

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

IN THE MATTER OF:

OSPI CAUSE NO. 2020-SE-0198

OAH DOCKET NO. 12-2020-OSPI-01230

KELSO SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Courtney E. Beebe via video conference, on February 5, 2021. The Parents of the Student whose education is at issue¹ appeared and represented themselves. The Kelso School District (District) was represented by Lynette Baisch, attorney at law, and Greg Swanson, attorney at law. Heather Ogden, Director of Special Programs, attended as the District's representative. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request on December 22, 2020. The ALJ issued a scheduling notice on December 23, 2020. The District and Parents held a resolution meeting as required, and on January 8, 2021, the District filed a response to the Parents' due process hearing request. The parties appeared for a prehearing conference on January 19, 2021, and the ALJ issued the First Prehearing Order on January 20, 2021. The parties thereafter appeared for hearing on February 5, 2021. The decision in this matter is due 45 days after the expiration of the 30 day resolution period, which is March 7, 2021.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: Exhibits A, B, C, D, E, and F.

District Exhibits: Exhibits 1, 2, 3, 4, 6, 7, 12, 13, 14, 15, 16, and 17.

District's Exhibits 5, 8, 9, 10, and 11 were not offered for admission.

The following witnesses testified under oath. They are listed in order of appearance: The Father of the Student; Mother of the Student; Kelsey Davis, Special Education Teacher; Heather Ogden, Director of Special Programs.

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

ISSUES AND REMEDIES

The issue(s) for the due process hearing are:

- a. *Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE):*
 - i. *By failing to provide the Student with special education services as per the Student's February 2020 Individualized Education Program ("IEP") between August 29, 2020 through November 20, 2020, by only allowing the Student to attend school in person two days per week instead of five days per week; and*
 - ii. *By failing to provide the Student with special education services as per the Student's February 2020 IEP from November 21, 2020 and thereafter by only allowing the Student to attend school in person three days per week instead of five days per week; and*
 - iii. *By predetermining the placement of the Student in the second grade for the 2021-2022 academic year and preventing the Parents from meaningfully participating in the decision making process.*
- b. *And, whether the Parents are entitled to their requested remedies:*
 - i. *Compensatory education for the Student's special education services that were not provided for the period of August 29, 2020 to November 20, 2020;*
 - ii. *Compensatory education for the Student's special education services that were not provided for the period of November 21, 2020, and thereafter; and*
 - iii. *Allow the Parents to decide that the Student should be placed in the first grade for the 2021-2022 academic year; and*
 - iv. *Or other equitable remedies, as appropriate.*

See Prehearing Order dated January 20, 2021.

FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence may be discussed regarding specific facts at issue.

1. The Student is a [REDACTED] first grader attending Beacon Hill Elementary in the District. (D1, pp.2-3; Testimony of Father; Testimony of Mother; Testimony of Kelsey Davis.)

2. On February 26, 2020, the District convened the Student’s Individualized Education Program team (“IEP Team”), including the Parents, to conduct an annual review of the Student’s IEP. (D1, pp.1, 3; Testimony of Mother; Testimony of Father.) The IEP Team agreed to continue the Student’s previous IEP. (D1, p.19; Testimony of Mother; Testimony of Father; Testimony of Ogden.) Specifically, the IEP Team determined that the Student continued to qualify for special education in the areas of cognitive / pre-academics (reading, writing, mathematics), adaptive skills, communication, motor, and social/emotional/behavior. (*Id.*) The IEP Team agreed that the Student would receive 702.5 total minutes per week of specially designed instruction (“SDI”) and related services as follows:

