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JUN 13 2014

SEATTLE - OAH

STATE OF WASHINGTON  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
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June 13, 2014

Parent

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Seattle, WA 98133

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901 Fifth Ave, Suite 3400  
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**In re: Seattle School District, Special Education Cause No. 2013-SE-0113**

Dear Parties:

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

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Michelle C. Mentzer".

Michelle C. Mentzer  
Administrative Law Judge

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

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

IN THE MATTER OF:

SEATTLE SCHOOL DISTRICT

SPECIAL EDUCATION  
CAUSE NO. 2013-SE-0113

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Seattle, Washington, on April 28 and 29, 2014. The Parent of the Student whose education is at issue<sup>1</sup> appeared and represented herself. The Seattle School District (District) was represented by Curtis Leonard and Lara Hruska, attorneys at law. The following is hereby entered:

**STATEMENT OF THE CASE**

The Parent filed a due process hearing request (complaint) on December 12, 2013. The case was initially assigned to ALJ Anne Senter. Telephonic prehearing conferences were held by ALJ Senter on January 10, January 17, February 20, February 27, and April 9, 2014. Prehearing orders were issued by ALJ Senter on January 10, January 21, January 30, February 18, and February 27, 2014. On April 17, 2014, a Notice of Reassignment of ALJ was issued, reassigning the case from ALJ Senter to ALJ Mentzer, in order to ensure the availability of an ALJ for the hearing. A telephonic prehearing conference was held by ALJ Mentzer on April 18, 2014.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to a District request for continuance that was not opposed by the Parent. See Second Prehearing Order of January 21, 2014. The hearing record closed with the filing of post-hearing briefs on June 6, 2014. Thirty days thereafter is July 6, 2014. The due date for the written decision is therefore July 6, 2014.

**EVIDENCE RELIED UPON**

The following exhibits were admitted into evidence:

Court Exhibits: C-1 and C-2;  
Parent Exhibits: P-1 through P-5; and  
District Exhibits: D-1 through D-12.

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

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<sup>1</sup> In 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."

The Student;  
Jennifer Chapman, teacher, St. Christopher Academy;  
Brenda Tomtan-Brayman, District special education teacher;  
Cameron Machle, District special education teacher;  
The Parent;  
Catherine Cook, District special education program specialist; and  
Cathy Thomas, District assistant principal.

### ISSUES

- a. Whether the District violated the Individuals With Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
- i. Failing to provide summer school for the Student in the summer of 2012;
  - ii. Moving the Student from special education classes to regular education classes near the end of the 2012 – 2013 school year;
  - iii. Improperly changing the Student's special education eligibility category near the end of the 2012 – 2013 school year;
  - iv. Not implementing the Student's new individualized education program (IEP) for the remainder of the 2012 – 2013 school year;
  - v. Not providing the Student with an appropriate sixth period class near the end of the 2012 – 2013 school year;
- b. Whether St. Christopher Academy is an appropriate placement for the Student;
- c. And, whether the Parent is entitled to her requested remedies:
- i. Reimbursement for the Student's tuition at St. Christopher Academy;
  - ii. Prospective placement of the Student at District expense at St. Christopher Academy through her senior year of high school;
  - iii. And/or other equitable remedies, as appropriate.

See Second Prehearing Order of January 21, 2014.

### FINDINGS OF FACT

#### Background<sup>2</sup>

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<sup>2</sup> The Parent offered exhibits going back to the Student's 2<sup>nd</sup> grade year. These exhibits were admitted because there was no objection to them from the District. However, the statute of limitations period did not begin until the Student's 9<sup>th</sup> grade year. For this reason, almost no Findings of Fact are made regarding years prior to middle school. A few findings are made regarding the Student's middle school years in order to provide background information for the high school years that are at issue in this case.

1. The Student was diagnosed with attention deficit hyperactivity disorder (ADHD) during kindergarten or early 1<sup>st</sup> grade, when she lived out of state. The District evaluated the Student in 2<sup>nd</sup> grade and found her eligible for special education under the Health Impaired category. The District's 2<sup>nd</sup> grade evaluation (and its subsequent 5<sup>th</sup> grade reevaluation) found the Student qualified for special education in four areas: reading comprehension, math reasoning, written expression, and study skills/organization (also called learning strategies). D-7; D-8.

2. During middle school, the Student attended a different school each year, all within the District. Her grade point average (GPA) in middle school dropped over time. Her 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grade GPAs, respectively, were 1.73, 1.42 and 1.03. P-5:5-6.<sup>3</sup> On statewide academic assessments, a passing score for general education students was 400, and for special education students using the "Basic" scoring system, a passing score was 375. The Student's scores in Reading during 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grade remained approximately the same: 375, 378 and 375. In Math, her scores declined during those years: 360, 352, and 344. P-2:6A-11.<sup>4</sup>

3. In the Student's triennial reevaluation during 8<sup>th</sup> grade, school staff noted the negative effects on her academics of peer influence, making bad choices for friends, doodling and socializing in class, rejecting teacher help, and turning in very little work. D-9. On standardized achievement testing, the Student scored in the 16<sup>th</sup> percentile in reading, the 6<sup>th</sup> percentile in writing, and the 14<sup>th</sup> percentile in math. *Id.*

4. At the end of 8<sup>th</sup> grade, in June 2011, the Parent requested that the District fund one-on-one summer tutoring for the Student. The Parent wrote that the Student had been left behind in middle school, felt stupid and lazy, was being allowed not to do her work, was making bad choices in the company she kept, and that the District had failed to timely notify the Parent that she was not attending her special education sessions. P-4:6-7. The District declined to fund summer tutoring because the Student's IEP did not provide for extended school year (ESY) services. The District stated that an IEP meeting would be held in September 2011 to address the difficulties the Student was having. D-1.

