 - ii. Basing the IEP dated June 12, 2014, on assessments not administered or scored in accordance with the instructions provided by producers of the assessments;
 - iii. Determining in the IEP dated June 12, 2014, that the Adult Student met graduation requirements for a regular high school diploma;
 - iv. Exiting the Student from special education on June 12, 2014;
 - b. And, whether the Adult Student is entitled to his requested remedies:
 - i. Compensatory education in reading and writing as transition services, math, and transition services;
 - ii. A determination that the Adult Student remains eligible for special education services;
 - iii. And/or other equitable remedies, as appropriate.

2. Issue 1(a)(i) was resolved in the Adult Student's favor as a result of his motion for partial summary judgment.

FINDINGS OF FACT

Background

1. The Adult Student turned 20 years old in May 2014. (Parent, Tr. 25) He had graduated from high school at the time of the hearing. Exhibit S19.

2. The Adult Student was initially evaluated and determined eligible for special education and related services in kindergarten under the specific learning disability (SLD) category. Exhibit S1, Finding of Fact (FOF) 2. He received specially designed instruction (SDI) in reading, written language, and math. *Id.* Following a reevaluation in the third grade, he was determined to need SDI only in math and written language and, after another reevaluation in the sixth grade, only in math. *Id.*

3. The Adult Student began ninth grade during the 2009-2010 school year. Exhibit S19. He received most of his high school education in general education classes, taking one or two special education classes in math and/or study skills each quarter throughout high school. Exhibit S19-22.

4. The Adult Student's high school proficiency exam (HSPE) for spring 2011 showed that he "passed" the HSPE in reading, although he only achieved the basic level, which is not generally a passing score. Exhibit S1, FOF 19. The Adult Student's IEP had not provided that he would meet the standard for the reading HSPE by meeting the basic level, rather than the proficient level, and it is not known why he was considered to have passed. *Id.* The IEP team believed that he had met the state testing requirements. Exhibit S22, p.4.

5. In high school, the Adult Student passed the following general education math classes: Algebra 1, Geometry 1 and 2, and Algebra 4/trig, earning two general education math credits.² Exhibit S19. He attempted, but did not pass, general education Algebra 1 (although he later passed it) and Algebra 3. *Id.* He took and passed the following special education math classes: "modified integ math," modified Algebra 1C and 1D, mathematics 1, and four semesters of "study skills basic" in which he received SDI in math, earning a total of four special education math credits. *Id.*; Exhibit S1, FOFs 5, 13, 21.

6. The Adult Student's last high school IEP was dated May 31, 2013. Exhibit S22. Shortly before that date, the Adult Student's Parent had provided a diagnosis of ADHD to the District, leading to a reevaluation. *Id.*; Exhibit S1, FOF 75. As a result of that reevaluation, the Adult Student's eligibility category was changed to "other health impairment." *Id.* at FOF 77.

² The District's courses entitled Algebra 1 and 2 are together the equivalent of the Algebra 1 state requirement. Exhibit S1, p.5, n.2; Stipulation of the Parties, Tr. 154. Similarly, the District's courses entitled Algebra 3 and 4 are together the equivalent of the state Algebra 2 requirement. *Id.*

7. The Student graduated from a District high school in June 2013, and received a "certificate of individual achievement," a type of diploma available to special education students. Exhibit S1, Finding of Fact (FOF) 87; RCW 28A.155.045.

8. On October 4, 2013, following his graduation, the Adult Student filed a due process hearing request in Cause No. 2013-SE-0090. On April 12, 2014, this ALJ entered Findings of Fact, Conclusions of Law, and Order ("prior decision") in that case. Exhibit S1.

9. The prior decision found, in part, that the sole math goal in the Adult Student's May 2013 individualized education program (IEP) was inappropriate for the following reasons: There was no way to determine what skills the goal was designed to address, the goal was immeasurable, and there was no way to determine whether the goal was met. Exhibit S1, Conclusions of Law (COL) 46. The decision also found that the District had failed to evaluate the Adult Student in a number of areas, failed to provide him with transition services set forth in his IEPs, and failed to determine whether he needed certain supports as part of his transition services. *Id.* at 27, 29, 30, 33. The decision did not find the May 2013 IEP inappropriate with respect to study skills. *Id.*

10. Additionally, the ALJ determined that the District had improperly graduated the Adult Student because he had not met state graduation requirements and his IEP team had not documented having made modifications to those requirements. Exhibit S1, COL 9, 16, 17, 20. The ALJ did not order that the Adult Student's graduation be rescinded because he did not request this remedy, and because rescission would potentially hinder his ability to pursue college classes in a timely manner. *Id.* at COL 68.

