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Oct 25, 2019  
OAH – SEATTLE

STATE OF WASHINGTON  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
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October 25, 2019

Parent  
[REDACTED]

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**In re: Aberdeen School District**  
**OSPI Cause No. 2019-SE-0004**  
**OAH Docket No. 01-2019-OSPI-00671**

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,

Jacqueline H. Becker  
Administrative Law Judge

cc: Administrative Resource Services, OSPI

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

IN THE MATTER OF

ABERDEEN SCHOOL DISTRICT

OSPI CAUSE NO. 2019-SE-0004

OAH DOCKET NO. 01-2019-OSPI-00671

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

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Jacqueline Becker in Aberdeen, Washington on July 9, 10, 16, 17, and August 29, 2019. The Parent<sup>1</sup> of the Student whose education is at issue appeared and was represented by Ryan Ford, attorney at law. The Aberdeen School District (District) was represented by Susan Winkelman, attorney at law. Also present for the District were Dr. Richard Bates, Executive Director of Special Services, and Bryan McKinney, school principal.

**PROCEDURAL HISTORY OF THE CASE**

The Parent filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on January 10, 2019. The Complaint was assigned Cause No. 2019-SE-0004 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered on January 11, 2019. The District filed its response to the Complaint on January 22, 2019. Prehearing conferences and motion hearings were held on March 5, April 15, May 10, and June 5, 2019. Prehearing orders were entered on March 7, April 18, May 3, May 21, June 10, and July 1, 2019.<sup>2</sup>

The Parent moved to amend the issues for the due process hearing on April 24, 2019 and the motion was granted effective April 25, 2019, via an order entered May 3, 2019. The Parent moved to strike two issues for the due process hearing on June 25, 2019 and the motion was granted on July 1, 2019.

**Evidence Relied Upon**

**Exhibits Admitted:**

Parent's Exhibits: P1 (except p. 1), P2 (except pp. 2, 24 and 25), P3 (except p. 3), P4-16, P17 (except pp. 2-3), P19 (pp. 1-2 only), P 20 (except p.5), P21-23, P24 (except p. 9), P25 (except section C pp. 5-8 and 10), P26, P27 (except pp. 16-17), P28 (pp. 1-5 only), P29-31, P33-44, P45 (pp. 5-11 only), P46-48, P49 (p. 1 only), and P50.

<sup>1</sup> "Parent" or "Mother" are used herein to refer to the Student's Mother. To help ensure confidentiality, names of parents and students are not used.

<sup>2</sup> The prehearing order of April 18, 2019, apparently was not deposited in the U.S. mail correctly by OAH. It was not received by the parties until approximately May 2, 2019, when it was sent via secure email and redeposited in the U.S. mail.

District's Exhibits: D1- D20.

Witnesses Heard (in order of appearance):

Bryan McKinney, Principal of McDermoth Elementary School  
Dr. Edward Danskin, Clinical Director Early Strides Child Development Center  
The Student's Mother  
Steven Galloway, District school psychologist  
Steven Arnold, friend of the Mother  
Adam Rudginsky, Director of Club Z In-Home Tutoring  
Lisa Carney, District special education teacher  
Dawn Fillo, District special education teacher  
Suzanne Black, District general education 5<sup>th</sup> grade teacher, McDermoth Elementary  
Dr. Richard Bates, District Executive Director of Special Services

Post-Hearing Briefs

The parties' post-hearing briefs were timely filed on September 25, 2019.

Due Date for Written Decision

The due date for a written decision in this case was continued to thirty (30) calendar days after the close of record, at the request of the parties, by Order dated February 20, 2019. The record closed with the receipt of the post-hearing briefs on September 25, 2019, and the due date for the written decision is **October 25, 2019**.

**ISSUES/REMEDIES**

The issues and requested remedies addressed in the due process hearing were:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by failing to implement the May 22, 2018 individualized education program (IEP) in its entirety by:
  - i. failing to provide Behavior Intervention Development and Behavior Intervention Implementation services comparable to those that had been provided in the previous school district;
  - ii. providing more minutes of specially designed instruction (SDI) to the Student than the number of minutes of SDI specified in his IEP; and
  - iii. for a portion of the 2018-19 school year, providing fewer minutes of SDI to the student in the area of math than the number of minutes of SDI specified in his IEP;
- b. Whether the District violated the IDEA and denied the Student FAPE by failing to educate the Student in the general education classroom setting to the maximum extent appropriate, thereby violating the least restrictive environment mandate of the IDEA;
- c. Whether the District violated the IDEA and denied the Student FAPE by failing to timely conduct an Assistive Technology evaluation;

- d. Whether the District committed procedural violations rising to the level of substantive violations of the IDEA by:
  - i. Predetermining that the Student does not qualify for extended school year (ESY); and/or;
  - ii. Denying the Parent meaningful participation in the Student's education by predetermining that the Student does not qualify for ESY;
  - iii. Failing to send the Parent a prior written notice within a reasonable time after the December 10, 2018 IEP team meeting for the occupational therapy screening and/or the agreed communication plan; and
  - iv. Failing to update the Student's IEP to reflect the minutes and services the Student was receiving throughout the 2018-19 school year;
- e. Whether the District committed multiple procedural violations of the IDEA, the cumulative impact of which resulted in a denial of FAPE to the Student;
- f. Whether the Student is entitled to compensatory education and/or reimbursement for private tutoring; and
- g. Whether the Student qualifies for extended school year services, and associated expenses, between the 2018-19 and 2019-20 school years.

### **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 conflicts, the evidence adopted has been determined to be more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence may be set forth below regarding specific facts at issue.

### BACKGROUND

1. The Student entered school in the District in August of 2018 and attended fifth grade at McDermoth Elementary School during the 2018-19 school year. D16; Tr. 182 (Mother).<sup>3</sup>
2. Prior to attending school in the District, the Student attended school in the Los Angeles Unified School District (LAUSD) in California. The Student first qualified for special education services in May of 2015. At that time, he was determined to have a specific learning disability (SLD) with attention and sensory-motor processing delays. D1 p.1. The Student attended a dual language English/Spanish program from kindergarten through third grade. His teachers in that program noted that he had a short attention span and difficulty listening to and following directions, and was often off-task. D1 p.2.
3. The Student underwent an academic assessment by the LAUSD in February of 2017. D1. That assessment concluded the following:

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<sup>3</sup> "D" and "P" refer to the specified exhibit. "Tr." refers to the transcript of the proceedings.

- a. The Student's basic reading skills and oral reading fell in the low average range. His reading comprehension, reading fluency, and broad reading (which assesses all of the above components) fell in the below average range.
- b. The Student's spelling was well below average. His sentence writing fluency was below average. His writing response skills were in the average range, and his overall written language score fell in the below average range.
- c. The Student's math facts fluency was somewhat below average, and his applied problem solving was average. His "number matrices" score was average, and his broad math score was also average.

D1 pp.5-6.

4. A psycho-educational assessment of the Student was performed in April of 2017 by an LAUSD school psychologist, for the purpose of reevaluating his special education eligibility. D2 p.1. The assessment determined that the Student's overall cognitive ability fell within the broad average range. D2 p.13. The assessment determined that the Student did not have an SLD or a psychological processing disorder. D2 p.14. The assessment further determined that the Student met the eligibility criteria for Other Health Impairment due to his impulsivity, limited attention and focus, and significant over-active behavior, all of which impact his progress in the educational environment. Consequently, he continued to qualify for special education services. *Id.*

5. In 2017, the Parent filed a request for due process against the LAUSD. She subsequently entered into a settlement agreement on August 16, 2017, and a nondisclosure agreement, with the LAUSD. D4 p.25; Tr. 697 (Mother); Tr. 697-98 (representation of counsel).

#### THE LOS ANGELES UNIFIED SCHOOL DISTRICT IEP OF MAY 22, 2018

6. The LAUSD developed several IEPs for the Student, the last of which was developed on May 22, 2018 (LA IEP). D7. The Parent participated in the IEP meeting on May 22, 2018. D7 p.16. This IEP was sent to the District in August of 2018 when the Student moved to Aberdeen. D12. The LA IEP is 29 pages long and sets forth a large quantity of information about the Student. D7.

7. The LA IEP states that the Student's reading fluency level is "very close to his grade level benchmark," and that he has been "closely approaching benchmark in terms of his reading accuracy." D7 pp.3-4. It also states that his reading comprehension is at a lexile<sup>4</sup> level of 980, indicating that he is able to "independently read and comprehend grade and above level text." D7 p.4.

8. The LA IEP states that the Student's "overall school performance indicates challenges in sustaining full attention over time as well as significant levels of distractibility and impulsivity," and that he "demonstrates characteristics of ADHD which may impact his progress in the general education curriculum." D7 p.4.

9. The LA IEP also states that the Student has poor penmanship, and does not write sequential sentences that approximate his verbal ability to explain information. D7 p.5.

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<sup>4</sup> A "lexile" level is a measure of reading ability. Tr. 529 (Fillo).

10. The LA IEP sets forth several goals, including, "Student will locate classroom items, and begin and maintain appropriate use of classroom materials with one teacher prompt within 60 seconds of directive, with 90% accuracy as measured by collected data." D7 p.9.

11. It sets forth a math goal which provides: "[Student] will independently solve a three-step grade-level word problem posed with whole numbers and having whole-number answers using any of the four operations, including problems in which remainders must be interpreted during structured whole group math lessons as measured by student work in two out of three trials with 90% accuracy." D7 p.12.

12. The LA IEP addresses extended school year services (ESY) briefly and in a confusing manner.<sup>5</sup> While the LA IEP's intent and meaning regarding ESY are not clear, no finding as to that intent and meaning needs to be made. The LA IEP's intent and meaning as to ESY is not relevant to the issues that are properly before the ALJ. No finding as to the LA IEP's intent and meaning regarding ESY is made.

13. The LA IEP sets out four services, all to be started on June 8, 2018. The first service pertains to reading and writing. It provides the Student will receive 200 minutes per week of Resource Specialist Program (RSP) instruction, with 60 of those minutes being pull out from general education. D7 p.22; Tr. 588 (Fillo). RSP is California terminology and is synonymous with Specially Designed Instruction (SDI). Tr. 588 (Fillo); 675 (Parent); 279-80 (Galloway).