#### Ninth Grade – 2011-12 School Year

5. The Student entered high school in September 2011. An IEP meeting held that month resulted in a new IEP. D-2. The Brigance assessment was used to establish the Student's present levels of performance (PLOP) for the IEP. On the Brigance, the Student performed at a 6<sup>th</sup>-to-7<sup>th</sup> grade level in reading, a 7<sup>th</sup> grade level in writing, and a 3<sup>rd</sup> grade level in math. The Student's grades a few weeks into the school year were very low. *Id.* All of her classes except for Family Health were special education classes. P-5:13. Most of these were small-group classes, composed only of special education students. One (Language Arts), was an inclusion

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<sup>3</sup> Citations to the exhibits are in the following format. "P-5:5-6" refers to Parent Exhibit 5, pages 5 and 6.

<sup>4</sup> The statewide assessment when the Student was in 6<sup>th</sup> grade was the Washington Assessment of Student Learning (WASL). The statewide assessment when the Student was in 7<sup>th</sup> and 8<sup>th</sup> grades was the Measurements of Student Progress (MSP). P-2:6A-11.

class composed of both general and special education students. It was co-taught by a general education teacher and a special education teacher. *Id.*; Testimony of Tomtan-Brayman.

6. At the semester break in 9<sup>th</sup> grade, the Student's Language Arts class was changed from an inclusion class to a Resource Room class. It was now a smaller group, composed only of special education students. The Student performed better in this environment. Testimony of Tomtan-Brayman; D-6:2. This change was done without notice to the Parent, but she does not challenge it.

7. Also at the semester break, the Student was placed in different math classes. The Student's two Math classes (algebra and basic math) were changed, without notice to the Parent, from smaller Resource Room classes to significantly larger inclusion classes. P-5:13; D-6:2; Testimony of Parent. The Parent learned of the change after the fact and complained about it to the District Superintendent in April 2012:

Today I am writing this email because she [the Student] was placed in the required IEP classes the beginning of the school year. Of course she struggled, but was doing fairly better with the tutoring I found for her. It was brought to my attention by my daughter that the Assistant Principal, Ms. Cathy Thomas, removed her, without notice, to a regular math class where she struggles severally [sic]. As I understand it, there are certain procedures that should be followed in order for this to happen. None of which was done. I also understand this has been done to several IEP students. This moved [sic] resulted and contributed to her being short half a credit . . . I called the school and spoke with the IEP teacher Ms. Collins, who agreed that she should not have been moved without notice.

P-4:5-6. While the Parent thought the new class was a "regular math class," (*id.*) evidence at the hearing established that it was an inclusion class with general and special education students, co-taught by a general and a special education teacher. Testimony of Thomas, Student, and Tomtan-Brayman. The email quoted above went on to request that the Student be moved back to her previous math classes, but this was not done. The teacher who taught the Student's Resource Room math classes during first semester (Jon Rogers) no longer taught them second semester. Testimony of Thomas.

8. The credits earned in an inclusion class are general education credits. By contrast, the credits earned in a Resource Room class are "modified," or special education credits. They are designated as special education credits on high school transcripts with an "M". P-5:13; Testimony of Thomas. The curriculum in the two classes was different as well. The Resource Room class focused on the basic math skills of the four operations: addition, subtraction, multiplication and division. The inclusion class focused on algebra, the mastery of which is a high school graduation requirement. Testimony of Tomtan-Brayman.

9. The Student was comfortable in her first semester Resource Room math classes, where concepts were broken down into smaller segments and the class proceeded at a slower pace. The Student felt very lost in her second semester math classes. Testimony of Student. She had earned C's in her Resource Room math classes. She failed both of her inclusion math classes. P-5:13; D-6:2.

10. The Student developed a good relationship with one of her special education teachers in 9<sup>th</sup> grade, Brenda Tomtan-Brayman. Because of this, and because the Student was exhibiting behavioral problems, she was reevaluated toward the end of 9<sup>th</sup> grade, and an IEP amendment was drafted in May 2012 to place her in Ms. Tomtan-Brayman's Life Skills class, a class that addresses emotional behavioral disorders (EBD). D-3. However, the reevaluation and the IEP amendment were not adopted until the following fall, in September 2012. The record is not clear as to why, but the draft amendment states that the Parent wanted to know more about the placement when the reevaluation was completed. D-3:8. The draft amendment also states the Parent was not able to attend a meeting scheduled for May 30, 2012, and that meeting would be rescheduled. D-3:19.