Concurrent	Services	Service Provider for Delivering Service	Monitor	Frequency	Location (Setting)	Start Date	End Date
Related							
No	Occupational Therapist	Occupational Therapist	OT	40 minutes / monthly	Special Education	02/27/2020	02/26/2021
Special Education							
No	Cognitive/Pre-Academics	Special Ed Teacher	SpEd Teacher	120 Minutes / Weekly	Special Education	02/27/2020	02/26/2021
No	Cognitive/Pre-Academics	Para-professional	SpEd Teacher	120 Minutes / Weekly	Special Education	02/27/2020	02/26/2021
No	Speech and Language Therapy	SLP and/or Para-professional	SLP	90 Minutes / Weekly	Special Education	02/27/2020	02/26/2021
No	Cognitive/Pre-Academics	Para-professional	SpEd Teacher	120 Minutes / Weekly	Special Education	02/27/2020	02/26/2021
No	Adaptive/Daily Living Skills	Para-professional	SpEd Teacher	150 Minutes / Weekly	Special Education	02/27/2020	02/26/2021
No	Social/Emotional/Behavior	Para-professional	SpEd Teacher	150 Minutes / Weekly	Special Education	02/27/2020	02/26/2021
No	Fine Motor	Motor Team	OT	40 Minutes / Monthly	Special Education	02/27/2020	02/26/2021

(D1, p.15.) The IEP also set forth seventeen accommodations, modifications, and supports, and provided for 60 minutes of occupational therapy supplementary aids and services yearly. (D1, pp.13-15; Testimony of Davis; Testimony of Father; Testimony of Mother.) The Student’s IEP provides for a total of 660 minutes per week of SDI in the areas of cognitive / pre-academics, adaptive skills, and social/emotional behavioral, and 90 minutes per week of SDI in the area of speech and language therapy (“SLP”). (D1, p.15; D4, p.1; PC, p.1; Testimony of Davis; Testimony of Ogden.) The Student spends 60.9% of the school week in the general education environment and 39.1% in the special education environment. (*Id.*)

3. The Student’s IEP began on February 27, 2020. (*Id.*) The District was ordered to stop all in-person educational programs on March 12, 2020, by proclamation from the Governor of Washington State.² (D14; D15; D16; Testimony of Mother; Testimony of Ogden.)

² Governor Proclamation 20-08-09.1 issued in response to the Covid-19 public health emergency.

4. To prepare for the 2020-2021 academic year, the District formed a “Reopening Task Force” that met during the summer of 2020-2021 to create a “Reopening Plan” based on guidance from the Washington Department of Health (“DOH”), the U.S. Department of Education (“DOE”), and the Office of Superintendent of Public Instruction (“OSPI”). (D14; Testimony of Ogden.) The District’s Reopening Task Force developed three learning options for elementary students:

Continuous 2.0 (Full Remote): *Our district will offer a robust remote learning curriculum for all grades. This is an upgraded, state-of the art system from the spring 2020 model. It is designed and delivered by your child’s school teacher.*

Hybrid Learning Option: *When community health conditions allow, our district will provide a hybrid learning model to the greatest extent allowable by state and local officials.*

-Weekly in-person model at every grade level, ensuring all health and safety protocols directed by the state are followed to protect students, staff and or community.

-This means, students and teachers will be required to wear a mask or facial covering and physical distancing measures will be in place, as per state OSPI Guidelines. By taking these actions, we will be a resource to our health department in combating Covid-19.

Virtual Learning Option: *Our district will offer a robust virtual learning curriculum for all grade levels. This is an upgraded, state of the art system, designed and led by KSD teachers. Kelso Virtual Academy (KVA), established 16 years ago, has expanded its learning pathways to meet the current needs of our Kelso families at all levels.*

(D14, p.6; Testimony of Davis; Testimony of Ogden.) The District’s Reopening Plan allowed parents to select one of the options for the 2020-2021 school year. (Testimony of Ogden.)