14. The second service pertains to behavioral support and consists of Behavior Intervention Implementation (BII) services for 900 minutes per week. D7 p.22. A BII provider (referred to as a BII) is a one-to-one interventionist who provides direct implementation of applied behavior analysis interventions. P47 exh. D; Tr. 72 (Danskin).<sup>6</sup> A BII working at the agency that provided BII services to the Student in the LAUSD is required to hold a bachelor's degree in applied behavior analysis, psychology, child development, or a related field. P47 exh. D. The BII working with the Student in the LAUSD had the following duties, among others: address the Student's problematic behaviors in accordance with positive behavior support techniques, provide direct behavior implementation of applied behavior analysis interventions, de-escalate problem

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<sup>5</sup> Under the heading "Additional Discussion," the LA IEP provides, "5/22/18: IEP team agrees the [Student] would benefit from ESY to prevent regression of skills, however the District offer of ESY is too restrictive." D7 p.23. "Extended School Year/Intersession" is marked as "Yes" in one chart in the LA IEP. *Id.* at 20. "Extended School Year/Intersession was marked "No" on previous LAUSD IEPs. D3 p.23; D4 p. 23; D6 p. 24. ESY is not set out as a service to be provided in the LA IEP's listing of services. *Id.* at 22-23. The Mother explained that the LAUSD summer program was not appropriate for the Student. He was not offered a summer program and did not receive ESY in the LAUSD during the summer of 2018. Tr.188, 722-24 (Mother). There is additional confusion regarding a portion of the LA IEP. The LA IEP contains a box with a sentence reading, "Parent/Student (18-21) AGREES to all components of the proposed IEP WITH THE SPECIFIC EXCEPTION(S) stated below." Below that sentence it states, "ESY is not appropriate. Student requires additional specialized instruction." D7 p.16. The same verbiage appears later in the LA IEP in the Mother's handwriting. D7 p.28. This is the Mother's verbiage and expresses her disagreement at the time of the LA IEP meeting with the handling of ESY. She expressed her opinion that the Student required additional specialized instruction. Tr. 721 (Mother). Thus, this language is not a conclusion of the LA IEP team; it is the Mother's expression of disagreement.

<sup>6</sup> Dr. Danskin holds bachelor's degrees in psychology and physical education, a master's degree in special education, and an Ed.D. in leadership and organizational change. D47 exh. A.

behaviors, track data pertaining to skill acquisition and problem behaviors, and make progress notes. P47 exh. D.

15. The third service also pertains to behavioral support and consists of Behavior Intervention Development (BID) for 240 minutes per month. D7 p. 22. The BID service provider (referred to as a BID) is a student's case manager who designs a treatment program for the student. P47 exh. D; Tr. 72 (Danskin). A BID working at the agency that provided BID services to the Student in the LAUSD is required to have the following credentials and experience: (a) a master's degree in applied behavior analysis, education, special education, or psychology with a specialization in behavior analysis; as well as (b) at least two years of experience providing applied behavior analysis, positive behavior supports, and crisis intervention for students with emotional disabilities in the school setting. P47 exh. D. The BID working with the Student in the LAUSD conducted a behavioral assessment and observations of the Student in the school setting, and developed a treatment plan and a child-specific behavior intervention plan. The BID also supervised the BII for at least six hours per month and visited the school bi-weekly to observe the BII interact with the Student. P47 ¶12. The BID also had the following duties, among others: collect and monitor data, provide feedback to parents and school personnel, and attend IEP meetings. P47 exh. D.

16. While he was in the LAUSD, the BII and BID services set forth in the LA IEP, and earlier IEPs, were provided to the Student by Early Strides Child Development Center, a non-public agency certified by the California Department of Education. P47; D4 and D6. Those services were provided during regular school days from August 24, 2017 to August 15, 2018. *Id.*; Tr. 71 (Danskin). It is not clear exactly how the BII engaged with the Student in his classroom, or where (s)he sat in relation to the Student.<sup>7</sup>

17. The LA IEP provides that communication between the agency providing behavior support services (Early Strides) and the Parent will be via daily charting and behavioral logs. D7 p. 27.

18. The fourth service pertains to math and provides that the Student will receive 45 minutes of RSP math instruction per week as pull out from general education. D7 p.23.

19. The LA IEP specifies that the percentage of time per week that the Student will spend outside of general education is seven percent. D7 p.23.

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<sup>7</sup> The LAUSD draft functional behavior assessment report from October of 2017 states that the BII sits directly or diagonally across the room from the Student, where she has a clear view. According to the draft report, "She does not go to him unless he requests help... The BII was not observed to intervene when the student did go off task because generally he responded to one teacher prompt and quickly returned to his task." D5 p.12. There is no signature on this draft report, no indication as to whether the draft ever became a final report, and no information as to how the report was used by the LA IEP team. Information in the draft report conflicts with information in the LA IEP. For example, the draft report states the Student demonstrated "very minimal off task behaviors." D5 p. 16. The LA IEP, in contrast, notes the Student had challenges with sustaining full attention over time and significant levels of distractibility and impulsivity. D7 p.4. Moreover, the draft report is from an earlier time period than that covered by the LA IEP. For these reasons, the draft report (exhibit D5) is found to be only marginally reliable and is given little weight by the ALJ.

20. The LA IEP states that the IEP team discussed the need for an assistive technology (AT) assessment of the Student, and the team agreed to assess the Student at the beginning of the 2018-19 school year. D7 p.23.

21. The LA IEP contains a three-page Behavior Support Plan. D7 pp.25-27. That plan provides that improved Student behavior will be reinforced by high-fives, verbal praise, and positive notes or phone calls to home, among other things. D7 p.26. The plan also provides a behavioral goal that "Student will locate and begin and maintain appropriate use of classroom materials with one teacher prompt within 90 seconds of directive, with 90% accuracy as measured by collected data." D7 p.26. This goal differs slightly from the classroom materials goal set out on page 9 of the LA IEP.

### THE TRANSFER PROCESS

22. Steven Galloway<sup>8</sup> was the school psychologist assigned to the Student's case when the Student entered the District. Mr. Galloway began his employment with the District in late August of 2018, and resigned in order to work in a neighboring district in June of 2019. Tr. 255-258 (Galloway). He resigned, in part, over his concerns regarding how the District handled special education matters. *Id.* at 390 (Galloway). He felt District policies and procedures were not written down and/or were not updated. Policies and procedures he felt were lacking included the referral process for initial evaluations, procedures for reevaluations, and a delineation of specific responsibilities of special education staff members. *Id.* at 390-91.

23. Mr. Galloway reviewed the Student's educational records from the LAUSD in September and/or October of 2018. Tr. 261 (Galloway). In consultation with Dawn Fillo,<sup>9</sup> the Student's special education teacher in the District, Mr. Galloway determined that the District could accept the decisions and documents pertaining to the Student from the LAUSD. "Acceptance" of the LAUSD documents means that the District accepted the LAUSD's eligibility decision regarding the Student's special education classification; the recommendations from the LAUSD eligibility team regarding provision of specially designed instruction in various areas; and the Student's LA IEP, thereby acknowledging that the LA IEP was current, valid, comprehensive, and congruent with the Student's evaluations' recommendations. *Id.* at 262 (Galloway).

24. Mr. Galloway and Ms. Fillo agreed that the District could provide services to the Student that were commensurate with those set forth in the LA IEP, though Mr. Galloway felt that the LA IEP needed to be "fine-tuned" in order to adapt it to the District. Tr. 262-63, 312 (Galloway). He expected this "fine-tuning" would occur within a "couple of weeks" of his conversations with the

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<sup>8</sup> Mr. Galloway holds a Bachelor of Arts degree in history, a Bachelor of Arts degree in English and philosophy, a master's degree in school psychology, and a master's degree in education administration. Mr. Galloway also holds a National School Psychology license, and served as a director at large for the Nevada Association of School Psychologists. He worked for 24 years in Nevada as a school psychologist and director of special education. He then worked for eight years as an independent contractor providing school psychologist services in various rural school districts. Tr. 255-58 (Galloway).

<sup>9</sup> Ms. Fillo holds a bachelor's degree in social science with an emphasis on education, and a master's degree in special education. She has taught special education in the District for the past six years. Tr. 513-14, 1001 (Fillo).

Mother that occurred in September of 2018. *Id.* at 393. Mr. Galloway never saw what he considered to be a “fine-tuned” IEP for the Student. *Id.*

25. Ms. Fillo reviewed the Student’s LA IEP in August of 2018, and reviewed his LAUSD cumulative file later in the school year. Tr. 519-20 (Fillo).

26. The Mother discussed the Student with Ms. Fillo at the beginning of the school year, at a school open house event. The Mother told Ms. Fillo that the Student had a one-on-one aide in the LAUSD and she was wondering how that would “translate” into the District. Tr. 191 (Mother).

27. In late August of 2018, Ms. Fillo spoke with the assistant principal of the Student’s LAUSD elementary school regarding the Student and the LA IEP. The conversation lasted only a few minutes. Tr. 588-89 (Fillo). Ms. Fillo was informed that the BII was classroom support that was being phased out, and the Student did not like the BII service and just needed prompting. *Id.* at 591. The notes Ms. Fillo took regarding the conversation state, in part, “BII 1:1 in Classroom Support; BID Person who wrote behavior plan.” P28 p.2. In quotations marks, the notes state, “Only needs redirecting prompting” and “Really good kid.” The notes further state, “Didn’t like services being singled out; Supportive family; worked w/ atty;”<sup>10</sup> and “from outside behavior agency.” *Id.* Next to the BID service listing on the page on which she took notes, Ms. Fillo wrote “60 min/Wk, 5 min/day.” Next to BID, she wrote “180 min/day.” Next to RSP Literacy/ELA/ELD she wrote “40 min/day” and she drew an arrow from “RSP” to her note reading “Resource Program Specialist (same as SDI).” Next to RSP math, she wrote “9 min/day.” *Id.*

28. Ms. Fillo’s understanding after the conversation with the LAUSD assistant principal was that the BII was in the classroom prompting the Student. She did not discuss whether the BII worked with other students at the same time. Tr. 607 (Fillo).

29. The amount of BII and BID services provided to the Student changed while he was in the LAUSD. He started the 2017-18 school year with 1200 minutes per week, and that was reduced to 900 minutes per week in December of 2017. Tr. 772-73 (Mother). Dr. Danskin, the clinical director of Early Strides, testified that the Student was on a “fading plan” because he was doing well with most of his program. Tr. p.79 (Danskin). However, the LA IEP does not state that the BII and BID services were being phased out and no phase-out plan is set forth. The 900 minutes specified in December of 2017 were the same as the amount specified in the May 2018 LA IEP. The ALJ finds there was no plan in the LA IEP to phase-out or otherwise change the amount of BII and BID services that were to be provided to the Student.

30. At the beginning of the 2018-19 school year, Mr. Galloway inquired about the District’s transfer review policies and procedures. He was told by the Director of Special Services, Dr. Richard Bates,<sup>11</sup> that it was not necessary to have a transfer review meeting, but that such a meeting could be held if, in Mr. Galloway’s judgment, it was necessary. Tr. 265 (Galloway).

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<sup>10</sup> “Atty” stands for attorney. Tr. 910 (Fillo).

<sup>11</sup> Dr. Bates holds a Bachelor of Arts degree in elementary education. He holds a master’s degree in educational administration and a doctorate in educational leadership. He also holds a special education endorsement. He has experience as a preschool teacher, an elementary special education teacher, a school principal, and an early childhood education college-level instructor. He has been Director of Special Services in the District since 2018. Tr. 1006-09 (Bates).

Mr. Galloway spoke with the Mother about the transfer review process, and she expressed to him that she did not feel a meeting was necessary, and the acceptance process could proceed without her attendance at a meeting. Tr. 266-70 (Galloway); D31 p.1. According to Mr. Galloway's notes of the conversation, the Mother "agreed that [the Student] should receive commensurate services." D12 p.2. Mr. Galloway described to the Mother in general terms the services the District would provide to the Student. He mentioned the District had a behavioral specialist and a behavior para educator who works with the specialist. Tr. 348 (Galloway). It would have been reasonable on the part of the Mother to infer from this conversation that the behavioral specialist and para would be providing services to the Student.