11. The reevaluation conducted in May 2012 (and finalized in September 2012) discussed the behavioral problems the Student exhibited in 9<sup>th</sup> grade:

[T]his year, [the Student] has been known by her teachers as a student who "cannot stop talking" – shouting in class, leaving class at her own will without asking permission, and acting as a catalyst for creating a general disturbance in class. Sometimes she is willing to work, othertimes [sic] she completely disregards the teacher . . . Other times, she completely misbehaves and shouts and is off-task, swearing at the teacher . . . She does enjoy her class with the "behavior modification" teacher, Ms. Brayman, where there tend to be 2 additional aids [sic] in the class allowing for her to receive some one-on-one attention and instruction.

D-10:1. The reevaluation noted: "Large, [sic] classroom settings, even ones that are a blend of general and special education, are not a workable match for [the Student]. It also stated:

She does notably better with teachers and educators whom she feels comfortable with, who spend quality time teaching her, and stay close to her physically rather than leave her and walk away to a different part of the room. . . . Thus her program should begin with a high degree of adult interaction, and a slow weaning process . . .

[The Student] has a tendency to fail to control an apparent impulse to verbally abuse teachers and students who irate [sic] her. She does not function well in large classroom settings, where teachers consistently report that she socializes loudly, frequently refuses to pay attention, fails to complete any work and does not manage to follow more than one step direction at a time on her own if that. She will leave class without asking permission unless she is in the class of one special education teacher that she likes.

D-10:13.

12. Standardized achievement testing done for the reevaluation found the Student in the 32<sup>nd</sup> percentile in reading, the 6<sup>th</sup> percentile in written expression, and the 9<sup>th</sup> percentile in math, compared with same-age peers nationwide. P-2:2-3.<sup>5</sup>

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<sup>5</sup> The record contains the Student's "standard scores" from this testing, not her percentile scores. The standard scores were 93 in Broad Reading, 77 in Written Expression, and 80 in Broad Math. P-2:2-3. At the hearing, the parties agreed that the ALJ could take official notice, pursuant to RCW 34.05.452(5), of a

13. The Student's attendance became a significant problem in the second semester of 9<sup>th</sup> grade. In the first semester, she averaged 1.7 absences and 1.5 tardies per class. In the second semester, she averaged 5.8 absences and 6.2 tardies per class. P-5:13; D-6:2. Her GPA was 1.75 in first semester (including failing her inclusion Language Arts class), and 1.55 in second semester (including failing her two inclusion Math classes). P-5:13; D-6:2.<sup>6</sup>

#### Summer School and ESY in 2012

14. The Parent did not know the distinction between summer school and ESY services. Testimony of Parent. She inquired of the school counselor about summer school classes for 2012, but was told they were not available for the Student. The counselor told her that the Student would make up the 9<sup>th</sup> grade classes she had failed during the regular school year in 10<sup>th</sup> grade. *Id.* Summer school at the high school level is mostly oriented to classes for juniors and seniors. Testimony of Thomas.

15. The Student's September 2011 IEP did not provide for ESY in summer 2012. D-2:12. The Assistant Principal at the Student's high school, Cathy Thomas, supervises all special education programs at the school. She was a member of the Student's IEP team and testified that ESY was not considered for the Student. She explained that ESY is only considered for students with low-incidence disabilities such as autism, dyspraxia, and physical challenges. The Student would have to fall within one of these categories for ESY to be considered. Ms. Thomas was asked whether ESY would be offered to a student with a high-incidence disability if that student showed a significant loss of skills after summer breaks and problems with recouping those skills in the fall. Ms. Thomas responded that she had never seen that happen. *Id.*

16. There is no evidence the Student had a significant loss of skills after summer breaks, or significant problems recouping skills in the fall. The Student's GPA was actually higher in the first quarter of 9<sup>th</sup> grade (1.28) than it was in the last quarter of 8<sup>th</sup> grade (1.07). See P-5:13-14. Likewise, it was higher in the first quarter of 10<sup>th</sup> grade (3.0) than it was in the last quarter of 9<sup>th</sup> grade (1.72). See D-6:2; P-5:10. While a regression/recoupment problem may exist despite such a GPA pattern, there is no evidence that such a problem existed here.

#### Tenth Grade – 2012-2013 School Year

17. The IEP drafted in May 2012 was ultimately signed in September 2012, near the beginning of the Student's 10<sup>th</sup> grade year. D-3:1. The Prior Written Notice issued in May 2012 stated that the Student's eligibility category was *not* being changed to EBD, but that she was eligible for services in the EBD program. D-3:17. The IEP amendment adopted in September 2012 was superseded later that month by a new, annual IEP drafted by Ms. Tomtan-Brayman, the

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table of standard scores and their equivalent percentiles scores. The percentile scores listed in text were taken from such a table. Both standard scores and percentile scores compare the test-taker with same-age peers from a nation-wide sample.

<sup>6</sup> The record does not contain the Student's IEP Progress Reports from 9<sup>th</sup> grade.