5. In the Hybrid Learning Option model, students would begin the 2020-2021 school year learning remotely as per the Continuous 2.0 (Full Remote) option. (D14, p.19; Testimony of Ogden.) However, when the Covid-19 public health emergency conditions improved students would return to in-person instruction two days per week and continue remote instruction the remaining three days per week. (*Id.*) Student’s with a last name that begins with the letters A-K comprised one cohort and would attend school in-person Monday and Tuesday, and learn remotely on Wednesday, Thursday, and Friday. (*Id.*) Student’s with a last name that begins with the letters L-Z comprised a second cohort and would attend school in-person Thursday and Friday, and learn remotely on Monday, Tuesday, and Wednesday. (*Id.*) Students from either cohort identified as needing support or services could also attend school in-person on Wednesdays, but these students would be isolated or grouped into their assigned cohort for instruction. (*Id.*) The District’s Reopening Plan prohibited students from “crossing cohorts,” or attending in-person instruction with students from another cohort. (*Id.*)

6. The District’s 2020-2021 academic year began with teacher and staff in-service from September 1 through September 4, 2020. (D12, p.1; D14, p.77; D17, p.1; PE, p.3; Testimony of Ogden.) The District offered parent teacher conferences for elementary school students’ parents

on September 8, 9, and 10, 2020. (*Id.*) Instruction of elementary school Students began on September 11, 2020. (*Id.*)

7. The Parents attended a parent teacher conference on September 10, 2020, and met with the Student's general education teacher, Heather Ogden,³ Director of Special Programs, and Kelsey Davis, Special Education Teacher.⁴ (D2, p.1; Testimony of Mother; Testimony of Davis.) The Parents selected the Hybrid Learning Option model for the Student, understanding that the Student would begin remote learning on September 11, 2020. (D2, p.1; Testimony of Mother; Testimony of Father; Testimony of Davis.)

8. The District issued the Student a Google Chromebook to access special education and general education remotely via the "Edgenuity Program" on September 11, 2020. (Testimony of Mother; Testimony of Davis.) The Student struggled to participate in the remote learning program. (D3, p.1; Testimony of Mother.) To assist, Ms. Davis provided the Parents with hands-on workbooks for the Student in order to modify and supplement the general education curriculum via remote learning. (Testimony of Davis; Testimony of Mother.) The workbooks were consistent with the Student's present level of performance, the Student's IEP, and the general education curriculum. (Testimony of Davis.)

9. The District offered to provide the Student with special education services and supports for general education classes via remote meetings, but the Parents declined because 1) the Parents' worked during the school day and could not be present to assist the Student, and 2) the Student's daycare service did not provide assistance with remote learning. (PF; Testimony of Father; Testimony of Mother; Testimony of Davis.)

10. The Student did not access any remotely offered special education, general education, or related services from September 11, 2020, through September 25, 2020. (D12, p.1; D13; Testimony of Davis; Testimony of Mother.) The District offered, but the Student did not access, 702.5 minutes per week of special education or related services as per the February 26, 2020, IEP the weeks of September 14, 2020, and September 21, 2020. (Testimony of Mother; Testimony of Davis.)

11. Starting September 28, 2020, the District offered the Student in-person instruction with his assigned cohort on Mondays and Tuesdays. (D12, pp.1-3; D13; Testimony of Mother; Testimony of Davis; Testimony of Ogden.) The District created a "Schedule of Specially Designed Instruction" that was designed to provide the Student with 405 minutes per week of in-person SDI on Mondays and Tuesdays. (D4, p.1; PC; Testimony of Mother; Testimony of Davis.) Beginning November 4, 2020, the Student began attending school in-person on Wednesdays as well because the District identified the Student as needing support and a safe, on-campus workspace was available. (D4, p.1; PE, p.1; Testimony of Mother; Testimony of Kelsey Davis; Testimony of

³ Heather Ogden has a bachelor's degree, an administrator's certificate, and is a certificated teacher. Ms. Ogden has worked as a teacher and building administrator for twenty-three years. Ms. Ogden started in her current position in August 2020.

⁴ Kelsey Davis has a bachelor's degree in special education and has been a certificated teacher in Washington for nine (9) years. (Testimony of Davis.) The 2020-2021 school year is Ms. Davis' first year at Beacon Hill Elementary.

Ogden.). The Schedule of Specially Designed Instruction provided that the Student would receive 705 minutes per week of in-person SDI on Mondays, Tuesdays, and Wednesdays. (D4, p.1; PC; Testimony of Mother; Testimony of Davis.)