31. The District's procedure for handling a student who transfers into the District with an IEP that calls for specific services that the District does not provide, such as a BII and BID, is as follows: research the records and programs from the previous school district, hold an IEP team meeting to determine what services are comparable to the services called for in the existing IEP, draft a new IEP, and give the required prior written notice. Tr. 1026, 1037 (Bates). According to Dr. Bates, that procedure was not followed in the Student's case. *Id.* In Dr. Bates's opinion, a new IEP should have been developed in October of 2019, or sooner. *Id.* at 1052.

32. Mr. Galloway was responsible for drafting the Student's transfer review documents. Mr. Galloway's professional opinion was that the District could provide services comparable to those set forth in the LA IEP. Tr. 266-67, 349 (Galloway). He believed the District could develop a service plan that pulled the Student out of the general education setting for approximately the same amount of time he had been pulled out while in the LAUSD. Mr. Galloway also believed that redirection of the Student's attention, as had been done by the BII, could be provided by a teacher or a para professional in the classroom. *Id.* He felt that a para professional in the District would be commensurate with a BII in the LAUSD. *Id.* at 393.

33. A meeting notice was issued by the District inviting various participants, including the Mother, to a transfer review meeting to be held on September 24, 2018.<sup>12</sup> D12. It is unclear whether the meeting was held. According to Mr. Galloway, on approximately September 24, 2018, he, Ms. Fillo, school principal Bryan McKinney, and Suzanne Black (the Student's general education teacher) met informally in Ms. Fillo's classroom to discuss the transfer review process. D12; Tr. 265, 268 (Galloway). Mr. Galloway testified that the meeting lasted about 30 minutes and everyone present agreed to accept the LAUSD transfer and related documents. *Id.* at 266, 272. Mr. McKinney does not recall such a meeting. Tr. 54-55 (McKinney). Ms. Fillo also does not recall attending a transfer review meeting, but does recall discussing the LA IEP and commensurate services with Mr. Galloway. Tr. 579 (Fillo). She believes the Mother waived the transfer review meeting and no such meeting took place. *Id.* at 583. The ALJ finds that various District staff members discussed the provisions of the LA IEP on several occasions, but no transfer review meeting was held.

34. The Mother contends the District held a transfer review meeting and, at that meeting, determined the Student did not qualify for ESY. Parent's Post Hearing Brief (PPHB) p. 14. The Mother relies, in part, on exhibit D12 at page 3, the District's "transfer review." That document reviews and summarizes the provisions of the LA IEP. It discusses services provided in the

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<sup>12</sup> The meeting notice states it was sent to participants on September 25, 2019. No evidence was presented to explain why the notice was sent after the meeting was to occur.

LAUSD, such as the BID and BII. In the fourth paragraph on page 3 it states, "It is stated in the referred-to IEP [the LA IEP] that Student will receive instruction outside of the general education setting '7%' of the time while in the school setting. ESY was discussed with conclusion that Student did not need ESY." D12 p.3. The Mother contends this means District staff discussed ESY and concluded the Student did not need it. This is a very strained and inconsistent reading of the document. The document clearly refers to a decision made by the LA IEP team in the first sentence regarding 7% of time in the general education setting. The most reasonable reading of the second sentence is that it also refers to the LA IEP team having discussed ESY and concluding the Student did not need it. The ALJ finds the statement "ESY was discussed with conclusion that Student did not need ESY" refers to a discussion by the LA IEP team, not a discussion held by District staff. There is no evidence in exhibit D12 that the District considered or made any sort of independent determination as to the Student's need for ESY. The District's placement document makes no mention of ESY. *Id.* at 5. The PWN also make no mention of ESY. *Id.* at 6.

35. The District's Transfer Review document indicates that the District accepted the LAUSD records as valid and as meeting Washington criteria for special education eligibility. D12 p. 3. The placement section of the Transfer Review document provides that the Student will spend 80-100% of his time in his "regular class." It states that 40-79% of time in the regular class was considered but "academic benefit cannot be satisfactorily achieved" with that percentage.<sup>13</sup> *Id.* at p. 5.

36. The District issued a Prior Written Notice (PWN) on September 24, 2019, proposing to continue the Student's educational placement, IEP, and eligibility category, commencing on September 24, 2019. D12 p.6. If the LA IEP transfer had not been accepted, the District would have reevaluated the Student and developed a new IEP. Tr. 391-92 (Galloway).

37. Ms. Black did not read the Student's LA IEP. She relied on a "briefing" by Ms. Fillo as to the contents of the LA IEP. Tr. 781 (Black). Ms. Fillo informed her that the Student had received a large amount of time with a one-on-one aide in his former school, but the District was not going to provide a one-on-one aide for the Student. Ms. Fillo said that the Student's "behavioral" minutes would be met through small group social-emotional instruction.

38. Ms. Black was unaware the Student had an IEP goal to locate classroom items and begin and maintain appropriate use of classroom materials with one teacher prompt within 60 seconds of the directive with 90 percent accuracy. However, she was asked to collect data regarding this goal on a periodic, less than weekly, basis. Tr. 886-888 (Black). Ms. Black was never asked to revise an attention redirection plan for the Student or to assess whether the redirection she was providing was effective. *Id.* at 888. She was not aware that part of the Student's behavior support plan consisted of positive phone calls or notes sent home. *Id.* at 888-89.

39. Ms. Fillo's professional opinion is that the Student received services in the District that were commensurate with the BII and BID services he received while in the LAUSD. Tr. 563, 911 (Fillo). According to her, the social skills group instructed him in "work habit skills, growth mind-set skills, friendship skills, and strategies to help him stay on track in class." *Id.* at 563-64 (Fillo).

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<sup>13</sup> The Transfer Review document prepared by Mr. Galloway contains an error on page 3. D12 p.3. BII services are indicated as being 900 minutes monthly, rather than weekly. This was a clerical error. Tr. 221 (Mother); 275 (Galloway).

He also received "concurrent support during all of his groups as well as in the classroom with reminders and prompting and proximity and all the things you do to help him stay on track if he was losing focus" from whoever was working with him at the time, be that a teacher or a para educator. *Id.* The Student never had a one-to-one para educator in the District, and Ms. Fillo acknowledges that a para educator would be more comparable to a BII than would additional SDI minutes. *Id.* at 566, 969.

40. The Mother never received any information from the District as to how the BII and BID, or services commensurate with them, would be implemented in the District. Tr. 775 (Mother).

41. In Mr. Galloway's professional opinion, if the Student were pulled out of the general education setting for more than ten percent of the school day, the District would not be in compliance with the LA IEP, which specified that the Student be pulled out for only seven percent of the day. D12 p.3, 5; Tr. 401 (Galloway).

42. At some point in the fall of 2018, Mr. Galloway and Ms. Fillo discussed whether the Student qualified for ESY. Mr. Galloway expressed at the time that ESY could be considered if the Student was observed to regress over school breaks later in the school year, and Ms. Fillo agreed. Tr. 296-97 (Galloway). Ms. Fillo did have concerns that the Student had regressed in reading when he came to the District from Los Angeles. Tr. 538 (Fillo). Decisions regarding whether a Student needs ESY are typically not made until the spring. Tr. 354 (Galloway).

#### SERVICES PROVIDED TO THE STUDENT BY THE DISTRICT

43. During his first semester in the District, the Student received SDI at the following times:

- a. A thirty-minute social skills group every morning (pull out);
- b. A thirty-minute fifth-grade reading intervention group every morning (pull out);
- c. Thirty minutes of core math support in the general education classroom every afternoon;
- d. A thirty-minute fifth-grade writing group every afternoon (pull out); and
- e. A twenty-five-minute fifth-grade math group (pull out) on afternoons when he did not have band practice.

Tr. 549-53 (Fillo); D18 p.1. The Student had band practice two days per week. Tr. 788 (Black). Thus, he received almost 2.5 hours of SDI on non-band days three days per week, and was out of the general education setting for almost two hours per day. He was in the general education setting for approximately four hours on non-band days, including lunch and recess with his peers. Thus, he was absent from general education approximately one-third of the school day on non-band days. On band days, two days per week, the Student received two hours of SDI, and was in the general education setting for approximately 4.5 hours per day; thus, he was out of general education for approximately 1.5 hours per day, approximately one-quarter of the school day, on band days. *Id.* Weekly, he received at least 600 minutes of SDI during the first semester.

44. During his second semester in the District, the Student received SDI at the following times:

- a. A thirty-minute social skills group every morning (pull out);
- b. A thirty-minute fifth-grade reading intervention group every morning (pull out);
- c. A thirty-minute fifth-grade writing group every afternoon (pull out); and

- d. Nine minutes of computer program IXL math practice each afternoon (sometimes in his general education classroom, sometimes in a special education classroom).<sup>14</sup>

This caused him to be out of the general education setting and receiving SDI for approximately 1.5 hours each day, and present in the general education setting approximately 4.5 hours each day. Thus, he was absent from the general education setting for approximately one-quarter of the day. D18, p.2. Weekly, he received at least 450 minutes of SDI during the second semester.

45. There were approximately 14 weeks in the first semester of the school year (August-December) and approximately 22 weeks in the second semester (January-June). D19.

46. A push-in special education para educator came into the Student's general education classroom every day for thirty minutes to support students who qualified for special education in math. The Student was among the students with whom the para educator worked. Tr. 879-80 (Black).

47. There were approximately 28-29 students in Ms. Black's classroom during the 2018-19 school year. Tr. 879 (Black). The students often used Chromebook tablets in the classroom, and the Chromebooks have speech-to-text capability. *Id.* at 877.

48. The nine minutes of computer math practice during the second semester consisted of the Student practicing skills in his general education classroom, or sometimes in Ms. Fillo's classroom, via a computer program called IXL. IXL is not a direct instructional tool; it is a supplemental tool that helps students practice what has already been taught. P40; Tr. 441 (Mother); Tr. 502, 506 (Carney). The Student's classroom teacher, Ms. Black, assigned the Student IXL skill modules pertaining to whatever concepts the students were studying in the classroom, for review and practice. Tr. 530 (Fillo). The Student used IXL throughout the entire year; sometimes a para educator worked with him on IXL during the first semester, but much of the time he worked independently, as did the general education students. Tr. 784-85 (Black). The Student was capable of doing grade-level work in IXL. *Id.* at 814 (Black). He did not have a para educator work with him on IXL during the second semester. *Id.* at 786. The Student engaged with IXL the same way the other students in his general education classroom did, and individual modules were selected independently for each student by Ms. Black. *Id.* at 785. According to Ms. Black, the Student was using IXL "as the other students were, as just part of our regular math instruction." *Id.*

49. Brief explanations of the content of each IXL skill module are provided on the IXL website. P45 pp.5-11. Ms. Black did not keep track of the IXL skill modules she assigned to the Student. Tr. 816-17 (Black). She does not know what level of skill within a module is considered mastery. *Id.* Ms. Carney, another special education teacher, considers 80 percent to be mastery of an IXL module. Tr. 485 (Carney). The Student worked on 27 or more fifth-grade math modules in IXL over the course of the school year. P 46. He worked on several of them for less than ten minutes. *Id.* He mastered 11 of those skill modules based on the 80% mastery threshold. *Id.* No evidence was presented as to whether the IXL modules were aimed at helping the Student reach his LA IEP math goal.