Student's new case manager. D-4.<sup>7</sup> Also adopted in September 2012 was the report of the reevaluation that had been conducted in May 2012. The Parent was a member of the reevaluation review team and signed the report. D-10:4. In none of these documents was the Student's eligibility category changed; it remained Health Impaired.

18. Although both of the IEPs adopted in September 2012 stated that the Student qualified for services in the area of behavior (D-3:3, 17; D-4: 3, 10), Ms. Tomtan-Brayman testified that the Student did *not* qualify for services in that area.<sup>8</sup> Testimony of Tomtan-Brayman. Ms. Tomtan-Brayman explained that she therefore made an error in including behavioral goals in the Student's IEP. However, a student does need not qualify for services in the area of behavior in order to be enrolled in Ms. Tomtan-Brayman's Life Skills class that focusses on appropriate behavior and social interactions. *Id.* The Student was enrolled in that Life Skills class throughout the 2012-2013 school year. P-5:9; D-6:3. She enjoyed the curriculum and made some progress in it. Testimony of Tomtan-Brayman.

19. The Student's September 2012 annual IEP for the first time included a Behavioral Intervention Plan (BIP).<sup>9</sup> D-4:13-14. The hypothesis of the BIP was that the Student's negative behaviors served two functions: to avoid academic demands and to mask her academic difficulties. The BIP proposed to provide a great amount of support in smaller classes to minimize distractions (and minimize her distraction of others) and to replace her negative behaviors with the following: On-task behavior leading to work completion; regularly asking teachers for help; engaging in acceptable reactions and comments to peers; and participating in each class. *Id.* Negative reinforcers would be re-direction and moving the Student's seat away from distractions. Positive reinforcers would be: time to walk around the classroom or to the water fountain; time to socialize after work completion; one-on-one assistance with class work; and constant encouragement to increase effort for the long term. *Id.*

20. In the first semester of 10<sup>th</sup> grade, the Student had four periods a day with Ms. Tomtan-Brayman (Reading, Language Arts, Life Skills, and Study Skills). Her grades went up from a 1.72 GPA in second semester of 9<sup>th</sup> grade, to a 2.33 GPA in first semester of 10<sup>th</sup> grade. D-6:2;

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<sup>7</sup> The first page of the new annual IEP states the Student is in 9<sup>th</sup> grade. D-4:1. This is because she had failed some classes the previous year and did not have enough credits to be in 10<sup>th</sup> grade. D-4:9.

<sup>8</sup> This testimony is correct in that behavior is not one of the areas of specially designed instruction listed in the Student's September 2012 reevaluation. See D-10:3. However, the omission of behavior from that list is puzzling in light of the assessment results in the reevaluation. The Behavior Assessment Scale for Children 2<sup>nd</sup> edition (BASC-II) found the Student's symptoms at the most severe level ("clinically significant") in three of the five areas assessed, and at the second most severe level ("at risk") in the remaining two. D-10:2. These assessment results were echoed in teacher observations about the Student's behavior collected for the reevaluation (discussed above). They described quite severe problems. See D-10:1-2.

<sup>9</sup> The BIP was based on a Functional Behavioral Assessment (FBA). The FBA was not included in the September 2012 IEP because software problems prevented Ms. Tomtan-Brayman from entering her handwritten version in an online format at the time the IEP was completed. D-4:26. The FBA is not in the record.



P-5:9.<sup>10</sup> However, absenteeism continued to be a problem. Her average number of absences per class went up slightly from 5.8 to 6.0 per semester; her average number of tardies remained 6.2 per class. *Id.*

21. The Parent challenges as inappropriate the sixth period Study Skills class the Student had with Ms. Tomtan-Brayman in the first semester<sup>11</sup> of 10<sup>th</sup> grade. See P-5:9. Sixth period was an open period for Ms. Tomtan-Brayman. No other students were assigned to her for that period. The Parent alleges the Student did not receive instruction when Ms. Tomtan-Brayman was away or occupied with other activities. Testimony of Parent.

22. The Student's IEP included an annual goal in Study Skills/Organizations: to increase work completion from 50% to 80%. D-4:11. It was appropriate to assign her a Study Skills period so she could work on this goal and complete assignments for her other classes. The Parent had justifiably complained at the beginning of the previous year, 9<sup>th</sup> grade, when the Student was *not* assigned a Study Skills class first semester.<sup>12</sup> The provision of instruction on a one-to-one basis is not objectionable to the Parent; it is largely what is provided to the Student at the Parent's chosen private placement.

23. The issue, then, is whether Ms. Tomtan-Brayman was away or occupied with other activities so that she did not consistently provide instruction to the Student during sixth period. The Parent's testimony to this effect is hearsay; she acknowledges that she did not observe the Student at school. Testimony of Parent. The only individuals with personal knowledge about this matter are the Student and Ms. Tomtan-Brayman. Both of them testified at the hearing, but the Parent did not ask them any questions about this subject.