11. Although the Adult Student had graduated, the ALJ determined that the District had improperly exited him from special education because Washington law states that a student remains eligible for services until the student both graduates *and* meets graduation requirements. *Id.* at COL 18 (citing WAC 392-172A-02000).

12. The decision awarded the Adult Student compensatory education to cover the denial of a FAPE through the date of the decision. *Id.* at COL 71-74, 76-78. It stated that the instruction would take place at the District office where the hearing was held unless the Adult Student, the Parent, and the District agreed otherwise. *Id.* at COL 80. It did not require the District to provide transportation for the Adult Student related to the compensatory services. *Id.* It also determined that he continued to be eligible for special education and ordered the District to reevaluate him. *Id.* at COL 69.

13. Following the entry of the ALJ's decision, the Adult Student's attorney, Andrea Shapow, emailed the District's attorney, Carlos Chavez, on April 23, 2014, to discuss implementing the compensatory education, beginning prospective services, and coordinating an evaluation. Exhibit S2. The email stated that the Adult Student and the Parent would like the instruction to take place at a local library and that the Adult Student would be out of town between May 8 and 12, 2014. *Id.* On April 28, Ms. Shapow sent another email to Mr. Chavez asking when he anticipated a response to her earlier email. Exhibit S3.

14. On or about May 1, 2014, a District school psychologist contacted the Parent to schedule the reevaluation. Exhibit S4, p.1; Parent, Tr. 44-45. The Parent requested that contact be made through the Adult Student's attorney instead. (Parent, Tr. 44-45)

15. Ms. Shapow sent a third email to Mr. Chavez on May 2, 2014, seeking an evaluation plan so the Parent would know what she would be consenting to. Exhibit S4, p.1. Ms. Shapow also stated that the Parent would like the testing to be done at her home, a public library, or the District central office, rather than the high school the District had proposed, and that the Adult Student would need transportation to the evaluation. *Id.* She again requested information about compensatory and prospective services. *Id.*

16. On May 2, 2014, Mr. Chavez provided Ms. Shapow with a reevaluation proposal for the Adult Student. Exhibits S4, pp. 2-8; D1.

17. The Parent, who has power of attorney for the Adult Student, provided consent for the reevaluation on May 5, 2014, and asked that she be present for the reevaluation. Exhibits D2, S5; Parent, RP 17, 20.

18. On May 8, 2014, Mr. Chavez notified Ms. Shapow in an email that the assessment would take place on May 13, 2014, at 9:00 a.m. and that the District had located a room with the ability for the Parent to observe the Adult Student. Exhibits S6; D3, p. 4. In the same email, Mr. Chavez stated that the Adult Student's one-on-one instruction would begin with Brian Young, a special education math teacher, on May 13, 2014, at 3:00 p.m. at the District's central administration building. *Id.*

19. Ms. Shapow responded in an email dated Saturday, May 10, 2014, confirming that the Adult Student would be available for the testing on May 13, 2014, and seeking to verify that the Parent would be able to both see and hear the testing in the observation room provided. Exhibits S7; D3, p.3. Additionally, Ms. Shapow stated that there was no valid IEP in place for the Adult Student and that transportation would need to be added as a related service. *Id.* She further stated that the Adult Student would be available on May 13, 2014, to receive the services ordered by the ALJ. *Id.* She specified that the Adult Student would like to start with filling out FAFSA forms for financial aid as part of his transition services. *Id.* She asked Mr. Chavez to confirm whether Mr. Young was qualified to provide that instruction. *Id.*

20. Mr. Chavez responded in an email on Monday, May 12, 2014, that he had not yet been able to confirm whether the room reserved for the evaluation would allow for auditory, as well as visual, observation. Exhibits S8; D3, p. 3. He stated that the District would view the Parent's request for such participation as a refusal to consent to the assessment of the Adult Student. *Id.* The District rescheduled the testing from 9:00 a.m. to 3:00 p.m. to give Ms. Shapow time to consider the Adult Student's position on the matter. *Id.* Mr. Chavez stated that the District was considering her request about the sequence of services for the Adult Student and would reschedule the math services to allow for the Adult Student's rescheduled testing. *Id.*

21. Dr. Allen Albertson, Psy.D., conducted a number of assessments of the Adult Student on May 13 and 15, 2014. Exhibit S13; Albertson, Tr. 282. The District had attempted to schedule the second day of assessments on May 14, 2014, but the Adult Student was unavailable. (Parent, Tr. 24)

22. Among other assessments, Dr. Albertson used the Behavior Assessment System for Children – Second Edition (BASC-2) to assess the Adult Student's social/emotional functioning

and the Behavior Rating Inventory of Executive Function (BRIEF) to assess his executive functioning. Exhibit S13, pp. 2, 6-11.