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<sup>14</sup> The parties dispute whether IXL is SDI or general education. This issue is decided below.

50. Ms. Fillo opined that IXL was an appropriate way to serve the Student in his nine daily minutes of math SDI because he had a higher skill level than other special education students he would have been grouped with in a special education pull out setting. Tr. 530 (Fillo). Ms. Fillo's professional opinion is that IXL becomes SDI when the teacher chooses what modules the student will work on. *Id.* at 532.

51. The Student was placed in the morning social skills group because he has impulsivity and challenging behaviors. In that group, he received instruction on "growth mind-set and advocating and ... how to be included." Tr. 553 (Fillo). A social skills group is the method by which the District addresses behavior challenges pertaining to focus and impulsivity. *Id.* at 555 (Fillo). The Student did not attend a social skills group in the LAUSD. The group was intended by the District, in part, to be in lieu of the BID and BII services. *Id.*

52. The Student missed guidance, music,<sup>15</sup> library, science, social studies, project-based learning, and "Moby Max" grammar practice in the general education classroom due to the SDI he received. Tr. 803-06 (Black). Guidance is taught by the school counselor and pertains to bullying and Internet safety, among other things. *Id.* at 557 (Fillo). During the time the Student attended his social skills group, he missed planner completion and schedule review, announcements, and independent reading time. *Id.* at 802. During the time the Student attended his reading intervention group, he missed a supplemental reading activity, such as Scholastic News. *Id.* While the Student attended his writing group, he missed library, music, guidance, or Moby Max. *Id.* at 804. While the Student was at his math group, he missed science, social studies, Moby Max or project-based learning. *Id.* at 805-07.

53. Science is considered a core curriculum subject around which Ms. Fillo tries to schedule SDI. Tr. 997 (Fillo). The Student missed 30 minutes, three days per week, of either science or social studies in the first semester (as approximated by Ms. Black.). Tr. 802-809 (Black). This amounts to roughly 45 minutes of science per week and 45 minutes of social studies per week (assuming science was taught 50% of the time and social studies the other 50%). There were approximately 14 weeks of school in the first semester. D19. Thus, the Student missed approximately 630 minutes of science instruction in the first semester, as well as 630 minutes of social studies instruction.

54. The Student missed nine minutes per day of science, social studies, or possibly some other subject, in the second semester while doing IXL. Tr. 802-809 (Black). There were approximately 22 weeks in the District's second semester (accounting for spring break and holidays). Assuming science was taught an average of two days per week in the second semester, the Student missed approximately 396 minutes of science instruction in the second semester. Thus, he missed a total of 1026 minutes (17.1 hours) of science general education instruction in the 2018-19 school year. Assuming social studies was also taught at average of 2.0 days per week in the second semester, the Student also missed 17.1 hours of social studies instruction in the 2018-19 school year.

55. Ms. Fillo's opinion is that, although the Student was not receiving the identical number of SDI minutes as called for in the LA IEP, "the difference is the concurrent services and in compensating for the BII and the BID that Aberdeen doesn't have and having that additional support for the Student because the team felt that's what the Student needed at the time [and

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<sup>15</sup> Music class is not the same class as band.

that] is what we did to serve him.” Tr. 573-4 (Fillo). She concedes that “Aberdeen and LA provided different services,” and she is unaware of the Mother ever receiving PWN of those differences. Tr. 574 (Fillo). She did not provide the Mother with an outline of exactly how many SDI minutes the Student was receiving in each subject. *Id.* at 577.

56. The District concedes that it should have updated the Student’s IEP to reflect the exact minutes and services that were being provided to the Student. District’s Post Hearing Brief (DPHB) p.29.

57. The Student needed “a lot” of redirection at the beginning of the school year in order to learn and adapt to the classroom norms and procedures. Tr. 828-29 (Black). Ms. Black provided that redirection and felt she was capable of doing so. *Id.* The Student started to “settle in” in October. *Id.* If the Student was struggling to focus, Ms. Black would suggest that he sit at the back table or on the beanbag. *Id.* at 830. She felt the Student’s behavior was “completely manageable” in the classroom setting with reminders from the classroom teacher. *Id.* at 860. The Student’s behavior never rose to the level where it disrupted the class or his learning for any period of time beyond needing a reminder to focus on his work. *Id.*

#### THE DECEMBER 10, 2018 IEP MEETING

58. In October of 2018, Ms. Fillo contacted the Mother by telephone because Mr. Galloway had said the Mother wanted an IEP meeting. The Mother and Ms. Fillo spoke, and the Mother indicated that she was happy with how things were going and did not think an IEP meeting was required at that time. Tr. 579, 990 (Fillo).

59. The Mother called the school in December of 2018 and said that she wanted an IEP meeting, so a meeting was arranged. Tr. 991 (Fillo).

60. The first IEP meeting held in the District regarding the Student occurred on December 10, 2018. Mr. Galloway’s professional opinion is that the IEP meeting was untimely and should have occurred earlier in the school year in order to assure that accurate and comparable services were being provided to the Student. Tr. 395 (Galloway).

61. Notes taken by Ms. Fillo indicate that the Mother, her friend (David Quigg), Mr. McKinney, Ms. Black, and Ms. Fillo attended the meeting. D13. Topics discussed included a one-to-one aide, accommodations for testing, communication between home and school, “flip charts” containing step-by-step instructions in lessons to be used by the Student, ESY, and an occupational therapy screening. The Mother expressed at the meeting that she felt the Student had regressed academically from where he was in fourth grade in the LAUSD. *Id.*

62. At the meeting, the Mother asked whether the Student was receiving BID and BII services as called for by the LA IEP. The District informed her that the Student was not receiving those services and the District did not have a one-on-one aide for him. Tr. 199-200 (Mother). This was the first time the Mother was informed by the District that the specific BID and BII services were not being provided. *Id.*

63. At the time of the meeting, the Mother believed the Student was receiving the same amount of SDI minutes as were specified in the LA IEP, and she was not informed otherwise by

the District. Tr. 206 (Mother). She did not understand why the Student was going to a social group in the mornings. Tr. 750 (Mother).

64. At the meeting, Ms. Black informed the IEP team that the Student would get up out of his seat to talk to other students when he should be working. P25B p.2; Tr. 206 (Mother). The Student had issues staying on task, but not to the level that Ms. Fillo believed he needed one-on-one support. *Id.* at 607 (Fillo).

65. At the meeting, Ms. Fillo stated the District had not had someone sitting right next to the Student. She stated that a one-to-one aide is very "enabling" and takes responsibility away from the child, and she did not see why the Student would need that service. P25B p.2; Tr. 218 (Mother); 612 (Fillo). Regarding the BII and BID, Ms. Fillo stated that the District's decision was to "see how the Student does" or something to that effect, meaning that if "something comes up and it becomes obvious that a one-on-one is something that's needed, we would address it at that time." Tr. 602-03 (Fillo).

66. At the meeting, the Mother requested a communication plan because the Student was bringing home crumpled pieces of paper in his backpack that often contained incomplete and/or messy work. The Mother wanted a better understanding of the Student's curriculum and the classroom projects. Tr. 208-13 (Mother). Ms. Fillo stated that she could put a communication plan into the Student's behavior plan, and Ms. Black said that she could meet weekly with the Mother. Tr. 207-08 (Mother). The Mother left the meeting with the belief that a communication plan was in place. *Id.*

67. At the meeting, Ms. Black also commented that the Student's writing skills were well below fourth or fifth grade level. Tr. 791 (Black).

68. ESY was discussed at the meeting. Ms. Fillo stated that ESY in the District is provided to low to moderate cognitive ability students, and the Student has a higher cognitive level, but they could talk about whether the Student needed ESY in the spring. P25B p.3; Tr. 219 (Mother). It was Ms. Fillo's opinion that the Student had demonstrated he could retain the information he was learning. Tr. 612 (Fillo).

69. Mr. McKinney<sup>16</sup> halted the December 10, 2018 meeting. He wanted Dr. Bates to be in attendance because the meeting had become "odd" in Mr. McKinney's view. He felt it was "odd" due to the issues that were raised, and the fact that the Mother brought a friend to take notes and she was typing notes. Tr. 66 (McKinney). Ms. Fillo's meeting notes state, "Will need to schedule a meeting w/Rick (admin) before making any decisions." D13.

70. The Mother's meeting notes are more comprehensive than those of Ms. Fillo. P25B pp. 2-4. The notes state, in part: Ms. Fillo wants to schedule a meeting with Dr. Bates because she does not have the authority to provide a one-on-one aide; Mr. McKinney wants to meet with the special education director [Dr. Bates] to amend the IEP if possible; and Ms. Black said decisions have to go through Rick [Dr. Bates]. *Id.*

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<sup>16</sup> Mr. McKinney holds a bachelor's degree in elementary education and a master's degree in education administration. Tr. 45-47 (McKinney). He has experience as an elementary school teacher and a school principal. The 2018-19 school year was his first year as a principal in the District. *Id.* at 47-48.

71. No Prior Written Notice (PWN) was issued before or after this meeting. The District concedes that no PWN was issued but contends that a PWN was not required because no decisions were made at the meeting. DPHB p.28-29.

72. Based on the contemporaneous notes taken by the Mother and Ms. Fillo, as well as the testimony of those in attendance at the meeting, the ALJ finds that no amendments were made to the LA IEP, and no new or changed services were agreed upon or refused, at the December 10, 2018 IEP meeting. No decisions were made at that meeting because the District staff felt they could not agree to changes or new services without the approval of Dr. Bates, who was not in attendance.

#### THE JANUARY 11, 2019 IEP MEETING

73. On January 8, 2019, Mr. Galloway sent an email to Ms. Fillo regarding a discussion he had with the District's behavioral specialist about the Student. In the email, Mr. Galloway states, "[M]om wants an aide, but the boy really does not need one." P34. This was Mr. Galloway's opinion at the time, but a decision that the Student did not need an aide or a BII had not been made by the IEP team. Tr. 406 (Galloway). Mr. Galloway conceded at the due process hearing that he should not have made a statement to the behavior specialist or to Ms. Fillo that the Student did not need an aide. *Id.*

74. A second IEP meeting pertaining to the Student was held on January 11, 2019. (The Complaint in this action had been filed the day before, on January 10, 2019.) Present at the meeting were the Mother, her attorney (Mr. Ford, by telephone), Dr. Bates, Mr. McKinney, Ms. Fillo, Ms. Black, and Mr. Galloway. D14 p.1; P25E pp.13-16.

75. Dr. Bates first became aware of the Student in December of 2018. In his professional opinion, the District did not "implement" the LA IEP because it did not provide a BII and a BID. Tr. 1019-20, 1038, 1049. (Bates). However, he believes the District provided commensurate services. *Id.* at 1051.

76. At the January 11, 2019 meeting, the District did not inform the Mother that the Student was receiving more minutes of SDI than the LA IEP specified. Tr. 223 (Mother); Tr. 340-41 (Galloway). They did inform her that the Student was missing general education science and social studies. Tr. 222 (Mother). She did not receive his daily schedule. Tr. 685 (Mother).