24. Ms. Tomtan-Brayman testified that all special education minutes listed in the IEP were delivered to the Student *when the Student was present*. Testimony of Tomtan-Brayman. There is no reason to find this testimony anything other than credible. The Student was very frequently absent for sixth period. Ms. Tomtan-Brayman recorded that the Student was absent 16 times and tardy five times for sixth period during first semester. P-5:9. It appears that the Student selectively chose to absent herself for that period, because she was largely present for the immediately-preceding fifth period (art class). She had only four absences from art class during first semester. In summary, there is no evidence to support the Parent's hearsay allegation that it was Ms. Tomtan-Brayman who was absent or not delivering instruction during sixth period, rather than the Student who was absent or tardy for that period.

25. In the second semester of 10<sup>th</sup> grade, the Student's attendance and grades dropped precipitously. D-6:3. She averaged 17.5 absences and 6.2 tardies per class. Many of her absences were in the first period. The Parent left for work before the Student left for school, so

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<sup>10</sup> Finding of Fact 16 discussed the Student's GPA for certain *quarters*. Finding of Fact 20 discusses her GPA for certain *semesters*. That is why the GPA numbers are different in these two findings.

<sup>11</sup> See footnote 16, below.

<sup>12</sup> This issue was not raised in the complaint or in the prehearing Issues and Remedies statement. See Issues statement, above. It therefore may not be adjudicated as a potential IDEA violation. See WAC 392-172A-05100(3); see also 34 CFR §300.512.

the Parent was not there to supervise the Student's departure. Testimony of Parent. The Student would often arrive at school in the morning very upset and non-communicative, and remain that way. Testimony of Thomas. Her GPA dropped to 1.17 in the second semester (it had been 2.33 first semester). She failed reading and P.E., her first and second period classes. D-6:3.

26. The Student's IEP Progress Reports for 10<sup>th</sup> grade stated that by the end of the school year she had made "some progress" toward her behavior and study/organizational skill goals, and "significant progress" toward her math, reading, and written language goals. She had not met any of these goals. D-12.

27. According to Ms. Tomtan-Brayman, who taught the Student in 10<sup>th</sup> grade for four periods first semester and three periods second semester (as well as two periods in 9<sup>th</sup> grade), the Student was fully capable of doing her classwork. She was in small-group special education classes for all subjects except for art in first semester and physical education in second semester. The Student failed both of these classes, though they require little in the way of academic skills. Ms. Tomtan-Brayman observed that the Student's poor achievement at school was due to her choices to be absent and tardy, to socialize excessively, to attend to her cell phone (in defiance of rules and repeated reprimands), and not to do her school work. Testimony of Tomtan-Brayman.

28. Near the end of 10<sup>th</sup> grade, the Student took the statewide assessment, the High School Proficiency Exam (HSPE), in reading and writing. As with the prior statewide assessments, a passing score was 400, and a passing score using the "Basic" scoring system was 375. The Student's score was 392 in reading. She did not complete enough of the writing exam to generate a score. P-2:5-6.

"Eleventh Grade" – 2013-2014 School Year<sup>13</sup>

29. Teachers observed similar behavior in the Student in the fall of 2013 as in the previous school year. Testimony of Machle and Cook.

30. The Student's annual IEP revision occurred in September 2013. D-5. Ms. Tomtan-Brayman was no longer the Student's case manager or teacher, as she was now assigned to a different high school. Testimony of Tomtan-Brayman. The Student's new case manager was Cameron Machle. The Student knew Ms. Machle because she had been a student teacher with Ms. Tomtan-Brayman the previous year. The Student found Ms. Machle helpful and fun. Testimony of Student. The Student was in five special education classes (including a Life Skills class) and one general education class (art). Her five areas of specially designed instruction remained the same (including behavior). D-5:3.

31. In mid-November 2013, the Parent withdrew the Student from her District high school to a private school, St. Christopher Academy, which is housed in Seattle Lutheran High School. A

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<sup>13</sup> "Eleventh grade" is in quotes here because, although the Student was in her third year of high school, she did not have enough credits to be a junior. She ultimately repeated 10<sup>th</sup> grade during this school year.

precipitating event that led to the Student's removal from the District was her romantic involvement with a boy in her Life Skills class who had a juvenile record for domestic violence against women, as well the Student's continued association with friends whom the Parent considered undesirable. Testimony of Parent; Testimony of Machle. The Parent contends the Student had been learning bad behaviors from her peer group in special education classes since 6<sup>th</sup> grade, and did not learn those behaviors at home. Parent's Brief.

32. The Parent requested that the District pay for the Student's private school tuition. This request was first made in the Parent's due process hearing complaint, filed December 12, 2013. C-1; Testimony of Parent.

#### St. Christopher Academy and Seattle Lutheran High School - 2013-2014 School Year

33. St. Christopher Academy (SCA) is a secular school within Seattle Lutheran High School (SLHS). SCA is for students who have learning disabilities or are at-risk. SCA has very small classes where the students essentially receive one-on-one instruction. SCA occupies one classroom within the SLHS building. Testimony of Chapman.