12. The Schedule of Specially Designed Instruction addressed the areas of cognitive / pre-academic (reading, math, written language), social / emotional, and adaptive skills. (D4, p.1; PC, p.1; Testimony of Davis.) Specifically, the Schedule of Specially Designed Instruction provided:

Monday – Push In	Tuesday – Push In	Wednesday – Pull Out
	8:45-9:00/reading	8:45-9:00/adaptive
9:00-9:30/reading	9:00-9:30/reading	9:00-9:30/reading
9:30-10:00/writing	9:30-10:00/writing	9:30-10:15/math
10:00-10:15/social/emotional	10:00-10:15/social/emotional	10:15-10:45/social/emotional
11:45-12:00/writing	11:45-12:00/writing	10:45-11:00/adaptive
12:00-12:30/adaptive	12:00-12:30/adaptive	11:00-11:30/writing
2:00-2:45/math	2:00-2:45/math	11:30-11:45/adaptive
2:45-3:15/social/emotional	2:45-3:15/social/emotional	12:00-12:30/social/emotional
		12:30-1:00/reading
		1:00-2:00/adaptive
R=30 W=45 M=45 SE=45 AD=30	R=45 W=45 M=45 SE=45 AD=30	R=60 W=30 M=45 SE=60 AD=105

(*Id.*) The Schedule of Specially Designed Instruction did not include providing the Student with 90 minutes of communication SDI with an SLP, the related service of occupational therapy of 40 minutes per month, or the supplementary aid and service of occupational therapy of 60 minutes per year. (*Id.*) While the Student’s IEP required only 660 minutes per week of SDI in the areas of cognitive / pre-academics, adaptive skills, and social / emotional behavioral, the District included additional minutes each week as “recovery services.” (D4; PC; D13; Testimony of Davis; Testimony of Ogden.)

13. Between September 28, 2020, and October 27, 2020, the Student received 195 minutes of SDI on Mondays and 210 minutes of SDI on Tuesdays (for a total of 405 minutes per week) in the areas of cognitive / academics (reading, writing, math), social/emotional behavioral, and adaptive skills when he attended school in-person. (D4, p.1; D12, pp.1-3; D13; Testimony of Davis.) Between September 28, 2020, and October 27, 2020, the Student received a total of 2,025 minutes of SDI in the areas of cognitive / academics (reading, writing, math), social/emotional behavioral, and adaptive skills. (*Id.*) The Student did not receive any recovery services during this period. (D13; Testimony of Davis.) The District offered occupational therapy services and supports as well as communication SDI from an SLP between September 28, 2020, and October 27, 2020, but the number of minutes offered, the method the District offered the minutes, and whether the Student accessed the occupational therapy services and communication SDI is not part of the record.⁵ (Testimony of Davis.)

⁵ The 2020-2021 Covid-19 Speech-Language Service Delivery Preference form, the Communication Speech & Language Therapy Delivery Log for the 2020-2021 School year, and the Occupational Therapy minutes record log dated January 21, 2021, are part of the case file at Exhibits D9, D10, and D11. However, the District did not offer D9, D10, and D11 for admission into the record.

14. Between November 4, 2020, and February 3, 2021, the Student received 195 minutes of SDI on Mondays, 210 minutes of SDI on Tuesdays, and 300 minutes of SDI on Wednesdays when he attended school in-person. (D4, p.1; PC, p.1; D13; Testimony of Davis; Testimony of Ogden.) The District offered SDI in the areas of cognitive / pre-academics, adaptive skills, and social / emotional behavioral, during this period. The Student was able to attend school in-person and receive SDI as follows:

November 2, 3, & 4, 2020 = 705 minutes of SDI
November 23, 24, & 25, 2020 = 705 minutes of SDI
November 30, 2020, & December 1, 2, 2020 = 705 minutes of SDI
December 7, 8, & 9, 2020 = 705 minutes of SDI
December 14, 15, & 16, 2020 = 705 minutes of SDI
January 4, 5, & 6, 2021 = 705 minutes of SDI
January 11, 12, & 13, 2021 = 705 minutes of SDI
January 19 & 20, 2021 = 510 minutes of SDI
January 25, 26, & 27, 2021 = 705 minutes of SDI
February 2 & 3, 2021 = 705 minutes of SDI

(D12, pp.1-2; D13; Testimony of Davis.) The Student received a total of 450 minutes of recovery services in the areas of cognitive / pre-academic, adaptive skills, and social / emotional behavioral during this period. (D13; Testimony of Davis.) The District offered occupational therapy services and supports as well as communication SDI from an SLP, but the number of minutes offered, the method the District offered the minutes, and whether the Student accessed the SLP SDI, OT related services, and OT supplemental supports is not part of the record.⁶ (Testimony of Davis.)

15. The Student did not attend school in-person on November 11, 2020, December 21, 22, 23, 28, 29, 30, 2020, January 18, 2021, and February 1, 2021, because the District was not in session. (D12, p.1; Testimony of Mother; Testimony of Father; Testimony of Ogden.) The Student did not attend school on November 9, 10, 16, 17, and 18, 2020, because the Student and his family were quarantining at home due to Covid-19 symptoms. (*Id.*)

16. Beginning September 11, 2020, and each week thereafter, the District continued to offer the Student access to the general education curriculum on Thursday and Friday via remote learning. (Testimony of Mother; Testimony of Davis; Testimony of Ogden.) The Student did not access the general education curriculum between September 11, 2020, and February 5, 2020. (Testimony of Davis; Testimony of Father; Testimony of Mother.) Because the Student was not using the Google Chromebook to access special education or general education the Student's general education teacher asked that the electronic device be returned to the District. (Testimony of Father; Testimony of Mother; Testimony of Davis.) The Student returned the Google Chromebook the first week of November 2020. (*Id.*)

17. The Mother met with the District on October 15, 2020, and requested that the Student attend school five days per week with both cohorts because he was unable to access general education

⁶ The 2020-2021 Covid-19 Speech-Language Service Delivery Preference form is part of the case file at Exhibit D9, but it was not offered for admission into the record.

and special education services via the remote Edgenuity Program. (D3, p.1; Testimony of Mother.) The District declined the Parents' request because the District's Reopening Plan prohibited students from attending school in-person with students from the other cohort ("crossing the cohort"). Also, the District denied the request because at the time the District provided the Student 405 minutes of special education services in-person on Mondays and Tuesdays. (Testimony of Mother; Testimony of Father; Testimony of Davis; Testimony of Ogden.)

18. On December 11, 2020, the Parents emailed the District and asked that the Student return to school in-person on Thursday and Friday. (PF, p.1; Testimony of Mother.) On December 18, 2020, the District denied the Parents' request because the Student attended school in-person three days per week and the District's Reopening Plan prohibited students from attending school in-person with students from the other cohort ("crossing the cohort"). (PF, p.2; Testimony of Mother.) The District again offered to provide the Student with remote learning supports and related services. (PF; Testimony of Ogden.) The Parents did not access the offered remote learning supports and related services. (Testimony of Mother; Testimony of Davis.)

19. Ms. Davis performed progress monitoring of the Student in the areas of social/emotional behavioral and written language on January 6, 2021, and confirmed that the Student had mastered his annual IEP goals in these areas. (D7, p.1; Testimony of Davis.) Ms. Davis performed progress monitoring of the Student in the area of math on January 6, 2021, and confirmed the Student had made sufficient progress towards the goal. (*Id.*) On January 27, 2021, progress monitoring showed the Student mastered his math IEP goal. (*Id.*) Ms. Davis performed progress monitoring of the Student in the area of reading on January 6, 2021, and discovered the Student had made insufficient progress towards the reading IEP goals. (*Id.*) However, later progress monitoring of the Student on January 27, 2021, showed he had made sufficient progress towards the IEP reading goals. (*Id.*)

20. On January 21, 2021, via email the Parents requested that the Student attend school in-person four days per week, Monday through Thursday. (PD, p.2.) On January 21, 2021, the District denied the Parents' request because "our current model of cohort at the elementary level limits K-5 students to their scheduled two days in person with some students being offered time on Wednesday." (PD, p.1; Testimony of Mother; Testimony of Ogden.)