23. The BRIEF is for the assessment of individuals 11 to 18 years old. Exhibits S23, pp. 1, 4; Albertson, Tr. 273. Dr. Albertson opined that it was appropriate to use the BRIEF with the Adult Student even though he turned 20 near the time of the testing because the teaching staff that completed the BRIEF had not worked with him since he last attended high school in June 2013 and their observations were from that time period. (Albertson, Tr. 273-74) The BRIEF teacher form requests information about whether a student had problems with specific behaviors "over the past 6 months." Exhibit S265, pp. 6, 7, 9. Dr. Albertson was not asked at the hearing about the propriety of having teachers who had not observed the Adult Student's behavior within that time period provide information about him. (Albertson, Tr. 237-87)

24. The BASC-2 teacher rating scales ask teachers to "mark the response that describes how [the] child has behaved recently (in the last several months)." Exhibit S26, pp. 1-3. Dr. Albertson was also not asked about the propriety of having teachers who had not observed the Adult Student's behavior within that time period provide information about him. (Albertson, Tr. 237-287)

25. On May 20, 2014, Mr. Chavez notified Ms. Shapow that the District had arranged for Stacey Kidd, a certificated special education teacher, to begin working with the Adult Student in the areas of transition, study skills, and math. Exhibits S9; D4. Mr. Chavez also stated that the Adult Student still needed to participate in a transition assessment as part of the reevaluation and stated that it could be completed after hours at the Adult Student's former high school with Rene Jones. *Id.*

26. The District and the Parent agreed that the services would be provided at a public library near the Adult Student's home beginning on May 27, 2014, at 4:00 p.m. Exhibits S10, p. 2; S11, p.2. The Parent requested that the District provide transportation for the Student. Exhibits S11, p.1; D5, p.1. The District declined in an email from Mr. Chavez, stating that the ALJ's order did not require transportation for the compensatory education services, the Adult Student's IEP did not identify transportation as a related service, and there was no indication that the need for transportation was required due to the Adult Student's disability. Exhibits S11, p.2; D5, p.1.

27. On May 27, 2014, the day the services were to begin, Ms. Kidd was 15 to 20 minutes late. Exhibits S12, p.1; D6, p.1; Mother, Tr. 30. The Parent was displeased about the delay, that there was no private room reserved for the session, and that Ms. Kidd did not have the Adult Student's IEP or a laptop. Exhibits S12, p.2.; D6. The Parent did not allow Ms. Kidd to work with the Adult Student that day. 124. The Parent insisted that a private room was necessary because the Adult Student would be embarrassed to be seen with a tutor in the library. (Parent, Tr. 61) The Adult Student, however, acknowledged that his friends did not go to the library in the summer, but stated that he would like to work in a private room so he would not be distracted. (Adult Student, Tr. 197, 207)

28. On May 27, 2014, Ms. Shapow notified Mr. Chavez that the Parent could only provide transportation for the Adult Student until the end of the week, at which point the Adult Student would be unable to attend sessions until the District made transportation arrangements. Exhibit S12, p. 1.

29. Ms. Kidd met the Adult Student at the library on May 28, 2014, to provide services to him, and they were able to meet in a private room. (Adult Student, Tr. 201) The Parent continued to have complaints: that Ms. Kidd printed the Adult Student's IEP at the library, that she still did not have a laptop, and that materials she ordered to use with the Adult Student had not arrived. Exhibit S12, p.2.

30. On May 29, 2015, the Parent notified Ms. Kidd that the Adult Student would not be available for his scheduled session that day because of a conflict related to a potential college basketball opportunity. Exhibits D8, p.2; Exhibit D9, p.1; Adult Student, Tr. 201.