34. SCA has one teacher, Jennifer Chapman, and a director. Ms. Chapman has taught for six years at SCA. She worked as a paraeducator in a public school district for two years prior to that. Ms. Chapman holds a bachelor's degree in education and a teaching certificate, but does not have either a degree or an endorsement in special education. She has been working with special education students throughout her eight years as an educator. *Id.*

35. SCA students take their core academic classes with Ms. Chapman. They take their elective classes, and a mandatory religion class each year, at SLHS. SCA students also participate in lunch, assemblies, and field trips at SLHA. Their diplomas and transcripts are issued by SLHS. SCA pays a monthly fee to SLHS for these services. *Id.*

36. SCA tuition is \$19,650 for the current year, 2013-2014. The Parent received \$9,000 in financial aid this year. Next year, 2014-2015, tuition will increase to \$21,500. The Parent will receive half of that as financial aid. Testimony of Parent.

37. The Student is doing well at SCA. She attributes this to the fact that she did not know anyone at the school, so she focused on her school work instead of on socializing. Testimony of Student. She is not displaying the disruptive, disrespectful behavior that she did at the District high school; she is quiet and compliant. She nevertheless still has trouble with focus and finishing tasks in a timely manner, especially homework. The Student is a 10<sup>th</sup>-grader instead of an 11<sup>th</sup>-grader due to her credit deficiency. Her GPA for the first semester of the 2013-2014 school year was 2.88. She passed all of her classes. Testimony of Chapman; P-3:3-5.

### **CONCLUSIONS OF LAW**

#### **The IDEA**

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

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

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

3. A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA (formerly the EHA). 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.

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

4. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but instead a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Rowley*, 458 U.S. at 200 - 201. "District must provide Student a FAPE that is 'appropriately designed and implemented so as to convey' Student with a 'meaningful' benefit". *J.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 432 - 433, (9<sup>th</sup> Cir. 2010); see also *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1038, n. 10, (9<sup>th</sup> Cir. 2009).

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

## District's Motion for Directed Verdict

6. At the conclusion of the Parent's case, the District moved for a directed verdict, also known as a judgment as a matter of law. This motion is governed by Washington Civil Rule (CR) 41(b)(3), which provides, in pertinent part:

### Defendant's Motion After Plaintiff Rests.

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

See also WAC 10-08-200(4). The tribunal took the District's motion under advisement and deferred ruling until the written decision because the ALJ did not have sufficient time to analyze the exhibits and testimony to determine, at that time, whether the motion should be granted.

7. Because it is now determined, as set forth below, that the Parent has proven a violation of the IDEA and a denial of FAPE, the District's motion for a judgment as a matter of law will be denied.

## Alleged IDEA Violations

### Failing to provide summer school for the Student in the summer after her 9<sup>th</sup> grade year<sup>14</sup>

8. The availability of ordinary summer school, and access to credit retrieval courses, are not subjects that are governed by the IDEA. However, ESY during the summer is governed by the IDEA. Our state regulation on ESY provides, in pertinent part:

(3) Extended school year services must be provided only if the student's IEP team determines *on an individual basis* that the services are necessary for the provision of FAPE to the student.

(4) *A school district may not limit extended school year services to particular categories of disability or unilaterally limit the type, amount or duration of those services.*

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<sup>14</sup> Paragraphs (a)(ii), (iii) and (iv) of the Issues and Remedies statement state that the events described in those paragraphs occurred in the "2012-2013 school year". See Issues section, above. The evidence is undisputed that the events in question took place during the Student's 9<sup>th</sup> grade year. Her 9<sup>th</sup> grade year was the 2011-2012 school year, not the 2012-2013 school year. The District did not object to this error or allege that it had any trouble preparing its defense because of it. For these reasons, the Issues and Remedies statement is amended to conform with the evidence. The references to the 2012-2013 school year in paragraphs (a)(ii), (iii) and (iv) of the Issues and Remedies statement are amended to refer to the Student's 9<sup>th</sup> grade year.

(5) The purpose of extended school year services is the maintenance of the student's learning skills or behavior, not the teaching of new skills or behaviors.

(6) School districts must develop criteria for determining the need for extended school year services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based upon the professional judgment of the team and consideration of factors including the nature and severity of the student's disability, rate of progress, and emerging skills, with evidence to support the need.

(7) For the purposes of subsection (6) of this section:

(a) Regression means significant loss of skills or behaviors if educational services are interrupted in any area specified on the IEP;

(b) Recoupment means the recovery of skills or behaviors to a level demonstrated before interruption of services specified on the IEP.

WAC 392-172A-02020(3) through (7) (*italics added*); see *also* 34 CFR §300.106. Credit retrieval is not one of the allowable bases for providing ESY under this regulation.

9. The Assistant Principal of the Student's high school explained that the Student was not considered for ESY because she does not have a low-incidence disability. This limitation of ESY to particular categories of disability is in direct violation of section (4) of the regulation quoted above. It also violates the requirement that IEP teams determine the need for ESY "on an individual basis" for each student. WAC 392-172A-02020(3). The failure of the Student's IEP team (of which the Assistant Principal was a member) to consider whether she required ESY in order to receive a FAPE was a procedural violation of the IDEA.