77. At the meeting, the BII and BID services were again discussed. Ms. Fillo and Mr. McKinney expressed their view that the Student was doing well and did not need those services. Tr. 221 (Mother).

78. At the meeting, the IEP team agreed to the following: evaluate the Student's academic progress using the Kaufman Test of Educational Achievement, Third Edition (KTEA-3); arrange for an occupational therapy (OT) screening; and "look into" an AT assessment. D14 p.1. A PWN describing the outcome of the meeting was issued by the District on January 11, 2019. D14. It states that an OT screening would be performed, an AT assessment would be "looked into," and the KTEA-3 would be administered to the Student to assess his present levels in reading, writing and math. *Id.* at 1.

79. At some point after the Mother filed the Complaint in this action, Mr. McKinney and Dr. Bates discussed the Student. Mr. McKinney was "baffled" by concerns around the fact that the Student did not have one-on-one support in the District. Mr. McKinney did not see why that would be beneficial to the Student or why it would be needed. Tr. 59 (McKinney).

#### THE SECOND SEMESTER AND THE MAY 2, 2019 IEP

80. The Student took the Measures of Academic Progress (MAP)<sup>17</sup> assessment at the usual District testing intervals, i.e. fall, winter, and spring of the academic year. P24 p.14. There are approximately four months between the fall and winter testing dates. Tr. 319 (Galloway). The Student's score in reading went from the second percentile in the fall of 2018 to the 21<sup>st</sup> percentile in the winter of 2019. P24 p.14. This is an atypical level of improvement. Tr. 320 (Galloway). The Student's reading score was in the 28<sup>th</sup> percentile in the spring of 2019. P24 p. 14. It is possible that the Student's reading scores indicate that he had regressed in his reading ability over the summer of 2018 and then regained those skills as the school year progressed. Tr. 321-323, 373 (Galloway).

81. The Student also took the "easy Curriculum-Based Measurement" (known as the easyCBM) standardized test at the usual district testing intervals.<sup>18</sup> The Student's score in reading went from the 27<sup>th</sup> percentile in September to the 73<sup>rd</sup> percentile in January. D17 p.1 This is atypical progress. Tr. 848-49 (Black).

82. The Mother believes the Student regressed academically during the 2018-19 school year. Tr. 426 (Mother). In February of 2019, she had the Student privately tested in Olympia. He was administered the "easyCBM CCSS Math, CCSS Reading, MCRC Reading Comprehension,<sup>19</sup> and Reading Fluency test" by Adam Rudginsky, director of tutoring at Club Z. P48 p.1. The Mother provided the testing materials, and Mr. Rudginsky proctored the administration of the tests. Tr. 456 (Rudginsky). Mr. Rudginsky had never administered the tests before and had not met the Student prior to the testing. *Id.* 456-57. Mr. Rudginsky did not calculate the formal score of the tests. *Id.* at 458-61.

83. On February 11, 2019, the Mother emailed Ms. Black inquiring about an incomplete writing assignment the Student had brought home. In the email, the Mother asked for information regarding what was happening in the Student's classroom. She referenced the first IEP meeting at which she thought a communication plan had been agreed upon. P43 p.3. Ms. Black responded with an explanation of the incomplete assignment, and stated that she continued to send home assignments that the Student completed in class. *Id.* p.2.

84. On April 10, 2019, the Mother again emailed Ms. Black regarding the communication plan that was discussed in the first IEP meeting. She stated that she had not gotten "much/any regular communication about what is happening weekly in class." *Id.* p.1. Ms. Black responded that the

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<sup>17</sup> The MAP is a standardized test that is given District-wide at set intervals in the school year. Tr. 902 (Fillo).

<sup>18</sup> The easyCMB is standardized test that is given District-wide at set intervals in the school year. Tr. 902 (Fillo).

<sup>19</sup> The full names of these tests were not provided.

formal communication plan was an amendment to the IEP that the Mother requested, but the proposed amendments had been “tabled.” Ms. Black stated that no formal communication plan was put in place.<sup>20</sup> She also reminded the Mother that she (the Mother) could see the Student’s assignments in digital format in Google Docs. P43 p.1. The ALJ finds that no communication plan was agreed to and/or put in place at either the December 2018 or January 2019 IEP meeting.

85. Megan Skelly, the District occupational therapist, concluded in her report dated February 20, 2019, that the Student did not require or qualify for OT. She opined that “his motor skills appear that [sic] of a typical 5<sup>th</sup> grader and he is able to access his education without additional assistance.” D15; Tr. 381-82 (Galloway).

86. Lisa Carney<sup>21</sup> is a special education teacher in the District. She does not work at McDermoth Elementary School. Ms. Carney administered the KTEA-3 to the Student on April 12, 2019, pursuant to the IEP team’s plan from the January meeting. D14 p.1; Tr. 469 (Carney). Ms. Carney has administered this assessment over one hundred times and is trained in how to do so. Tr. 469-72 (Carney).

87. Ms. Carney had not met the Student prior to April 12, 2019, and spent about twenty minutes getting acquainted with him prior to administering the assessment. She administered the assessment in a small room of which she and the Student were the only occupants. The Student had his back to the door and did not appear to be distracted. Tr. 473-75 (Carney). Ms. Carney gave the Student as many chances as he wanted to go back and look at a particular problem to see if he could answer it. She felt that he enjoyed the challenge the test presented. *Id.* at 483.

88. Ms. Carney presented herself at the due process hearing as an enthusiastic, engaged and supportive teacher. Ms. Carney does not feel the Student was assisted in the testing by her presence and she denied helping the Student reach the correct answers in any way. Tr. 473-75, 494 (Carney). After the testing was complete, the Student asked Ms. Carney questions about how to solve some of the problems. She gave him strategies to try and he got the answer to some conceptually difficult questions. *Id.* at 497-99. (See also narrative in P13). Ms. Carney’s testimony as to the administration of the KTEA-3 to the Student was detailed and credible.

89. The Mother believes Ms. Carney assisted the Student during the course of the testing and does not believe the KTEA-3 test results are reliable. According to the Mother, the Student told her that he had been directed toward the correct answers on the exam.<sup>22</sup> Tr. 670, 751 (Mother).

90. Ms. Carney is more persuasive than is the Mother on the issue of whether Ms. Carney assisted the Student with answering the KTEA-3 test questions. The ALJ finds that Ms. Carney

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<sup>20</sup> Ms. Black does not believe a communication plan was put into place at either the December 2018 or January 2019 IEP meeting. Tr. 822-23 (Black).

<sup>21</sup> Ms. Carney holds a bachelor’s degree in education. She holds a special education endorsement and a master’s degree in middle school math instruction. Tr. 467-8 (Carney). She is certified to teach special education in grades K-12, and has done so for thirteen years. She has also taught mathematics. *Id.*

<sup>22</sup> The testimony regarding what the Student told his Mother is hearsay.

did not assist the Student in answering the questions on the KTEA-3 assessment administered on April 12, 2019.

91. The Student's performance on testing throughout the school year was inconsistent. When being assessed for math skills, he would do well on one occasion and very poorly on another. Tr. 654 (Fillo). In Ms. Black's opinion, the Student's performance on tests and quizzes was not an accurate reflection of his understanding of the material being tested. He appeared to understand math concepts, but needed more practice solving math problems accurately. Tr. 866 (Black).

92. The District has an ESY program that would meet the Student's needs if he had been determined to need ESY services. Tr. 338 (Galloway).

93. A meeting was held on May 2, 2019, in order to develop a new IEP for the Student because the LA IEP was almost one year old. Present at the meeting were the Mother, her friend (Mr. Arnold), Mr. McKinney, Ms. Black, Ms. Fillo, and Dr. Bates. D16. Because the due process action had been filed, there was confusion on the part of some of the District staff as to whether changes could be made to the Student's IEP. Mr. McKinney believed that only changes that were agreed upon in writing by the Parent and the District could be made to the IEP, while Ms. Fillo appeared to believe that no changes could be made. Tr. 175 (McKinney); 431-32 (Mother).

94. The Student's May 2, 2019 IEP was drafted by Ms. Fillo. Tr. 583 (Fillo). This IEP was the first time the District provided a listing of the SDI minutes the Student was receiving. Tr. 595 (Fillo). Prior to the May 2, 2019 IEP meeting, the Mother had never received PWN that the Student's SDI minutes had increased from those set forth in the LA IEP. Tr. 434 (Mother).

95. At the time of this meeting, the AT assessment was still pending. The District was working with the Special Education Technology Center at Central Washington University (SETC) to complete the assessment. D16 p.6; P25F p.17.

96. The May 2, 2019 IEP does not provide for BII or BID services. D16. It also does not set forth a behavior intervention plan. D 16 p.6. Ms. Black agreed with this IEP because she felt the Student's behavior was completely manageable in the classroom setting. Tr. 860 (Black).

97. The IEP describes the Student's present level of performance in math as in the average range according to the KTEA-3. The winter Measure of Academic Progress (MAP) test placed him in the 19<sup>th</sup> percentile, and the easyCBM placed him in the 22<sup>nd</sup> percentile. He did not meet his LA IEP math goal. D16 pp.9-10. If he had not used a skill for a while, he lost what he had learned, resulting in a setback. *Id.* However, the Student regained his skills quickly after a brief review according to Ms. Fillo. Tr. 655-56 (Fillo). The IEP notes the Student practiced math skills "independently on IXL" and IXL was intended to strengthen "the grade level math concepts students are working on in class." D16 pp. 9-10. Ms. Black estimated the Student could solve one-step word problems and multi-step word problems with only 25% accuracy. D16 p.10. The May 2, 2019 IEP recommends 50 weekly minutes of math SDI in the special education setting, beginning August 28, 2019. *Id.* at 21.

98. The May IEP sets out one math goal, which reads: "By 5/1/2020, when given a grade-level multi-step word problem with whole numbers, [Student] will independently solve the

problem using any of the four mathematical operations improving his ability to solve real world problems from inconsistent to 80% accuracy as measured by curriculum based or teacher made assessments on 2 out of 3 data points.” D16 p.14.

99. The IEP describes the Student’s present level of performance in reading as in the average range according to the KTEA-3, and as “somewhat successful” with grade level curriculum. D16 pp.9, 11. The RAZkids reading program he used with Ms. Fillo placed him at a lexile level of 510-620 (a second grade level). The winter MAP test placed him in the 21<sup>st</sup> percentile and at a lexile level of 775 (a fourth grade level), and the easy CBM assessment placed him in the 73<sup>rd</sup> percentile. Tr. 536-539 (Fillo); D7 p.4; P 24 p. 14. He met his LA IEP reading goal in March of 2019. D16 pp. 11-12.

100. The IEP describes the Student’s present level of performance in writing as in the below average range. He was in the 7<sup>th</sup> percentile for written expression in the 9<sup>th</sup> percentile for spelling. D16 p. 9. He was not successful with grade level writing curriculum. He did not appear to meet his LA IEP writing goal. D16 p.12.

101. The IEP team determined that ESY was not appropriate for the Student because he had not demonstrated that he would lose 2-3 months of learning over the summer, and it would not be his least restrictive environment. It was noted that the Student was able to retain what he had learned over the winter break and made gains on his winter benchmark testing. D16 p.22; P25F p.19; Tr. 642 (Fillo). He did not lose ground academically in his workgroups or the classroom after school breaks. Tr. 978 (Fillo).