31. Ms. Kidd and the Adult Student met at the library again on May 30, 2015. (Adult Student, Tr. 200) They were able to meet in a private room again that day. *Id.* at 201. However, private rooms could only be reserved two times per year. (Kidd, Tr. 169-70)

32. The library is approximately one and one-half miles from the Adult Student's home, and he acknowledged that he could have walked there. (Adult Student, Tr. 208, 226) The Adult Student estimated that it would take him about half an hour to walk there because he can jog a mile in ten minutes. (Adult Student, Tr. 226)

33. The Parent raised her concerns about Ms. Kidd and the lack of transportation in an email to Jon Bell, the District's assistant director of student services, on May 29, 2014. Exhibit S12, pp. 2-3. Mr. Bell responded to the Parent's email on May 30, 2014. Exhibits S12; D10, p.1. He confirmed that the District would not provide transportation for the Adult Student. *Id.* He stated that the District would not provide a laptop for the Adult Student's use, but that he was welcome to bring one if he wished. *Id.* He also stated that the Parent's request for a private room would not be considered as it was unnecessarily complicating the process of agreeing on an alternate location. *Id.* He stated that the District remained prepared to offer services for the Adult Student at the District's central administration building if the Parent continued to request a private room. *Id.* The Adult Student agreed, through Ms. Shapow, to accept services at the District's central administration building, but stated that he would not be able to access the services offered by the District unless it provided transportation. Exhibit S12, p.8.

34. The District's central administration building is approximately five and one-half miles from the Adult Student's home. (Bell, Tr. 363)

35. The Adult Student stopped attending sessions with Ms. Kidd after May 30, 2014. (Mother, Tr. 35) The Mother states this was because of transportation. *Id.* She also testified that the District did not offer services after that date, but this is inconsistent with Mr. Bell's email stating that the District was prepared to offer services at the District's central administration building. *Compare* Mother, Tr. 72 with Exhibits S12, D10, p.1. The Adult Student states that he stopped tutoring with Ms. Kidd after two sessions because they were not accomplishing anything. (Adult Student, Tr. 201) Regardless of the reason, the Adult Student had not availed himself of any further services, including the compensatory services ordered by the ALJ in the prior order, at the time of the hearing. (Mother, Tr. 35)

36. The Adult Student declined to participate in a transition assessment as part of the District's reevaluation because the Parent and Adult Student did not agree with it being done at his

former high school by a person who had previously been involved with his education. Exhibit S12, p.8.

37. On June 12, 2014, a joint meeting of the Adult Student's evaluation team and IEP team was held. Exhibits D11, p.3; D12, p.2; S14, p. 1; S15, p.1. The evaluation team found that the Adult Student continued to be eligible for special education and recommended services in math and study skills. Exhibits S14, p. 6; D11, p. 8.

38. The IEP team considered whether individualized graduation requirements were appropriate for the Adult Student.

39. With respect to math, the ALJ found in the prior order that the Adult Student only had two of three math credits required for graduation by state law to be obtained in certain enumerated courses.³ Exhibit S1, COL 7-9. The ALJ noted that the Adult Student had additional math credits in special education classes, but his then-existing IEP did not specify that he would meet his graduation requirements through those classes. *Id.* at COL 9. Accordingly, given the District policy that modifications to graduation requirements for special education students must be incorporated in their IEPs, the ALJ held that the special education math classes had not substituted for the math classes specifically-enumerated in state law, so the Adult Student had not met graduation requirements with respect to math credits. Exhibit S1, FOF 91, COL 9.

40. At the June 2014 IEP meeting, the team considered that the Adult Student had completed five math credits during his four years of high school, including some coursework beyond the general education minimum standards. Exhibits S15, pp. 8, 17; D12, pp. 9, 18; *see also* Exhibit S19. Given the Student's deficiencies in math calculation and reasoning skills and quantitative math concepts, the IEP team determined that the coursework he completed may reasonably substitute for the graduation credit requirements of specific math courses. Exhibits S15, pp. 8, 17; D12, pp. 9, 18.

41. With respect to the Adult Student's score on the reading HSPE, the ALJ found in the prior order that, although IEP teams may adjust a special education student's passing criteria from the proficient level to the basic level, no such decision for the Adult Student had been documented in the Adult Student's IEP as required by OSPI's guidance. Exhibit S1, COL 14-16. Nor was there any evidence that the IEP team had actually made such a decision, and the District had described the Adult Student having been allowed to "pass" the reading HSPE at the basic level as "inadvertent." *Id.* at FOF 19, p. 7, n.3. Accordingly, the ALJ held that the Adult Student had not met graduation requirements with respect to the reading HSPE. *Id.* at COL 16.