21. During a meeting with the District in January 2021, the Parents verbally requested that the District retain the Student in the first grade for the 2021-2022 academic year. (PD, p.1.) The District uses an assessment called the "Lights Retention Scale" to evaluate whether a Student should advance to the next grade. (Testimony of Ogden.) The District has a policy of convening an IEP Team meeting, including the Parent's, to obtain input about the Student's progress in order to collectively determine whether a student should be advanced to the next grade. (Testimony of Davis; Testimony of Ogden.) Via email, Ms. Ogden informed the Parents that "we are willing to meet to discuss your request to retain [the Student], but would like to have that discussion closer to the end of the year. [The Student] still has time to make growth this year and it is too early to make that decision." (PD, p.1; Testimony of Ogden.)

CONCLUSIONS OF LAW

The IDEA and Jurisdiction

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

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

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

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

Rowley, supra, 458 U.S. at 206-07 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Id.* at 200-01.

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

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

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

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

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

5. Procedural safeguards are essential under the IDEA. The Ninth Circuit has stated:

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

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

The District Did Not Prevent the Parents from Meaningfully Participating in the Decision of Whether to Place the Student in the Second Grade for the 2021-222 Academic Year.

6. The Parents assert that at a January 2021 meeting the District made the decision to advance the Student from the first grade to the second grade for the 2021-2022 academic year and did not allow the Parents to participate in that decision. The District counters that the decision to advance the Student to the second grade for the 2021-2022 academic year has not been made, and will not be made, until after an IEP Team meeting occurs with the Parents and the Lights Retention Scale assessment is performed in May 2021.

7. Placement determinations for students eligible for special education should be made by a group of individuals, including the parents, who are "knowledgeable about the student, evaluation data, and placement options." WAC 392-172A-02060. The placement decision should be based on the student's IEP and comply with the least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070. *Id.* Districts must ensure that parents of eligible students are members of any group making decisions about the student's placement. WAC 392-172A-05001; 34 CFR § 300.327; 34 CFR § 300.501(c).

8. A district violates a parent's right to meaningfully participate in the IEP process if it predetermines a student's placement, such as when it "independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). Predetermination may also occur when a District makes a placement determination prior to an IEP meeting and is unwilling to consider other alternatives. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

9. Arguably, whether to advance the Student to second grade for the 2021-2022 academic year is a "placement" decision because it implicates the general education and special education environments that the Student will receive the SDI and related services provided in the Student's IEP. Therefore, the Parents must be allowed to provide input and meaningfully participate in the decision of whether to advance the Student to the second grade for the 2021-2022 academic year.

10. Regardless of whether the decision to advance the Student to the second grade is a placement decision, there is no evidence that the District either determined or predetermined that the Student would advance to second grade for the 2021-2022 academic year, or that the Parents have been deprived of an opportunity to meaningfully participate in any decision-making process. The District has communicated the decisionmaking process and procedure to the Parents and has informed the Parents that they will have the opportunity to provide input and meaningfully participate in the placement decision for the 2021-2022 academic year.

11. Based on the record it is concluded that the Parents have not shown by a preponderance of the evidence that the District predetermined the placement of the Student for the 2021-2022 academic year or that the Parents were denied an opportunity to meaningfully participate in the decision making process. The Parents, then, are not entitled to their requested relief.

The District Did Not Fail to Materially Implement the Student’s IEP Beginning September 11, 2020 and Thereafter

12. The Parents argue the District failed to materially implement the Student’s IEP from September 8, 2020, through November 3, 2020, because the District only allowed the Student to attend school in-person two days per week. The Parents also assert that the District failed to implement the Student’s IEP from November 4, 2020, and thereafter because the District only allowed the Student to attend school in person three-days per week.