10. Procedural violations of the IDEA result in a denial of FAPE only if they:

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

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

11. The procedural violation of failing to consider whether the Student needed ESY in 2012 did not result in a denial of FAPE. This is because there is no evidence the Student in fact needed ESY in order to receive a FAPE. There is no evidence she experienced significant regression over summer breaks or significant difficulty recouping skills in the fall. Nor is there any other evidence of a need for ESY in order to maintain skills previously learned.

12. For these reasons, the District's IDEA violation of denying ESY to the Student based on her disability category, without considering her individual needs, did not result in a denial of FAPE and does not create an entitlement to relief.

Moving the Student from special education classes to inclusion classes<sup>15</sup> in the second semester of 9<sup>th</sup> grade

13. The Student was moved from two special education Resource Room math classes to two inclusion math class for the second half of 9<sup>th</sup> grade. This change of setting was done without notice to the Parent and without an opportunity for her to participate in the decision.

14. Specially designed instruction (SDI) can be provided in a variety of different settings. Two such settings are a Resource Room and an inclusion class. While SDI may be delivered in either setting, the two settings occupy different places on the least-restrictive environment (LRE) continuum. The District acknowledged in its post-hearing brief that a Resource Room is a more restrictive environment than an inclusion class. District Brief at p. 4.

15. Inclusion classes are comprised of both general education and special education students. They are significantly larger than Resource Room classes, and are co-taught by a general education and a special education teacher. The credits that students earn when they take an inclusion class are general education credits, even if the students have IEPs. By contrast, the credits that students earn when they take a Resource Room class are modified (special education) credits, distinguished on their high school transcripts with an "M". The curriculum was also very different in the two settings: In the Resource Room class, the emphasis was on basic skills of the four math operations. In the inclusion class, the focus was on algebra and meeting the high school graduation requirement of competency in that subject.

16. The hallmarks of a change in educational placement on the LRE continuum are changes in the degree of participation with general education peers, and the degree of participation in the general education curriculum. See WAC 392-172A-02050 and -02055; see also 34 CFR §300.114 and 300.115. Because the two settings here had significantly different degrees of participation with general education peers and in the general education curriculum, they occupied different places on the LRE continuum. A change from one to the other for one-third of the Student's class time constituted a change of educational placement.

17. It was a procedural violation of the IDEA for the District to unilaterally change the Student's educational placement without notice to the Parent or an opportunity for the Parent to participate in the decision. See 20 USC §1415(b)(3) and (c); WAC 392-172A-02060 and -05010(1)(a); see also 34 CFR §300.116 and 300.503. This procedural violation resulted in a denial of FAPE on two grounds: The Parent was denied the opportunity to object to the change and try to dissuade the IEP team from making it. The Student was denied educational benefit, as evidenced by her steep drop in grades in her math classes (she went from C's to failing both of them) and her testimony that she was unable to understand or keep up with her new math classes.

18. The Parent has established a violation of the IDEA and a denial of FAPE on this claim.

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<sup>15</sup> The Parent mistakenly called these classes "regular education classes." See Issues statement, above. The District failed to notify her of the change to these classes, so it is understandable she did not understand the nature of the new classes.

Improperly changing the Student's special education eligibility category near the end of her 9<sup>th</sup> grade year

19. The Student's eligibility category was not changed either in 9<sup>th</sup> grade or in 10<sup>th</sup> grade. It remained the Health Impaired category, based on her ADHD, at all times. The Parent has not established a violation of the IDEA or a denial of FAPE on this claim.

Failing to implement the Student's IEP for the remainder of her 9<sup>th</sup> grade year

20. The Parent testified that this claim relates to the allegation that the District improperly moved the Student from Resource Room math classes to regular education (actually inclusion) math classes in the second half of 9<sup>th</sup> grade. This claim has been discussed above.

Failing to provide the Student with an appropriate sixth period class in the first semester of 10<sup>th</sup> grade<sup>16</sup>

21. As discussed in the Findings of Fact, the Parent has failed to establish that the Student's sixth period Study Skills class in the first half of 9<sup>th</sup> grade was inappropriate. The Parent has not established a violation of the IDEA on this claim.

## **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). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra*, 401 F.3d at 523-524.

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

24. The Parent has prevailed on only one claim: The District's unilateral change of the Student from two Resource Room math classes to two inclusion math classes constituted a

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<sup>16</sup> Paragraph (a)(v) of the Issues and Remedies statement alleges that the Student was placed in an inappropriate sixth-period class "near the end" of the 2012-2013 school year (10<sup>th</sup> grade). See Issue statement, above. However, the evidence is undisputed that the allegedly inappropriate sixth-period class occurred in the first semester of that school year, not near the end of it. The District did not object to this error or allege that it had any trouble preparing its defense because of it. For these reasons, the Issues and Remedies statement is amended to conform with the evidence. The reference in paragraph (a)(v) to "near the end" of the 2012-2013 school year is amended to refer to the first semester of that school year.



change of placement on the LRE continuum and resulted in a denial of FAPE. The Parent's requested remedy of reimbursement for a private school placement is not an appropriate remedy for this violation for several reasons. First, the remedy is disproportionate to the violation, making it inequitable. A denial of FAPE in one subject (albeit two classes) for one semester can be remedied within the District, and be can remedied with relief much less broad than a full year of private placement in all subjects. Second, the private placement in 11<sup>th</sup> grade occurred for reasons other than one semester of inappropriate math classes in 9<sup>th</sup> grade. The primary reason for the private placement -- and the primary reason for the Student's lack of academic success -- was not the District's single denial of FAPE. The District almost entirely provided the Student with small-group special education classes that were appropriate for her needs. When the Student's behavior deteriorated, the District did not ignore this, but reevaluated her and provided specially designed instruction in behavior from a teacher with whom the Student had a strong relationship. Despite these appropriate steps by the District, the Student engaged in excessive absenteeism and chose not to do her school work. These choices, and the choice of friends that the Parent disapproved of, caused the Parent to remove the Student from her District high school. It was not the inappropriate 9<sup>th</sup> grade math classes that caused the Parent to do this in the middle of 11<sup>th</sup> grade.<sup>17</sup>

25. The Parent did not offer evidence regarding a compensatory education remedy other than private school tuition reimbursement. However, it would be inequitable to deny the Parent any relief where there has been a denial of FAPE and the Student is still in need of special education. A total denial of relief might also prolong these proceedings unnecessarily (and leave the Student without compensatory education for years) by causing a remand for a remedy award, or the imposition of such an award by a court on appeal. See *A.G. v. District of Columbia*, 794 F. Supp. 2d 133, 140-141, (D.D.C. 2011). For these reasons, tutoring in math will be awarded under the aegis of "other equitable relief as appropriate". See Issues statement, above.

26. Appropriate relief for the inappropriate math classes is one-on-one tutoring in math to bring the Student to the level she would have been absent the denial of FAPE. One-on-one instruction has been found successful with the Student at SCA. The District will be ordered to provide one-on-one math tutoring at a rate of one hour of tutoring for every three class hours encompassed by the violation (the hours encompassed by the violation were two class periods per day for one semester).<sup>18</sup> The full amount of these class hours must be compensated for because the Student failed both classes, indicating she did not receive educational benefit from them. The ratio of one hour of tutoring to three hours of inappropriate class instruction is based on the greater intensity and effectiveness of instruction in a one-on-one setting. See *Tacoma School Dist.*, 114 LRP 21796 (SEA WA 2014); *Peninsula School Dist.*, 113 LRP 46801 (SEA WA 2013).

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<sup>17</sup> For these reasons, no Conclusions of Law need be entered regarding the appropriateness of SCA as a placement for the Student, and whether the religious nature of SLHS would preclude reimbursement for the placement.

<sup>18</sup> The ALJ is unaware of evidence on the exact length of class periods at the Student's public high school. Therefore, the exact amount of tutoring hours awarded is not calculated here. The parties have access to information on the length of class periods. They can use that information to perform the calculation discussed here.

27. The tutor shall be a fully certificated special education teacher. The District and the Parent shall jointly select the tutor and the location for tutoring, but in the event of a disagreement the District shall make the final selection on both of these matters. The best time for the tutoring to occur may be during the upcoming summer break. However, the Parent is free to select tutoring during the school year, either before or after school hours. (The Parent may also select a combination of summer and school-year tutoring.) The Parent shall notify the District of the days and times she wishes the tutoring to occur. The District shall provide tutoring at those times unless it is unable to find a qualified tutor available at those times. This compensatory education remedy must be fully utilized within one year of the date of this decision.

28. If the Student misses or cancels a scheduled tutoring session without giving 24 hours advance notice, then the missed session will count against the Parent's compensatory education award unless the District agrees that the failure to give advance notice was due to an unforeseeable emergency.

#### Prospective Placement

29. The Parent has not established that she is entitled to prospective placement outside the District. She has not established that the Student's current IEP or her current educational placement within the District are inappropriate. Therefore, relief in the form of a prospective placement is denied.

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

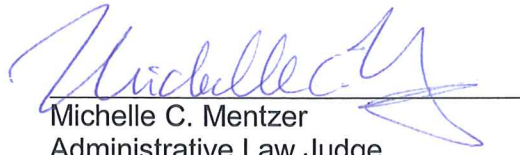
### **ORDER**

1. The District's motion for a judgment as a matter of law, made at the close of the Parent's case and taken under advisement at that time, is DENIED.

2. The District violated the IDEA and denied the Student a FAPE by changing the Student's placement on the least-restrictive environment continuum for two math classes in the second semester of 9<sup>th</sup> grade, without notice to the Parent and without an opportunity for the Parent to participate in the decision.

3. As compensatory education for this violation, the District shall provide one-on-one math tutoring at a rate of one hour of tutoring for every three hours of class time encompassed by this violation, according to the terms set forth in the Conclusions of Law, above.

Signed at Seattle, Washington on June 13, 2014.

  
Michelle C. Mentzer  
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. *Jan*

Parent

  
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