42. At the June 2014 IEP team meeting, the team determined that the Adult Student's score at the basic level on the reading HSPE was sufficient to meet the graduation requirement, given

³ WAC 180-51-066 sets forth the minimum high school graduation requirements for students entering the ninth grade on or after July 1, 2009, through June 30, 2012. With respect to math, it states that students must have three credits which *must* include algebra I or integrated mathematics I; geometry or integrated mathematics II; and algebra 2 or integrated mathematics III. WAC 180-51-066(10)(b)(i). Exceptions exist, but the ALJ determined that they did not apply to the Adult Student's situation. Exhibit S1, COL 7.

his struggles with focus and effectively demonstrating his full capability in the testing context. Exhibits S15, pp. 4, 17; D12, pp. 5, 18.

43. Having determined that these individualized graduation requirements were appropriate for the Adult Student, the IEP team determined that the Adult Student had obtained all required credits and met all state assessment requirements for graduation. Exhibits S15, pp. 15, 17; D12, pp. 16. The IEP team then exited him from special education on the same day, finding that he had completed all graduation requirements and had already graduated. *Id.* The team determined that, going forward, the Adult Student would receive only the compensatory services ordered by the ALJ. *Id.* This action was effective July 7, 2014. Exhibits S15, p. 18; D12, p. 19.

44. The Adult Student requested an independent educational evaluation (IEE), and the District agreed to provide one. Guy Oram, Ph.D., conducted a neuropsychological evaluation of the Adult Student, which concluded on December 18, 2014. Exhibit S16. Dr. Oram recommended, among other things, that the Adult Student may benefit from “supportive counseling” to provide guidance and encouragement. *Id.* at 12. This recommendation was based on Dr. Oram’s observation that the Adult Student appeared to lack confidence in his abilities during the testing, which could lead to avoidance and an unwillingness to advocate for himself when needed with his instructors or other college staff. *Id.* Dr. Albertson had not similarly recommended supportive counseling in his report, although he endorsed Dr. Oram’s recommendation in his testimony. Exhibit S13; Albertson, Tr. 258.

45. The Adult Student began attending Tacoma Community College at the beginning of the 2014-2015 school year and was still attending at the time of the hearing in April 2015. Exhibit D16; Mother, Tr. 72.

46. The Adult Student does not seek the opportunity to take the high school math classes that he would have needed to graduate had his requirements not been modified. (Adult Student, Tr. 215, 222) Nor does he seek the opportunity to retake the reading HSPE to attempt passing at the proficient level. *Id.* Both the Adult Student and his Parent believed there was no need to talk about graduation requirements at the June 2014 IEP meeting because the Adult Student had already graduated. (Parent, Tr. 37; Adult Student, Tr. 203) Instead, the Adult Student is requesting that the District pay a private school to, among other things, help him obtain certification as a personal trainer. Adult Student’s Closing Brief, p. 31-33. Similarly, in the previous due process hearing, the Adult Student was seeking to take college classes at the District’s expense. Exhibit S1, COL 81.

47. The District’s Policy No 2410 addresses high school graduation requirements and states the following:

It is the policy of Tacoma Public Schools to permit students to earn credit to be applied towards high school graduation in all manners acceptable under the laws and regulations of the State of Washington and as identified in Policy No. 2000. A student who qualifies for Special Education services shall satisfy those

competency requirements which are incorporated into the Individualized Education Program (IEP).⁴

Exhibit D14, p.1.

48. Similarly, the District's Regulation 2410R addresses graduation requirements and states:

An individual student may be granted an exemption from any course requirement in this policy if such requirement impedes the progress toward graduation provided there is a direct relationship between the failure to meet the requirement and the student's ability.

Exhibit S18, p.5.

49. OSPI has provided guidance for school districts in selecting the appropriate assessments for special education students earning a certificate of individual achievement. Exhibit D13. The guidance identifies, as one of the available options, allowing a student to meet standard for an assessment at the basic level, rather than the proficient level. *Id.* at 1. OSPI's guidance states that this option is available to any student receiving special education services and identifies the following descriptors of students for whom this option might be appropriate: 1) student is receiving the vast majority of her/his instruction in the general education setting; 2) student is demonstrating knowledge and skills close to that of her/his grade level peers; 3) student is preparing for post-secondary education. *Id.*

50. There were 42 school days between April 12 and July 7, 2014. Exhibits S17, p.1; D17, p.1. The Student was unavailable May 8 - 12, 2014. (Mother, Tr. 46) Three of these days were school days. Exhibits S17, p. 1; D17, p.1. He was also unavailable on May 14 and 29, 2014. (Mother, Tr. 24, 62) Both of these were school days. Exhibits S17, p.1; D17, p.1. Thus, there were 37 school days in this time period on which the Adult Student was available to receive services.