102. The IEP team also determined that the Student would spend 40-79% of his time in regular class from 5/2/19 through 8/27/19. After that, he would spend 80-100% of his time in regular classroom. D16 pp.23-24. The Mother did not indicate her agreement or disagreement with these decisions anywhere on the meeting report.

103. On May 9, 2019, the Mother exchanged emails with Kristin Leslie of SETC. Ms. Leslie informed the Mother that SETC had been contacted by the District to perform an AT evaluation of the Student in early March, by phone, and then via email on March 13, 2019. P38. This was confirmed by Dr. Bates, and he offered no reason why SETC was not contacted until March. Tr. 1047-49 (Bates). It appears the District simply overlooked contacting SETC about the Student’s assessment.

104. SETC’s procedure is to perform an initial screening in order to determine if a full assessment is needed. Tr. 1030-31 (Bates). The AT screening of the Student was performed on May 7, 2019, and it was determined that a full assessment was not needed. P38; Tr. 1031 (Bates).

105. After the AT screening, SETC recommended the Student be provided with a headset and microphone for use at school.<sup>23</sup> Tr. 1031-33 (Bates). No evidence was presented that the headset and microphone were provided to the Student. The Mother believes the Student needs

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<sup>23</sup> SETC also recommended the Student enroll in the Bookshare program, a program that provides audio books for student use. Tr. 1032 (Bates). However, when Mr. McKinney received paperwork to enroll the Student, he did not feel he comfortable making the representations as to the extent of the Student’s disability that Bookshare seemed to require. Tr. 153-54(McKinney).

another AT assessment to determine what sort of AT he will need in middle school. Tr. 763 (Mother).

106. The Student was at reading lexile level 775, or lower, in the District in the spring of fifth grade, according to the Measure of Academic Progress (MAP) test. Tr. 536-539 (Fillo); D7 p.4; P24 p.14.

#### ADDITIONAL INFORMATION

107. The Student's three-year reevaluation is due to be conducted in April of 2020. Tr. 1050 (Bates).

108. The Parent, through her counsel, asserted at times throughout the due process proceedings, and continues to assert in her post-hearing briefing, that District personnel acted dishonestly, both in dealing with the Student and when testifying at the due process hearing. See, for example, PPHB at footnotes 7 and 26. These assertions cite minor inconsistencies in testimony (much of which occurred over several hours, and some of which was interrupted by over a month due to the dates on which the hearing was held), and lack of exacting specificity when recounting details about matters that occurred up to a year ago. The Parent argues that the testimony of Ms. Fillo and Dr. Bates should be given little weight due to the witnesses' "likely dishonesty" and "intellectual dishonesty." PPHB at footnote 7. The Parent's assertions are not supported by the factual record or the conduct and demeanor of the witnesses; therefore, full weight is given to the testimonies of Ms. Fillo and Dr. Bates. While District personnel may have been mistaken or ill-informed, there is no evidence that the personnel were dishonest or altered their testimony to support the District's legal position.<sup>24</sup>

### **CONCLUSIONS OF LAW**

#### Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings 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 pursuant to these statutes, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Since the Parent is the party seeking relief in this case, she has the burden of proof. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof to resolve a dispute in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981); *Thompson v. Department of Licensing*, 138 Wn.2d

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<sup>24</sup> Some of the assertions regarding District witnesses the Parent makes in her post-hearing brief are inappropriate and disrespectful. They do not advance the Parent's arguments.

783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). Therefore, the Mother's burden of proof in this matter is preponderance of the evidence.

### The IDEA and Procedural Violations

3. The IDEA and its implementing regulations provide federal funds 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*, 458 U.S. at 206-207 (footnotes omitted). In order for a school district to provide a free and appropriate public education (FAPE), it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Id.* at 458 U.S. at 200-201.

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).

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

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

20 USC §1415(f)(3)(E)(ii); WAC 392-172A-05105(2); and 34 CFR §300.513.

6. As set forth above, not every procedural violation of the IDEA is sufficient to support a finding that the child in question was denied FAPE. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003)(quoting *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 887, 892 (9th Cir. 2001)). "A procedural violation denies a free appropriate public education if it results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island*

*Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010)(citations omitted). An alleged denial of parental participation is not a denial of FAPE unless it is shown that the violation significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to their child. WAC 392-172A-05105(2).

Whether the District violated the IDEA and denied the Student FAPE by failing to provide services comparable to the BID and BII services set forth in the LA IEP

7. The Mother argues the District violated the IDEA and denied the Student FAPE by failing to provide services comparable to the BII and BID services called for in the LA IEP. PPHB p.44.

8. Washington law is clear regarding the manner in which a school district must handle the transfer of a student eligible for special education from a different state:

If a student eligible for special education transfers from a school district located in another state to a school district within Washington state and had an IEP that was in effect in the previous school district, **the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP**, until the new school district:

- (a) Conducts an evaluation to determine whether the student is eligible for special education services in Washington state, if the school district determines an evaluation is necessary to establish eligibility requirements under Washington state standards; and
- (b) Develops and implements a new IEP, if appropriate, that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

WAC 392-172A-03105(5) (emphasis added).

9. The meaning of "comparable" in this context has been addressed by the Office of Special Education Programs (OSEP) and the courts. In *Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2018), the district court held that the service provided to the child at issue by the new school district was similar and equivalent to the service that had been provided in the previous district even though it was delivered in a different setting (at a local elementary school rather than in the home). The court stated:

In 71 Fed. Reg. 46540 (Aug. 14, 2006), OSEP notes that while several commentators requested clarification of the meaning of "comparable" services, clarification was not necessary because "the Department interprets 'comparable' to have the plain meaning of the word, which is 'similar' or 'equivalent.'" *Id.* at 46681. When a child transfers to a new public agency from another state, "comparable services means services that are 'similar' or 'equivalent' to those that were described in the child's IEP from the previous public agency, as determined by the child's newly-designated IEP Team in the new public agency." *Id.*

10. Thus, the new school district is not required to provide the exact same services set out in the student's previous IEP; it is required to provide comparable services, i.e. services that that

are “similar” or “equivalent.” There is no exception to the obligation to provide comparable services if a district does not offer the specific services described in the IEP, or does not believe those services remain appropriate for the student. In such circumstances, a district’s obligation is to develop and implement a new IEP.

11. Although not directly on point, *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811 (9<sup>th</sup> Cir. 2007), is instructive in that it analyzes whether services have been provided to a student “in conformity with” the IEP. According to *Van Duyn*, minor discrepancies between the services required by the IEP and those that are provided do not violate the IDEA. *Id.* at 822. The *Van Duyn* court stated:

“[S]pecial education and related services” need only be provided “in conformity with” the IEP. There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.

\* \* \*

We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.

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

12. In the present case, the BII and BID services called for in the Student’s LA IEP were replaced by the District with a social skills group, greatly increased minutes of pull out SDI, and redirection of the Student’s attention by the classroom teacher or whoever else was working with him. No reasonable argument can be made that these services are comparable or equivalent to a BII and BID who provided one-to-one services to the Student in the general education classroom, and collected and monitored behavior data. Although the District has a behavior specialist and a behavior para educator on staff, their services were not provided to the Student. There is no evidence that the Student needed instruction on “growth mind-set, advocating, and how to be included,” which is much of what the social skills group provided.

13. Moreover, although various District personnel responsible for implementing the IEP opined that the social skills group and increased pull out instruction were comparable to a BII and BID, no reasonable bases for those opinions were provided. Rather, the school principal was “baffled” by the Mother’s concerns that the BII and BID were not being provided because he did not see why the Student needed them. The special education teacher, as well as the school psychologist, opined that a para professional would be comparable to a BII, but a one-on-one para professional was not provided by the District. In fact, the school psychologist took it upon himself to determine “the boy doesn’t need [an aide]” prior to the January 2019 IEP meeting. The Student’s special education instructor noted the District “doesn’t have” BII and BID services, so it “provided additional support” because the team felt that was what was needed at the time. However, in violation of the District’s own policy, the IEP team never met to consider what was comparable to BID and BII services, or what was needed by the Student in place of or instead of those services.

14. The District appears to argue in its post-hearing brief that the LA IEP was internally inconsistent and the BII and BID services were not warranted even while the Student was in the

LAUSD. According to the District, "Despite finding the Student's behavior occurred five times per day for one minute and only developing one behavior goal, Los Angeles included 900 minutes per week of BII services and 240 minutes per month of BID services in his IEP." DPHB pp. 8-9. The District further argues that there is no evidence the Student required BII and/or BID services in order to receive FAPE. Rather, the District alleges that those services were provided in the LAUSD solely because of the due process settlement agreement entered into after the Mother filed a due process action in the LAUSD. DPHB pp.14-15, 19. These arguments are not persuasive. "[T]he proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute – not to decide on its own no longer to implement part or all of the IEP." *Van Duyn*, 502 F.3d at 822. If the LA IEP was inappropriate, the District should not have accepted it. Rather, the District should have developed and implemented a new IEP. Indeed, the school psychologist and the District Executive Director of Special Services opined that the Student's IEP should have been modified ("fine tuned," as Mr. Galloway phrased it) or a new one should have been developed (Dr. Bates).

15. The District further argues that it provided the Student with FAPE as evidenced by the fact that he made progress during the 2018-19 school year. According to the District, his assessments showed "great growth," and he demonstrated no significant difficulties in any academic areas except written expression as of April of 2019. DPHB pp.13-14. A Student's educational progress, or lack thereof, may be probative as to whether there has been more than a minor shortfall in the services provided. *Van Duyn*, 502 F.3d at 822. But, WAC 392-172A-03105(5) requires the new school district to provide FAPE that *includes* comparable services. By the WAC's own wording, an education that does not include comparable services is not FAPE. Moreover, the District overstates the progress the Student made in the District and no finding that he made "great growth" has been made.

16. Because the services provided by the District varied so widely from his LA IEP, the Student was not provided with comparable services and he was denied FAPE. It is therefore concluded that the District violated the IDEA and denied the Student FAPE by failing to provide services comparable to the BII and BID required by his IEP.

17. The Mother seeks 999 hours of compensatory education for this FAPE denial. The evidence does not support such an award. Compensatory education is warranted, however, and is awarded for other violations of the IDEA, as set forth below.

Whether the District violated the IDEA and denied the Student FAPE by providing more minutes of SDI to the Student than specified in the LA IEP

18. The LA IEP provided the Student should receive pull out SDI for 105 minutes per week. While in the District, he was pulled out of the general education setting for SDI anywhere from 99 to 145 minutes per day, i.e. more than five times the amount of time specified in the LA IEP. The Parent was not informed of the amount of pull out SDI the Student was receiving until May of 2019.