13. The District contends that it materially implemented the IEP to the maximum extent possible by providing the Student with SDI, related services, and supplementary aids and services via remote and in-person instruction beginning with the first day of instruction September 11, 2020, and as allowed by the District’s Reopening Plan.

14. All Washington school districts were ordered to stop all in-person educational programs on March 12, 2020, by proclamation from the Governor of Washington State. Governor Proclamation 20-08, 20-09.1. The U.S. Department of Education (“DOE”) issued guidance that same day stating,

If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, than an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child’s individualized education program (IEP)

U.S. Dep’t of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020) at p. 2.

15. The Office of Superintendent of Public Instruction (“OSPI”) also issued guidance stating, “[t]here remains an expectation that individualized education program (IEP) services will be delivered to the maximum extent possible during the pandemic while adjusting delivery methods to comply with state and local health/safety restrictions.” *OSPI Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in Summer and Fall 2020* (released

3/24/20, last updated 8/26/20). This guidance further recognized that there have been no changes made to the IDEA or its implementing regulations, thus, school districts are not relieved of their obligation to comply with said laws. *Id.* However, it is well established that the IDEA does not require school districts to provide special education services on days when the school district is not in session. 34 C.F.R §104.4(b)((1)(ii).

16. The Washington State Department of Health (“DOH”) also issued two guidance documents regarding reopening public schools for in-person instruction: “*Washington State Department of Health: K-12 Schools 2020-2021 Guidance*” and “*Washington State Department of Health Tools to Prepare for Provision of In-Person Learning among K-12 Students at Public and Private Schools during the Covid-19 Pandemic.*” These guidance documents required that 1) persons must maintain six feet of physical distance while in school facilities, and 2) school districts must utilize small cohorts of students to reduce the risk of coronavirus transmission. (*Id.*)

17. It must be recognized that the unprecedented impacts of the Covid-19 public health emergency and resulting legal mandates prohibit schools from providing in-person learning unless DOH guidelines for social distancing and proper hygiene practices are followed at all times. Special education services require multiple staff to be in direct physical contact with students likely multiple times each day. Here, the District formulated the Reopening Plan to comply with guidance from the DOH, DOE, and OSPI, and to meet the individual needs of all students to the maximum extent possible through a combination of remote and in-person educational opportunities. The purpose of the District’s Reopening Plan is simple: reduce the risk of coronavirus transmission while allowing students to participate in the general education and special education environments.

18. The Parents are essentially asking this tribunal to order the District to allow the Student to attend school in-person in contravention of the District’s Reopening Plan, thereby placing District staff and other students at risk of increased Covid-19 transmission. While the Parents’ frustrations with the District’s Reopening Plan and remote learning are understandable, this tribunal does not have the legal authority to order the District to allow the Student to attend school in-person five days per week in contravention of DOH guidelines.

19. Regardless, the District, to the maximum extent possible, must provide special education services to students and provide recovery services to students when DOH requirements allow. The issue, then, is also whether the SDI and related services provided to this particular Student satisfied the District’s obligation to implement the Student’s IEP to the maximum extent possible, and if not, whether any failure to implement the IEP was a material failure. *See Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007). In a similar case, *Denver Public Schools District 1*, the Colorado Department of Education found that while the district failed to provide the Student with all service minutes called for in the IEP, the failure to implement was not material and did not constitute a denial of FAPE because the Student demonstrated educational progress. 120 LRP 29273 (2020).

20. The record shows that the District offered to provide the Student with the special education services in his IEP via remote learning for the period of September 11, 2020, to September 25, 2020, but the Parents declined to access the services offered. Therefore, it must be concluded that the District complied with applicable laws and rules by offering the Student SDI and related

services from September 11, 2020, to September 25, 2020, in order to implement the Student's IEP to the maximum extent possible.