51. The Parent believes that the District is not capable of providing a program for the Adult Student because it has failed the Student in the past and she believes it is retaliating against him and that nothing would "be fair or correct or right." (Mother, Tr. 76-77) The Adult Student, in contrast, thinks the District is capable of providing tutoring to help him reach his goals. (Adult Student, Tr. 203) The Adult Student has not demonstrated that the District has retaliated against him or that it is not capable of providing him services.

⁴ The version of this policy placed in evidence in this case by the District states that it was revised June 26, 2014, which was after the IEP team meeting at which the team determined the Adult Student had met graduation requirements. However, it is substantially similar to the earlier version submitted in evidence in the prior due process hearing. *Compare* Exhibit D14, p.1 *with* Exhibit S1, FOF 91.

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 Adult Student is the party seeking relief in this case, he has the burden of proof.

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.

Rowley, 458 U.S. 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" as defined by the Act.

Id. at 188-89.

IEP between April 15 and June 12, 2014

5. The ALJ determined, on summary judgment, that the District violated the IDEA and denied the Student a FAPE from April 12, 2014, to June 12, 2014, because the IEP in effect for the Adult Student during that time period contained a math goal that had been determined in the prior hearing to be inappropriate.

June 2014 IEP

Determination that the Adult Student met graduation requirements

6. The ALJ determined, on summary judgment, that a school district may graduate a student with a regular diploma using modified standards set by his IEP team in place of state and school district standards. For that reason, the ALJ denied the Adult Student's motion for partial summary judgment on that issue. The Adult Student has not revisited that issue in his post-hearing briefs. He now argues that the District violated the law in the way it modified his graduation requirements.

7. Substantive standards for high school graduation are set by state law and school district policies, not by the IDEA. *Letter to Anonymous*, 22 IDELR 456 (OSEP 1994). Diploma requirements may be waived for students with disabilities if the modification is made on an individual basis in the student's IEP. *Camas School Dist.*, 106 LRP 2398 (SEA WA 2003); see also *Letter to Runkel*, 25 IDELR 387 (OCR 1997).

8. WAC 180-51-066 sets forth the state graduation requirements for subject areas and credits for those, like the Adult Student, who entered ninth grade between July 1, 2009, and June 30, 2012. However, WAC 180-51-115 allows individual students to be exempted from graduation requirements if, due to the student's limitations, those requirements are impeding the student's progress toward graduation:

(1) No student shall be denied the opportunity to earn a high school diploma solely because of limitations on the student's ability. The board of directors of districts granting high school diplomas shall adopt written policies, including procedures, for meeting the unique limitations of each student. Such procedures may provide for:

(a) The extension of time the student remains in school up to and including the school year in which such student reaches twenty-one years of age;

(b) A special education program in accordance with chapter 28A.155 RCW if the student is eligible; and

(c) Special accommodations for individual students, or in lieu thereof, exemption from any requirement in this chapter, if such requirement impedes the student's progress toward graduation and there is a direct relationship between the failure to meet the requirement and the student's limitation.

(Emphasis added).

9. Thus, where a school district adopts a policy that allows modification of graduation requirements consistent with a special education student's particular disabilities, it has the authority to award a diploma based upon modified requirements. *Camas, supra*.

10. Here, the IEP team determined that the Adult Student's math credits for classes not specifically enumerated in the state graduation requirements would reasonably substitute for the graduation credit requirements given his deficiencies in math calculation and reasoning skills and quantitative math concepts. This is directly related to the Student's limitations based on his specific learning disability in math.

11. A certificate of individual achievement is a type of diploma available to special education students who are not appropriately assessed by the Washington statewide high school assessment system. RCW 28A.155.045. The certificate may be earned using multiple alternate ways to demonstrate skills and abilities "commensurate with their [IEPs]." *Id.* The determination of whether the high school assessment system is appropriate for a student shall be made by the student's IEP team. *Id.* See also WAC 392-172A-03090(1)(f) (If IEP team determines that a student must take an alternate assessment instead of a particular regular state assessment, IEP must include a statement of why the student cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate for the student); 34 CFR §300.320(a)(6)(i).