19. Providing more minutes of services than specified in a student's IEP constitutes a failure to provide services in conformity with the IEP. *Ada-Borup Indep. Sch. Dist.*, 74 IDELR 120 (SEA MN 2018) (providing a student with twice the amount of speech therapy as called for by his IEP constituted a failure to provide services in conformity with the IEP and thereby violated 34 C.F.R. §300.17). See also *Van Duyn*, 502 F.2d at 823 (finding that a five-hour per week shortfall in the

amount of math instruction provided to the student was a material implementation failure); *Termine v. William S. Hart Union High Sch. Dist.*, 249 F. App'x 583, 48 IDELA 272 (9<sup>th</sup> Cir 2007)(holding that placement of a student into the general education setting for 32% of the school day, when her IEP from the previous school district called for her to spend all of her time in a special education environment, was not in conformity with the IEP and constituted a material failure to implement her IEP).

20. No persuasive argument can be advanced that five times the specified amount of SDI is a "comparable" service to the SDI called for in the LA IEP, or to the BID and BII services, as set forth above. It is therefore concluded that the District violated the IDEA and denied the Student FAPE by providing more minutes of SDI to the Student than were specified in his IEP.

21. The Student is entitled to compensatory education for some of the general education curriculum he missed by having such a large amount of pull out SDI. This relief is addressed below.

Whether the District violated the IDEA and denied the Student FAPE by providing fewer minutes of SDI in math than were specified in his IEP for a portion of the school year.

22. The Mother contends the 45 minutes of weekly math SDI set forth in the LA IEP were not provided to the Student by the District during the second semester of the 2018-19 school year. She argues that IXL was the math instruction the District provided, purportedly as SDI, but IXL does not constitute SDI.

23. "Special education" means specially designed instruction to meet the unique needs of a student eligible for special education. WAC 392-172A-01175(1). SDI means "adapting, as appropriate, to the needs of an eligible student, the content, methodology, or delivery of instruction: (i) To address the unique needs of the student that result from the student's disability; and (ii) To ensure access of the student to the general curriculum, so that the student can meet the educational standards within the jurisdiction of the public agency that apply to all students." WAC 392-172A-01175(3)(c).

24. The Student's LA IEP math goal provided that he was to work toward solving three-step grade-level word problems. His progress was inconsistent and he "struggled with" achieving this goal; ultimately, he did not achieve it. He was able to accurately solve one-step or multi-step word problems correctly only 25% of the time throughout fifth grade. There was little to no evidence that the IXL sessions were targeted at developing the skills the Student needed in order to reach his math goal. There was little evidence that IXL provided content, methodology or delivery of instruction adapted to the unique needs of the Student. The Student worked on IXL "independently" to strengthen concepts that were being taught in his general education classroom. The District never explained what was being taught, what concepts the IXL helped to strengthen, or how those concepts related to the Student's math goal. The teacher's selection of IXL modules the Student should work on independently each day was the only adaption shown by the District, but the teacher did not keep track of which modules she assigned the Student, and did not know whether he mastered the modules. Moreover, the teacher selected modules for general education students to work on independently just as she selected modules for the Student.

25. "General education is what is provided to non-disabled children in the classroom." *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d. 996, 1004 (9th Cir. 2017). The Student used IXL the same way the general education students used it. There is no evidence from which to conclude that selection from available IXL modules by the classroom teacher was sufficient to turn IXL into SDI for the Student.

26. The Parent has shown by a preponderance of the evidence that the math SDI called for by the LA IEP was not provided by the District during the second semester and the Student was denied FAPE. The Student's present level of performance in math, including his failure to meet his math goal and his inability to consistently solve one-step word problems, indicates that he requires compensatory education to put him where he would have been had FAPE been provided. This relief is addressed below.

Whether the District violated the least restrictive environment mandate of the IDEA and denied the Student FAPE by failing to educate the Student in his general education classroom to the maximum extent possible

27. The IDEA's least restrictive environment (LRE) mandate requires school districts to educate students eligible for special education in the general education setting with their non-disabled peers to the maximum extent possible. WAC 392-172A-02050. Removal of an eligible student from the general education environment should occur only if the nature or severity of the student's disability is such that education in the general education classroom, with the use of supplementary aids and services, cannot be achieved satisfactorily. *Id.*

28. The Ninth Circuit has adopted a four-part test to determine whether a student's placement is the least restrictive environment. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d at 1136-37. Factors to be considered include the academic benefits of placement of the student in a mainstream setting, the non-academic benefits of a mainstream placement, any negative effects the student's presence may have on the general education classroom, and the cost of educating the student in a mainstream environment. *Id.*

29. In the present case, the Student was removed from the general education setting for approximately one third or one quarter of the school day during the first semester (depending whether it was a band day) and one quarter of the school day during the second semester. The LA IEP specified that he should only be removed from general education for seven percent of the school day, and should receive behavioral support in the classroom to allow him to remain in the general education setting as much as possible.

30. A determination as to the Student's LRE was never specifically made by the District because it did not convene an IEP team meeting to determine whether the increased amount of SDI provided to the Student in the pull out setting, as opposed his to remaining in the general education classroom with a one-one-one aide, was his LRE. However, by accepting the LA IEP, the District implicitly acknowledged that the LA IEP complied with the IDEA's LRE requirement. The District thereby accepted the LAUSD's finding that BID and BII services in the classroom, and pull out from general education for seven percent of the school day, were the Student's LRE.

31. Thus, the District violated the LRE mandate of the IDEA and denied the Student FAPE by failing to educate the Student in his general education classroom to the maximum extent possible.

Whether the District violated the IDEA and denied the Student FAPE by failing to timely conduct an assistive technology evaluation

32. The Parent alleges the District denied the Student FAPE by failing to perform the Student's AT evaluation in a timely manner. The AT screening of the Student was not conducted until May 7, 2019. The LA IEP clearly states that the LA IEP team agreed to assess the Student's AT needs at the beginning of the 2018-19 school year, so the District was on notice as of August of 2018 that an AT assessment was warranted. An AT assessment was discussed at the January 2019 IEP meeting and the District agreed to "look into" it. However, no one from the District contacted SETC until March of 2019. No explanation for this delay was offered by the District. It is possible the District interpreted the IDEA to mean that it was not required to provide, or was prohibited from providing, the AT assessment during the pendency of the due process proceeding. However, the evidence shows that the District and the Mother agreed that the AT assessment would be "looked into," and the District confirmed this in a PWN issued January 11, 2019. Once the District agreed to explore the possibility of conducting an evaluation, it needed to follow through. Moreover, the delay from August to January was never addressed by the District, and no due process proceeding was in place at that time.

33. An AT device is any item, piece of equipment, or product system used to increase, maintain, or improve the functional capabilities of a student eligible for special education. WAC 392-172A-01025. WAC 392-172A-02015 mandates: Each school district shall ensure that assistive technology devices or assistive technology services, or both, are made available to a student eligible for special education if required as part of the student's: (a) Special education; (b) Related services; or (c) Supplementary aids and services.

34. AT provided to a student must be tailored to his individual needs. *See, e.g., Houston County Sch. Dist.*, 67 IDELR 133 (SEA GA 2015) (finding that although the district provided the student a voice-output device, the device's static display limited his communicative vocabulary and the district was ordered to provide a device with a dynamic display). The speech-to-text software available as standard equipment on the Student's Chromebook did constitute AT tailored to his individual needs. Availability of this technology did not excuse the District from pursuing the AT assessment.

35. Waiting over six months from learning that an AT assessment was warranted, and over two months to contact SETC after agreeing to do so, was unreasonable on the part of the District. In *Seattle School Dist. No 1*, 67 IDELR 22 (OCR WD WA 2015), the Office of Civil Rights found that when the district failed to conduct an AT evaluation for over seven months, the district failed to provide the student FAPE.

36. The evidence demonstrates that the District denied the Student FAPE by failing to timely conduct his AT evaluation. The District shall provide the Student with a headset and microphone for use at school as set forth in the Order below.

Whether the District committed multiple procedural violations of the IDEA that resulted in the denial of FAPE to the Student

37. The Mother argues that the District committed multiple procedural violations of the IDEA that resulted in the denial of FAPE to the Student. She contends the District failed to send a

required PWN within a reasonable time after the December 10, 2018 IEP team meeting regarding the OT screening and the communication plan. School districts must provide parents of special education students with PWN before the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. WAC 392-172A-05010(1). The evidence here shows that no amendments were made to the LA IEP, and no new or changed services were agreed upon or refused, at the December 10, 2018 IEP meeting. Therefore, no PWN was required.

38. The Mother further argues that the District committed a procedural violation when it failed to update the Student's IEP to reflect the minutes and services he was actually receiving throughout the 2018-19 school year. An IEP must specify the anticipated frequency, location, and duration of educational services. *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1197 (9<sup>th</sup> Cir. 2017); WAC 392-172A-03090(1). Placement decisions may not be made without the involvement of a parent. WAC 392-172A-05001(2)(d). Parents have the right to monitor and enforce the special education services their child is receiving. *M.C. v. Antelope Valley*, 858 F.3d at 1198. When a parent is unaware of the services provided by a district due to the district's failure to give the parent appropriate notice as to what those services are, the parent has been denied FAPE. *Id.*

39. The evidence overwhelmingly supports the Mother's contention. The District did not provide notice to the Mother of the actual SDI minutes the Student was receiving until May of 2019. For almost the entire school year, the Mother did not know that the Student was receiving significantly more SDI than was called for in the LA IEP. The Mother was denied the opportunity to participate in the decision to increase the provision of SDI. This significantly impeded her opportunity to participate in the decision making process regarding the provision of FAPE to the Student. This was a procedural violation of the IDEA that denied the Student FAPE. WAC 392-172A-05105.

Whether the District predetermined that the Student did not qualify for ESY and/or denied the Parent meaningful participation in the Student's education by predetermining that the Student does not qualify for ESY

40. The relevant Washington regulation pertaining to ESY, WAC 392-172A-02020, provides as follows:

- (1) Extended school year services means services meeting state standards contained in this chapter that are provided to a student eligible for special education:
  - (a) Beyond the normal school year;
  - (b) In accordance with the student's IEP; and
  - (c) Are provided at no cost to the parents of the student.
- (2) School districts must ensure that extended school year services are available when necessary to provide a FAPE to a student eligible for special education services.
- (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.

(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.

41. The WAC provision set forth above requires a school district to develop criteria to determine when a student is eligible for ESY. It allows the IEP team to use its professional judgment to determine whether ESY is needed, and requires evidence to support such a need. ESY is only provided when it is necessary for the provision of FAPE to a student eligible for special education.

42. The Mother contends the District committed a procedural violation of the IDEA by predetermining that that Student did not qualify for ESY, thereby denying her meaningful participation in the Student's education. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *HB v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342, 344 (9<sup>th</sup> Cir. 2002). Predetermination of a student's placement is a procedural violation that can deprive a student of FAPE. According to the *Ms. S. v. Vashon Island* court, a school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification. 337 F.3d at 1131.

43. The Mother asserts the District determined at its transfer review meeting in September of 2018 that the Student did not qualify for ESY. PPHB p. 14. This argument is not supported by the facts, as set forth above, and the Mother's assertion that the District transfer review team decided not to provide the Student with ESY during the summer of 2019 is not persuasive. Furthermore, the evidence is clear that District staff repeatedly and consistently noted that a determination as to the necessity of ESY for the Student would not be made until the spring, in order for the staff to have the opportunity assess whether the Student regressed over school breaks and, if so, how quickly he regained lost skills.

44. Ms. Fillo expressed at the December 10, 2018 IEP team meeting that the Student had demonstrated he could retain information and may not need ESY, but no recommendation regarding ESY was made at that meeting. Moreover, a recommendation is not a predetermination. A school district is required to come to the IEP table with an "open mind" but not a "blank mind," and the district may come with a draft IEP for discussion but must not have finalized its placement prior to the meeting. *D.M. v. Seattle Sch. Dist.*, 2016 U.S. Dist. LEXIS

122519 (W.D. WA 2016)(citing *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1263 (E.D. Va. 1992)).

45. For the above reasons, the evidence in the present case does not support a finding of predetermination on the part of the District as to whether the Student qualified for ESY. The Parent was not denied meaningful participation in the Student's education by a procedural violation of the IDEA regarding predetermination of ESY services.

Whether the Student qualified for ESY services between the 2018-19 and 2019-20 school years

46. The question of whether the Student qualifies for ESY services over the summer of 2019 was added to the issues to be decided in this matter by an amendment to the Complaint that was effective April 25, 2019. The Parent now asserts the Student qualified for ESY services and should have received ESY over the summer of 2019. At the time the Complaint was amended and the issue was added, however, no decision had been made about ESY eligibility, as discussed above.

47. Because there was no eligibility determination for the Parent to contest at the time the issue was raised, the issue is not properly before this tribunal and will not be considered.<sup>25</sup> Nothing in this order prevents the Parent from filing a new due process complaint, should she so choose, to challenge the ESY eligibility decision made by the IEP team in May of 2019.

Whether the Student is entitled to compensatory education and/or reimbursement for private tutoring

48. "Compensatory education is an equitable remedy that seeks to make up for 'educational services the child should have received in the first place,' and 'aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA.'" *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9<sup>th</sup> Cir 2011)(quoting *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)). "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).

49. A generalized award of compensatory education may be denied when it is not appropriate. *Id.* Moreover, there is no obligation to provide day-for-day compensation for missed educational time. *Id.* A hearing officer may fashion individualized relief for students seeking compensatory education. As noted in *R.P. v. Prescott*:

Courts have been creative in fashioning the amount and type of compensatory education services to award. *See, e.g., Ferren C. v. Sch. Dist. of Phila.*, 612 F.3d 712, 718-19 (3<sup>d</sup> Cir. 2010) (court can order school to provide annual IEPs to student who had aged out of a statutory right to a FAPE); *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, 553 F.3d 315, 324-26 (4<sup>th</sup> Cir. 2009) (court can order that private school tuition be reimbursed); *Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034 (9<sup>th</sup> Cir. 2006) (court can order additional training for a child's teachers).

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<sup>25</sup> If predetermination of ESY eligibility by the District in September of 2018 had been proved by the Parent, this issue of eligibility would be properly before the ALJ.

631 F.3d at 1126.

50. In the present case, the Parent has proved by a preponderance of the evidence that the Student missed instruction in the general education setting, and that he was not provided with the minutes of math SDI that were called for in his LA IEP called. However, an award of compensatory education should not be based on the amount of service the Student missed, but rather the amount of services needed to place the Student in the position he would have been in if the District had fulfilled its FAPE obligations. Evidence regarding the Student's present levels of educational performance indicate he needs some of the instruction of which he was deprived. Consequently, it is conclude that the Student is entitled to compensatory education.

51. Students generally progress more rapidly with one-on-one instruction as opposed to instruction in a classroom with twenty or more other students. An hour-for-hour award without evidence to support such would not be appropriate. The ALJ adopts a 1:3 formula whereby one hour of compensatory education is awarded for every three hours of general education classroom instruction that was missed. The Student missed 17.1 hours of both science and social studies, so he shall receive six hours of compensatory education in science and six hours in social studies.<sup>26</sup>

52. The Student is also entitled to compensatory education for 22 weeks of nine minutes per day of math SDI of which he was deprived. Because this is SDI, hour-for-hour compensatory education is warranted. The Student shall receive 990 minutes (16.5 hours) of compensatory education in math.

53. Much of what the Student missed while receiving SDI, such as independent reading, planning, and group projects, cannot or need not be addressed by compensatory education. Moby Max grammar skills are more appropriately addressed in the Student's ongoing writing SDI and will not be ordered as compensatory education. However, guidance is a topic that would benefit the Student and one that is required in order to put him in the position he would have occupied but for the District's violation of the IDEA. Based on the testimony of Ms. Black, the Student missed 30 minutes of guidance approximately 1.25 times per week for the entire school year. There are 36 weeks in the school year, so the Student missed 1350 minutes (22.5 hours) of guidance. Again, the ALJ adopts a 1:3 formula whereby one hour of compensatory education is awarded for every three hours of general education classroom instruction that was missed. Accordingly, the Student shall receive 7.5 hours of compensatory education in guidance.

54. The compensatory education shall be provided as follows: The instructor for science and social studies shall be a certificated teacher who is familiar with the District's fifth grade curriculum, and has not worked with the Student to date. The instructor for guidance shall be any person who holds the necessary credentials to teach guidance in the District and has not worked with the Student to date. The instructor for math shall be a certificated teacher who holds the necessary qualifications to teach special education in the District, and has not worked with the Student to date. The District shall choose the instructor(s) and will endeavor in good faith to get agreement on the instructor(s) from the Parent. The hours of compensatory education must

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<sup>26</sup> Missed SDI, such as math, may be calculated differently than missed general education, and hour-for-hour compensatory education may be more appropriate.

be provided to the Student by the end of the 2019-20 school year. The instruction shall be provided at a location and time agreed upon by the Parent and the District, including at the Student's current school building if that is most convenient. The instruction shall be delivered outside the Student's normal school hours. Once the schedule is set, the Parent shall, except in an emergency, give notice 24 hours in advance of a scheduled session if the Student needs to reschedule. Without such notice and in the absences of an emergency, that missed session will count toward the compensatory education award. The instruction may be provided on weekends and/or school holidays/vacation days if the Parent and District agree but the District is not required to provide the instruction on weekends or school holidays/vacation days.

#### Other relief

55. The District shall initiate a reevaluation of the Student within 15 school days of the date of this order, so long as the Mother provides consent. The reevaluation shall be performed by the District. No person who worked with the Student during the 2018-19 school year shall participate in conducting the evaluation unless agreed upon in advance by the Mother and the District (this includes Ms. Carney and Dr. Bates). The reevaluation shall be completed according to the timeframe set forth in the IDEA.

56. Within ten school days of the completion of the reevaluation, the District shall convene the Student's IEP team to develop an IEP for the Student. Alternatively, if the Mother refuses to provide consent for the reevaluation, within ten school days of learning of the refusal, the District shall either convene the Student's IEP team to develop an IEP for the Student based on the information available, or initiate a due process action seeking to override the Parent's refusal to consent.

57. Due to the potentially contentious relationship between the District and the Parent, the IEP team meeting shall be facilitated by a Sound Options facilitator, which shall be arranged by the District. The recommendations of SETC shall specifically be considered at the IEP meeting and the IEP team shall decide whether a new AT screening of the Student is warranted given that he now attends a different school. The May 2019 IEP may be modified or adopted in full by the IEP team if the team deems it appropriate.

58. The IDEA does not require compensatory education services to be awarded directly to a student, so school district staff training can be an appropriate remedy. *Park v. Anaheim Union High School Dist.*, 464 F.3d 1025, 1034 (9th Cir. 2006) (student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher trained to properly do so). Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or that may benefit other pupils. *Student v. Reed Union School District*, 52 IDELR 240 (SEA CA 2009)(requiring training of special education employees regarding predetermination and parental participation in IEPs).

59. Within two months of the date of this order, the District shall provide two hours of training pertaining to (a) the IDEA's requirement of comparable services, least restrictive environment, participation rights of parents, and specially designed instruction; and (b) the District's procedures for IEP transfer reviews and acceptance of IEPs from out-of-state school districts. Training shall be provided to the following personnel: all administrative staff (excluding clerical staff), special education staff, and school psychologists who work at, or who provide services to

students who attend, McDermoth Elementary School. The training shall be provided by a person(s) of the District's choosing who possesses the necessary training, education and experience to conduct such training and is not an employee of the District. The training may be provided by attorneys for the District if the District deems it appropriate. The District shall maintain a record of the attendance of individuals who receive this training and provide that information to the Parent if she requests it.

60. Within three months of the date of this order, the District shall also provide training to every general education teacher and para educator at McDermoth Elementary School. This training shall be no less than 45 minutes and shall include, at a minimum, a review of the IDEA and the general education teacher's role in implementing an IEP. This may be provided in conjunction with other District trainings. The training shall be provided by a person of the District's choosing who has the education, training and experience to provide such training, and such person may be an employee of the District. The training may be provided by attorneys for the District if the District deems it appropriate. The District shall maintain a record of the attendance of individuals who receive this training and provide that information to the Parent if she requests it.

61. Within six weeks of the date of this order, the District shall provide one hour of training pertaining to the IDEA, specially designed instruction, participation rights of parents, and least restrictive environment to the following personnel: all administrative staff (excluding clerical staff), special education staff, and school psychologists who work at, or who provide services to students who attend, the Student's current school. The training shall be provided by a person(s) of the District's choosing who possesses the necessary education, training and experience to conduct such training, and such person may be an employee of the District. The training may be provided by attorneys for the District if the District deems it appropriate. The District shall maintain a record of the attendance of individuals who receive this training and provide that information to the Parent if she requests it.

62. The District shall provide the Student with a headset and microphone for use at school (in keeping with the specific recommendations of SETC) within ten school days of the date of this order.

63. The Parent requests, in her post-hearing brief, that funds be placed in an educational trust for the Student, at the District's expense, "based on the District's current hourly rate for a one-to-one certificated instructor with a special education credential." PPHB p. 60. No authority is cited in support of this request and no information is provided as to the referenced hourly rate. It is inferred that the Parent requests this relief because she seeks an award of over 1000 hours of compensatory education, and that tremendous amount would need to be delivered over a lengthy timeframe and/or via methods other than direct instruction, such as camps and other activities. Nothing approaching the amount of compensatory education sought by the Mother has been awarded, however, so establishment of an educational trust is not warranted and is denied.

64. 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 Aberdeen School District violated the IDEA and denied the Student FAPE by (1) failing to provide services comparable to those that had been provided in the Student's previous school district; (2) providing more minutes of SDI to the Student than were called for in his IEP; (3) providing fewer minutes of SDI in math to the Student than were called for in his IEP; (4) failing to educate the Student in the least restrictive environment; (5) failing to conduct a timely assistive technology evaluation; and (5) failing to update the Student's IEP to reflect the minutes and services the Student was receiving throughout the 2018-19 school year.
2. The District did not otherwise violate the IDEA and did not otherwise deny the Student FAPE.
3. The District is ordered to provide compensatory education, training, and other relief as set forth in Conclusions of Law paragraphs 50 – 63.
4. All remedies requested by the Parent have been considered. Any remedies not awarded above are denied.

DATED at Seattle, Washington on October 25, 2019.



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Jacqueline H. Becker  
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 this final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

CERTIFICATE OF SERVICE

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

Parent



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cc: Administrative Resource Services, OSPI