21. Regarding the period of September 28, 2020, through October 31, 2020, the record reflects that the District dedicated the entirety of two in-person instruction days per week to providing the Student with 405 minutes of SDI in the areas of cognitive / pre-academic, adaptive skills, and social / emotional behavioral. The record also reflects that the District offered to provide the Student with the remaining special education services in the Student's IEP via remote learning. Given the District's inability to provide in-person instruction beyond two days per week and the District's offer of remote services it must be concluded that the District implemented the Student's February 2020 IEP to the maximum extent possible from September 28, 2020, through October 31, 2020.

22. Similarly, after November 2, 2020, the District dedicated the entirety of three in-person instruction days per week to providing the Student with 705 minutes of SDI in the areas of cognitive / pre-academic, adaptive skills, and social / emotional behavioral. The District provided not only the 660 minutes of SDI required in these areas by the Student's IEP, provided recovery services. Based on the record, then, it must be concluded that the District implemented the Student's February 2020 IEP to the maximum extent possible beginning November 4, 2020.

23. Regarding the communication SDI and occupational therapy related services and supplementary aides and supports in the Student's IEP, the record shows that the District offered the services beginning September 11, 2020, and thereafter. The Parents did not carry their burden to show that these services and supplementary aides and supports were not offered, but only showed that the services were not accessed. As a result, it is concluded that the District implemented the Student's February 2020 IEP to the maximum extent possible regarding these services beginning September 11, 2020.

24. The restrictions on in-person learning due to the Covid-19 public health emergency placed all school districts in a difficult position, and the District was no exception. The circumstances of the Covid-19 public health emergency restricted the District to offering the Student special education services via remote learning from September 11, 2020, through October 31, 2020. Regardless, it is acknowledged that the Student did not access or actually receive the services in his IEP from September 11, 2020 through October 31, 2020.

25. Like the *Denver Public Schools District 1* case the District's failure to actually provide the Student will all service minutes in his IEP cannot be considered a material failure and denial of FAPE because the District offered the special education services remotely and provided the special education services in-person to the Student when the District's Reopening Plan allowed. Also, from November 2, 2020, the District provided and / or offered the Student all the special education services in his IEP, as well as recovery services, in-person on all days the District was in session. Thus, it must be concluded that the District did not materially fail to implement the Student's IEP and did not deny the Student FAPE beginning September 11, 2020, and thereafter.

26. Based on the record presented, then, it is concluded that the Parents did not meet their burden and have not shown that the District failed to materially implement the Student's IEP to the maximum extent possible from September 11, 2020. As a result, the Parents have not

prevailed and have not shown that the District violated the IDEA or that that District did not provide the Student with FAPE.

Remedies

27. Because the Parents did not prevail on any of the issues raised in the due process hearing request, the Parents are not entitled to any of the remedies requested.

ORDER

Based on the findings and conclusions above, it is hereby ordered that the District did not violate the IDEA and did not deny the Student FAPE, because:

1. The Parents have failed to prove a material failure to implement the Student's IEP for the period of September 11, 2020 through October 31, 2020.
2. The Parents have failed to prove a material failure to implement the Student's IEP for the period of November 2, 2020, and thereafter.
3. The District did not predetermine the placement of the Student in the second grade for the 2021-2022 academic year or prevent the Parents from meaningfully participating in the decision making process.
4. Therefore, the Parents are not entitled to the relief requested.

Served on the Date of Mailing.



COURTNEY E. BEEBE
Administrative Law Judge
Office of Administrative Hearings

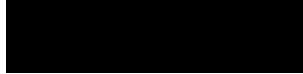
Right To Bring A Civil Action Under The IDEA

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.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that today I served this document on each of the parties listed below. I emailed via secure email or mailed a copy to the parties at their addresses of record using Consolidated Mail Services or U.S. Mail.

Parents



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Lynette Baisch
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Porter Foster Rorick LLP
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Dated March 5, 2021 at Seattle, Washington.

Representative
Office of Administrative Hearings
600 University Street, Suite 1500
Seattle, WA 98101

cc: Administrative Resource Services, OSPI