12. With respect to the assessment, the IEP team determined it was appropriate for the Adult Student to pass the reading HSPE at the basic level, rather than the proficient level, because of his struggles with focus and effectively demonstrating his full capability in the testing context. This is one of the assessment options specified in OSPI's guidance for students, like the Adult Student, who receive most of their education in the general education setting, demonstrate knowledge and skills close to that of their grade level peers, and who are preparing for post-secondary education.

13. The Adult Student argues that there is no disability-related need to make these adjustments because the Adult Student has already graduated so nothing is impeding his graduation. However, the Adult Student does not seek to have his graduation rescinded, to take the missing math classes, or to retake the reading HSPE. He is interested only in furthering his post-secondary education. The Adult Student wishes to take advantage of the District's procedural errors in graduating him without making and/or documenting the decisions to modify his graduation requirements to allow him to continue to receive special education services while, at the same time, having the benefit of the graduation that could not properly have been granted without those modifications.

14. The Adult Student has not met his burden of proving that the District violated the IDEA by determining that the Adult Student met graduation requirements.

Appropriateness of the reevaluation on which the IEP was based

15. Under the evaluation procedures set forth in WAC 393-172A-03020, a school district must ensure that assessments are administered in accordance with any instructions provided by the producer of the assessments. WAC 392-172A-03020(b); 34 CFR §300.304(c)(1)(v).

16. The District used the BRIEF to assess the Adult Student's adaptive functioning when he was 20 years old, although the BRIEF is designed for students between the ages of 5 and 18. Additionally, both the BRIEF and the BASC-2 are designed to assess behaviors exhibited in recent time periods – the prior six months for the BRIEF and “the past several months” for the BASC-2 – yet the teachers who provided information about the Adult Student had not seen him in an educational setting for approximately one year.

17. The District's failure to administer the BRIEF and the BASC-2 in accordance with their instructions is a procedural violation of the IDEA. Not all procedural errors result in a denial of FAPE. *LM v. Capistrano Unified Sch. Dist.*, 538 F.3d 1261 (9th Cir. 2008). Procedural inadequacies constitute a denial of FAPE when they impede a student's right to a FAPE, significantly impede a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. WAC 392-172A-05105(2); 34 CFR §300.513(2).

18. The Adult Student argues that the IEE, which does not contain the same procedural inadequacies, recommends supportive counseling for the Adult Student, a related service not recommended by Dr. Albertson's evaluation, which formed the basis for the June 2014 IEP. However, the June 2014 IEP exited the Adult Student from special education, ending the District's obligation to provide related services (such as counseling) to the Adult Student. The Adult Student was exited because of the determination that he met graduation requirements. Because that decision did not depend on the flawed reevaluation, the outcome would not have been different without the procedural inadequacies in the reevaluation. Thus, the procedural inadequacies in the reevaluation did not result in a denial of FAPE because they did not result in the loss of educational opportunity for the Adult Student.

Exiting the Adult Student from Special Education

19. One of the bases for exiting a student from special education is that a student “has met high school graduation requirements established by the school district pursuant to rules of the state board of education, and the student has graduated from high school with a regular high school diploma.” WAC 392-172A-02000(2)(b).

20. As determined in the prior order, the Adult Student had graduated from high school with a regular high school diploma in June 2013. The IEP team has now determined, consistent with the District's policies, WAC 180-51-066, and RCW 28A.155.045, that the Adult Student has met his high school graduation requirements. Accordingly, the Adult Student has not proven that exiting him from special education violated the IDEA.

Other Matters

21. The Parent also argues that the District violated the IDEA because it did not provide transportation as a related service for the Student. Because this issue was not included in the Statement of the Issues, it is not considered.

REMEDIES

Compensatory Education

22. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility, rather than rigidity, is called for. *Reid*, 401 F.3d at 523-524. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Id.* at 524.

23. The District argues that no compensatory education should be awarded because the conduct of the Adult Student and the Parent demonstrated that they did not seriously intend for the Adult Student to receive educational services from the District. The District further argues that the Adult Student's Parent was uncooperative in the reevaluation process by refusing to speak directly with District staff, requesting to observe and then also to hear the assessments, requesting to record the assessments, and refusing to allow the transition assessment to take place. The District argues the Parent obstructed the delivery of services to the Adult Student by refusing to allow the Adult Student to meet with Ms. Kidd on the first day when she was late, demanding that tutoring sessions occur in a private room, that the Adult Student be provided a laptop, and that he be provided transportation to and from the public library even though it was near the Adult Student's home. The Parent's demands did not significantly increase the time it took the District to conduct the reevaluation or to hold the IEP meeting. The Adult Student's interest or lack thereof in accepting earlier services is not a reason to deny him a remedy for a denial of FAPE related to different services. Accordingly, compensatory education is not eliminated or reduced because of the conduct of the Adult Student or the Parent.

24. Compensatory education is awarded for the time period in which the District did not have a valid IEP in place between the date of the prior order, April 12, 2014, and the date that the IEP team's decision to exit the Adult Student from special education was effective, July 7, 2014. There were 37 school days in this time period on which the Adult Student was available for instruction.

25. The Adult Student requests one hour per day of compensatory services consistent with the service matrix in the May 2013 IEP. However, that matrix provided for 27 minutes per day five times per week of special education in math and 28 minutes five times per week in study skills. As the prior order found no deficiency in the May 2013 IEP with respect to study skills, no compensatory award of study skills services is made in connection with the failure to have an appropriate IEP in place in this time period. The District shall provide compensatory education in math because of the failure to have an IEP with appropriate math goals in place during this time period. The Adult Student would have been entitled to and available for 17 hours of math instruction during this time period (27 minutes x 37 days = 999 minutes divided by 60 = 17 hours (rounded)). Students are generally able to progress more rapidly with one-on-one instruction rather than receiving instruction in a classroom with other students. An hour-for-hour award, without evidence to support such, would not be appropriate. The ALJ adopts the formula used in the prior order, under which 20 minutes of one-on-one instruction is equal to one hour of

classroom instruction. Accordingly, the Adult Student is awarded a total of 6 hours of one-on-one instruction, including assessment to determine what instruction is appropriate, if necessary, in math (17 hours x .33 = 6 hours (rounded)).

26. 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 during the five months following the entry of this decision, at the duration and frequency determined appropriate by the Adult Student, his Parent (if she continues to have power of attorney for the Adult Student), and the District. Once such a schedule is set, the Adult Student shall, except in an emergency, give notice 24 hours in advance of a scheduled session if he cannot attend. Without such notice and in the absence of an emergency, that session will count towards the compensatory education award. The instruction shall take place at the District's central administration building unless the Adult Student, the Parent (if she continues to have power of attorney for the Adult Student), and the District agree otherwise.

27. The Adult Student requests transportation for the compensatory education. The Adult Student argues that transportation is an appropriate related service whenever it is necessary for a student to benefit from special education, not just when the need is related to the student's disability. The Adult Student is correct that there are cases taking this view, as well as cases holding that the transportation need only be provided if the student's disability causes a unique need for specialized transport. Compare *Donald B. v. Board of Sch. Comm'rs of Mobile County*, 117 F.3d 1371 (11th Cir. 1997) with *McNair v. Oak Hills Local Sch. Dist.*, 872 F.2d 153 (6th Cir. 1989). Even when a student need not show a disability-related need, an inquiry is made to determine whether a student needs transportation, including: 1) the student's age, 2) the distance the student must travel, 3) the nature of the area through which the student must pass, 4) the student's access to private assistance in making the trip, and 5) the availability of other forms of public assistance, such as crossing guards or public transit. *Donald B.*, 117 F.3d at 1375. Here, the Adult Student is an able-bodied adult and the distance to be travelled would be at most five and one-half miles if the parties are not able to agree to a closer location for the provision of services. There is no evidence that, when the Adult Student's car and the Parent are not available to him, walking and/or public transportation would not be reasonable options to access the compensatory services. Accordingly, the Adult Student has not established that transportation is a necessary related service, and it is not awarded.

28. The Adult Student's request for "supportive counseling" as a related service for the Adult Student is denied as the Adult Student has not established that the District should have, but failed, to provide this service. Therefore, no compensatory education in the form of counseling is awarded.

29. All other requested remedies are denied.

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ORDER

1. The District violated the IDEA and denied the Adult Student a free and appropriate public education from April 12, 2014, to June 12, 2014, because the IEP in effect for the Adult Student during that time period contained a math goal that had been determined in the prior hearing to be inappropriate.
2. The District did not otherwise deny the Adult Student a FAPE.
3. The District shall provide the Adult student with 6 hours of one-on-one instruction in math on the terms set forth in the Conclusions of Law.
4. The Adult Student's remaining requested remedies are DENIED.

Signed at Seattle, Washington on June 17, 2015.



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*

Adult Student

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cc: Administrative Resource Services, OSPI
Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator