



MAILED
Dec 21, 2019
OAH – SEATTLE

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
One Union Square • 600 University Street • Suite 1500 • Seattle, Washington 98101
(206) 389-3400 • (800) 845-8830 • FAX (206) 587-5135 • www.oah.wa.gov

December 21, 2019

Parents
[REDACTED]

Andrew Perkins, Superintendent
[REDACTED] School District

Jeannette A. Cohen, Attorney at Law
2223 112th Avenue NE Suite 202
Bellevue, WA 98004

Curtis M. Leonard, Attorney at Law
Craig S. Peters, Attorney at Law
Patterson Buchanan Fobes & Leitch, Inc., P.S.
1000 Second Avenue, 30th Floor
Seattle, WA 98104-1064

In re: [REDACTED] School District
OSPI Cause No. 2019-SE-0086
OAH Docket No. 05-2019-OSPI-00790

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,

Dana Diederich
Administrative Law Judge

cc: Administrative Resource Services, OSPI

Dec 21, 2019

OAH – SEATTLE

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

IN THE MATTER OF:

OSPI CAUSE NO. 2019-SE-0086

OAH DOCKET NO. 05-2019-OSPI-00790

██████████ SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Dana Diederich in ██████████ Washington, on September 16 – 20, 2019. The Parents of the Student whose education is at issue¹ appeared and were represented by Jeannette Cohen, attorney at law. The ██████████ School District (District) was represented by Curtis Leonard and Craig Peters, attorneys at law. Superintendent Andrew Perkins and Special Services Director/Assistant Principal Mel Blair also appeared for the District.

STATEMENT OF THE CASE

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on May 30, 2019. The Complaint was assigned Cause No. 2019-SE-0086 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered on June 3, 2019, which assigned the matter to ALJ Dana Diederich. The District filed its Response to the Complaint on June 12, 2019.

On June 14, 2019, the parties agreed in writing to waive the resolution session. As such, an order was issued on June 17, 2019, adjusting the decision due date to July 29, 2019. Prehearing conferences were held on July 2, 2019, and August 22, 2019, and Prehearing Orders were issued on July 3, 2019, and August 23, 2019.

Due Date for Written Decision

As set forth in the First Prehearing Order, the due date for a written decision in this matter was continued to thirty days after the record of the hearing closes. The record closed with the filing of post-hearing briefs on November 22, 2019. As such, the decision due date is December 22, 2019.

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

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 – D2, D4 – 5, D7 – D8, D11, D14, D17, D20 – D21, D23 – D30; and

Parents' Exhibits: P1 – P9, P11 – P12, P14 – P15, P19, P21 – P30, P32 – P45.

Witnesses Heard (in order of appearance):

Student's Mother

Steve Tutty, PhD

Luisa Sanchez-Nilsen, Executive Director/Principal of Gersh Academy Cougar Mountain

Cindy Sanders, Preschool Teacher at CDI Headstart serving Kittitas County

Terri Allen, Licensed Mental Health Counselor

Ceri Betts, Speech and Language Pathologist

Katy Yu, Clinical Supervisor at Gersh Academy Cougar Mountain

Student's Sister

Laura Jones, District Student Services Coordinator

Andrea Green, District Kindergarten Teacher

Andrew Perkins, District Superintendent / Principal

Mel Blair, District Special Services Director / Assistant Principal

ISSUES

As set forth in the First Prehearing Order dated July 3, 2019, the issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2018-2019 school year, by:
 - i. Failing to implement the Student's March 2018 Individualized Education Program (IEP);
 - ii. Failing to evaluate the Student after his referral for an evaluation by the Ellensburg School District, after the District became aware of the Student's Autism Spectrum Disorder diagnosis, and after the Student experienced challenges in the classroom because of his disability;
 - iii. Denying the Parents full participation in the Student's 2018² reevaluation when it changed the course of the evaluation without informing the Parents;

² The issue statement in the First Prehearing Order contains a typo. Issue (a)(iii) refers to the "2019 reevaluation" rather than the "2018 reevaluation." Parties briefing and the evidence presented clearly indicates the evaluation contested was initiated in September 2018.

- iv. Denying the Parents full participation in developing and/or revising the Student's IEP when it did not provide the Parents with the data and information needed to fully participate;
 - v. Failing to provide the Student with an appropriate educational program for the 2018-2019 school year, including providing no specially designed instruction or related services;
- b. And, whether the Parents are entitled to their requested remedies:
- i. A finding that the Student was denied a FAPE under the IDEA starting September 10, 2018, to present;
 - ii. A finding that the appropriate program for the Student for the 2019-2020 school year is a placement at Gersh Academy, a private school specializing in serving students with Autism Spectrum Disorder diagnoses, with appropriate special education services to include speech and language services, ABA services, occupational therapy services, and 1:1 support if Gersh believes this is necessary for the Student to receive a FAPE. Due to the distance, living expenses for the Student and Mother during the school week are to be included;
 - iii. A finding that the District is to provide the Student with appropriate speech and language services for the number of sessions missed during the 2018-2019 school year with the Student's private therapist;
 - iv. Compensatory education to the Student during the 2019-2020 school year due to his loss of educational opportunity for the 2018-2019 school year in the form of Applied Behavioral Analysis (ABA) therapy services after the school day at District expense;
 - v. That the Court retain jurisdiction over this case until an appropriate IEP is developed with placement at the Gersh Academy;
 - vi. Or other equitable remedies, as appropriate.

FINDINGS OF FACT

Ellensburg School District

1. The Student began attending preschool at Bright Beginnings for Kittitas County in the Ellensburg School District (ESD) when he was three years old. Mother T16³. He attended Bright

³ Citation to the testimony of a witness is by the witness's last name or the term Mother or Sister followed by the hearing transcript page number. For example, Mother T16 is a citation to the testimony of the Student's Mother at page 16 of the transcript.

Beginnings through the 2017-2018 school year. P2p1⁴. The Student attended the program four days a week for four hours each day. Sanders T393.

2. Cindy Sanders was the Student's teacher for the majority of his time in the program, including the 2017-2018 school year. Sanders T391-92; Mother T17. Ms. Sanders has an associate's degree in early childhood education, but is not a certificated teacher. Sanders T426. Ms. Sanders referred the Student for a special education evaluation to address his speech issues in early 2017. Mother T21.

3. The Student was first evaluated and found eligible for special education on April 7, 2017, by the ESD. P3p14. The evaluation team found the Student eligible under the category of communication disorder because the Student's "articulation skills were below normal limits" which "may impact his ability to effectively communicate his needs and wants within his environments." *Id.* It was recommended he receive speech therapy 30 minutes per week. *Id.*

4. The Student's first IEP was developed in April 2017. P3p46. The IEP team noted the Student's "communication delay would adversely impact his participation in the educational classroom/curriculum" and that the Student "may have difficulty expressing basic needs and wants to unfamiliar listeners." *Id.* at p48. The IEP called for 30 minutes of speech and language specially designed instruction (SDI) per week delivered by a speech language pathologist (SLP) in a special education setting. *Id.* at p53. A prior written notice (PWN) was issued on April 7, 2017, proposing to implement the IEP on April 12, 2017. *Id.* at p57.

5. On March 6, 2018, a second IEP was implemented for the Student. P3p33. The IEP indicated the Student's communication disability was "creating an adverse impact on his ability to be an effective communicator within his pre-school environment." P3p36. He was found to continue to qualify for SDI in the area of communication only. *Id.* The IEP called for 30 minutes of speech and language services per week in a special education setting. *Id.* at p40. The IEP called for the Student to be in a general education setting for 98.33% of the school day. *Id.* at p40. A PWN was issued on March 1, 2018, proposing to implement the IEP on March 6, 2018. *Id.* at p43.

6. While attending Bright Beginnings, the Student exhibited problems getting along with his peers and displayed rigid behaviors. Sanders T397-98. The Student did not have issues with elopement while at Bright Beginnings. Sanders T404.

7. Ms. Sanders alerted the Parents that the Student was having these difficulties in class and suggested they have him evaluated to determine if he had a diagnosis that was causing his difficulties with peers and rigidity. Mother T17-18.

8. On April 24, 2018, the Student underwent a developmental and behavioral pediatric evaluation by Dr. Diane Liebe at Children's Village Pediatrics. P34. During this evaluation, the Student was first diagnosed with autism spectrum disorder (ASD). *Id.* at p1. Dr. Liebe measured

⁴ Citation to the exhibits of record is by exhibit and page number, e.g. Exhibit P2p1 is a citation to Parents' Exhibit P2 at page 1.

the severity of the Student's ASD at level 1, meaning "requiring support," in the area of social communication and level 2, meaning "requiring substantial support," in the area of restricted/repetitive behaviors. *Id.* at p1. Dr. Liebe recommended the Parents notify the Student's school of his ASD diagnosis. *Id.* Dr. Liebe also stated it would be helpful for the Student to have "Occupational Therapy (OT) to address his sensory processing difficulties," and that Dr. John Walters, the Student's primary care provider, should initiate a referral for such services. *Id.* at p2.

9. On April 26, 2018, Dr. Walters, completed a referral order for the Student to receive OT for sensory processing. He noted in the referral the Parents should "see if this can be done through school district." D7p4.

10. Prior to the end of the 2017-2018 school year, the Student and his family moved from the Ellensburg School District to the [REDACTED] School District. P2p38.

[REDACTED] School District – 2018-2019 School Year

11. On May 11, 2018, the Mother completed paperwork to enroll the Student in the District. P9. This paperwork was provided to the District on May 30, 2018. D8p1. The paperwork noted the Student's diagnosis of ASD and his behavior problems. *Id.* at p2. It also indicated the District had been provided special education forms from the ESD. *Id.* at p6. Along with the paperwork, the Mother also submitted a copy of the evaluation performed by Dr. Liebe on April 24, 2018, and a letter from Cindy Sanders that was provided to Dr. Liebe prior to her evaluation of the Student. Mother T48-49.

12. On May 17, 2018, at the end of the 2017-2018 school year, Ms. Sanders completed a Kindergarten Transition Summary Form for the Student. P2p1; Sanders T406. The form included information about the Student's abilities in the areas of social-emotional, language, literacy, physical, and math. *Id.* at p3-13. It also indicated areas in which the Student would need additional support. *Id.* at p4. It indicated the Student had challenges making friends and exhibited control issues and repetitive/obsessive behaviors. *Id.* The transition summary also included techniques used by Ms. Sanders that were successful with the Student. None of these techniques were memorialized in the Student's IEP. Mother T186-87. Ms. Sanders provided these documents to the education manager in the ESD to be sent to the District. Sanders T434.

13. It is unclear whether the transition summary completed by Ms. Sanders was ever transmitted from the ESD to the District. The Mother and Ms. Sanders thought it was transmitted, but neither personally provided the document to the District. Mother T30, 171, 202; Sanders T434. Further, all of the District employees testified they had not seen the document prior to the hearing. Jones 657; Green T786; Blair T1007. As such, I find that the District did not receive a copy of the transition summary completed by Ms. Sanders.

14. It was the opinion of Ms. Sanders that the Student would be able to succeed in general education kindergarten if provided accommodations for his behavior difficulties. Sanders T413. Based on her experience with the Student in an education setting, Ms. Sanders's opinion is given significant weight.

15. The ESD issued a PWN on June 4, 2018, proposing the Student be reevaluated. P2p38. The PWN indicated the reason for the reevaluation is “[Student] has been provided a new medical diagnosis of Autism, and his medical provider referred him for further evaluation, specifically with concerns for sensory processing.” *Id.* Because the Student was residing in the District, the PWN indicated it would be referring the reevaluation to the District. *Id.*

16. The 2018-2019 school year in the District started on September 6, 2018. D1p1. All grade levels started school on that date, except kindergarten students who started on September 10, 2018. Jones T761-62. The Student started kindergarten in the District on September 10, 2018. Jones T658, 662.

17. The Student’s kindergarten teacher for the 2018-2019 school year was Andrea Green. The Student’s class had a total of eighteen students. Green T778. Ms. Green has taught kindergarten for six years, but has been employed by the District for fourteen years. Green T773. Ms. Green is endorsed to teach preschool through third grade and kindergarten through eighth grade special education. *Id.* She has a master’s degree in reading and is a certificated teacher. Green T774. Ms. Green has worked as a special education teacher in the past. *Id.*

18. Ms. Green is Right Response trained. Right Response is training that teaches individuals how to deescalate students and involves using restraints on students as a last resort. Green T775. Ms. Green receives one day of training every year to keep her Right Response training current. *Id.*

19. As of August 2018, Mel Blair was the District special education director. Blair T982. Starting July 1, 2019, she became the District assistant principal and special services director. *Id.* Ms. Blair has a teaching certification and an administration certification. She received her master’s degree in educational leadership and principalship and her bachelor’s degree in special education and social science. Blair T986.

20. Before the Student started school in the District, the District was aware that the Student was diagnosed with ASD and that he had an IEP that included speech services. Perkins T941; Blair T992, 994; Green T815-16.

Consent for September 2018 Occupational Therapy Reevaluation

21. The Student, his Mother, and his Grandmother all met with Ms. Green at the school on September 7, 2019. Mother T60; Green T815. The Student’s ASD was discussed at this meeting. Green T815-16. The Mother testified that a special education department employee came to this meeting and provided her with a blank form titled Consent for Initial Evaluation. P8; Mother T61. She thought the form might have had the Student’s name written at the top, but otherwise, it was blank. Mother T62. She said she asked Ms. Green for help completing the form, but was told to sign the form and leave the rest blank to be completed by the special education department. *Id.* at T63.

22. Ms. Green testified that she remembers Becky Hill, the District special education teacher, walking into the meeting and handing a piece of paper to the Mother, but she does not know what

was on the paper. Green T823-24. Ms. Green does not remember the Mother asking for help filling out the form. Green T824.

23. Ms. Blair testified she was told by Ms. Hill that the consent form was signed by the Mother in June 2018, when the Mother met with the District's previous director of special education, Rich Layman. Blair T1011. Ms. Blair first saw the form on September 13, 2019. When Ms. Blair received the form, it included the Student's birthday, the District's name (██████████) and the Mother's signature. "Motor" and "I give consent" were checked, and "OT" was written in the space provided. Blair T1012. The Student's grade level and sex were not listed, there was no name printed on the "Please return form to" line, and the form was not dated. Blair T1012-13. Ms. Blair dated the form September 13, 2019, she added the Student's grade and sex, and added Becky Hill's name to the bottom. Blair T1013.

24. Ms. Blair further testified that she believed the consent form was signed in June 2018 because the Student's name was handwritten and not typed on the form. In her experience, once a Student is registered with the District, all special education forms are generated through IEP Online, the school's computer program, and the Student's information would be printed rather than handwritten. Blair T1076-77. She believed the Student would have been registered by September 7, 2019, but she was not sure of the Student's actual registration date. Blair T1064, 1077.

25. Because the Mother had firsthand knowledge of the consent form and Ms. Green confirmed her testimony regarding Ms. Hill bringing her a form during the September 7, 2018 meeting, the Mother's testimony regarding the date she signed the consent form is given greater weight than that of Ms. Blair. Ms. Blair was not present when the form was signed and was relying on information told to her by individuals who did not testify at the hearing. Further, she was not sure when the Student was registered in the IEP Online system. As such, I find that a blank version of the consent form was signed by the Mother on September 7, 2018.

September 2018 Reevaluation

26. The Mother believed there was agreement between herself and the District that the Student would undergo a "full evaluation." Mother T62. This is what she believed she was agreeing to when she signed the consent form. *Id.* The Mother was unable to explain what a "full evaluation" would include. The Mother did not request that the District perform any specific assessments on the Student.

27. On September 14, 2018, the District received a sensory profile completed by Ms. Sanders. D11p1-7. Ms. Sanders testified that, while she does not remember completing this form, it appears to be her handwriting on the form. Sanders T421. A similar sensory profile was completed by Ms. Green in the fall of 2018. D11p8-13. Ms. Green was unsure when she filled out this form, but testified she believed it would have been completed while the Student was still in school at the District. She also testified that the handwriting at the top stating "fall of 2018" was not her handwriting. Green T854-55. Ms. Green testified that the forms look "like something that would be from the OT" but she was not certain who asked her to fill out the document. Green T863.

28. On September 20, 2018, Peg Bryant, the District's occupational therapist completed an observation of the Student in the classroom setting. D17p1; Blair T1015.

Lunchroom Incident – September 19, 2018

29. On September 19, 2018, the Student had an incident in the lunchroom. Laura Jones,⁵ the District student services coordinator, was notified by another student that the Student was very upset in the lunchroom. Jones T651, 669. Ms. Jones located the Student's Sister and brought her to the lunchroom to try and calm the Student down, and the two walked with the Student back to Ms. Jones's office to call the Student's Mother. Jones T669-70; Sister T630; Mother T72-73. When the Mother arrived at the school, she joined Ms. Jones, the Student, and the Sister in Ms. Jones's office. The Student was still very upset, so the Mother spent roughly fifteen minutes calming him down. Mother T75; Jones T670. Once the Student calmed down, Ms. Green was called to Ms. Jones's office to escort the Student back to class. Mother T76. The Student stated he thought Ms. Green was mean and he did not want to go back to class. Sister T631-32; Mother T75, 78; Jones T671. At this point, the Sister was sent back to her own class. Sister T632; Mother T77.

30. When Ms. Green arrived in Ms. Jones's office, the Student was playing with Legos. Jones T671; Green T672. Ms. Green asked the Student to pick up the Legos so he could return to class. Green T807; Jones T671. The Mother attempted to help the Student pick up the Legos, but Ms. Green instructed her not to help and to let the Student clean up after himself. Jones T671; Mother T79; Green T807. Ms. Green then took the Student's hand and told him he needed to go back to class. Jones T671. The Student was struggling and walking slightly behind Ms. Green and tugging on her hand while walking down the hallway. Jones T673. Ms. Green testified that she held his hand because she was concerned he would run and put himself in danger. Green T826. The Mother felt Ms. Green's actions were inappropriate and aggressive. Mother T80.

Phone Call with Ms. Green - September 27, 2018

31. On September 27, 2018, the Mother had a phone conversation with Ms. Green. P14p1. The Mother was concerned about notes she saw regarding the Student that indicated he was not following directions and listening in class and was having melt downs. *Id.*; Mother T66, 68. The Mother conveyed to Ms. Green that these behaviors were related to his ASD. *Id.*; Mother T69. Ms. Green conveyed to the Mother that she did not observe behaviors related to ASD, but she had observed "a lot of non compliance." P11p1. Ms. Green felt the Mother was "making excuses" for the Student's behaviors. *Id.*

32. In response to this conversation, the Mother emailed the school superintendent and principal, Andrew Perkins,⁶ to express concerns that Ms. Green did not understand the Student's

⁵ Ms. Jones is credentialed as a school counselor and has previously been a certificated teacher. She has a master's in school counseling and worked as a physical education teacher for twenty-one years. Jones T653.

⁶ Mr. Perkins was a teacher for thirteen years prior to becoming a school administrator. He currently has a superintendent credential, a teaching certificate, and an administrator certificate. Perkins T878-79. Prior

diagnosis or the related symptoms. P14p1. She also indicated she disagreed with Ms. Green punishing the Student for behaviors related to his ASD. She asked Mr. Perkins how to best address her concerns about Ms. Green. *Id.*

33. Mr. Perkins emailed the Mother back the same day stating, "Mrs. Green is a great teacher who is trying to be fair with all students." P14p1. He further stated the Mother was "doing the right thing in talking to the teacher" and asked the Mother to keep him updated. *Id.*

34. The Mother replied to Mr. Perkins's email the same day, again indicating she felt Ms. Green was dismissive of the Student's medical diagnosis and that Ms. Green was not interested in understanding the Student's symptoms and learning how to help him cope in the classroom. P14p2. The Mother indicated she did not feel that communicating directly with Ms. Green would be productive at this point and asked to set up a meeting with Ms. Green and Mr. Perkins. *Id.* Mr. Perkins replied to the email the same date and told the Mother to contact his administrative assistant on Monday, October 1, 2018, to set up a meeting.

Bus Incident – September 27, 2018⁷

35. Ms. Green has a standard routine she requires students to go through at the end of the day before they are released to their parents. Students line up outside of the school, and when their parents arrive, the student will shake her hand and she will pass them off to the parents. Green T790. Students who are not picked up in front of the building walk as a group down the breezeway with Ms. Green, and she shakes their hands before they get onto the bus. *Id.* at T790-91. The Student was normally picked up in front of the school by his Mother. *Id.*

36. On September 27, 2018, the Student's Mother was late getting to the school for pick up. Mother T94; Green T791; Jones T679. Because of this, the Student walked with Ms. Green and other students down the breezeway towards the busses. Green T791. Ms. Green held his hand during this walk because this was the first time he had walked towards the bus area after school. Green T842. Ms. Jones was already standing near the bus area when Ms. Green and the Student arrived. Jones T677. When Ms. Green and the Student reached the bus area, the Student wiggled free of Ms. Green's hold and ran towards the school busses. Green T792. Ms. Jones got in front of the Student and stopped him from running into the parking area. Jones T680; Green T792. Ms. Green grabbed the Student's hand again and told him he would have to hold her hand until the Student's Mother arrived to pick him up. Jones T680; Green T793. The Student was very upset at this time. He was struggling, crying and swinging his backpack back and forth. Sister T608; Green T793. This struggle went on for ten to fifteen minutes until the Mother arrived. Jones T683; Green T794.

to joining the District he was executive director of student services at another school district, which involved supervision of the special education department. *Id.*

⁷ A video of part of this incident was admitted to the record. See P45. The incident is difficult to see in the video due to the distance of the camera. Also, the video includes no audio. As such, the video provides little information beyond what was already testified to by parties and is given little weight.

37. At some point, Ms. Jones, Ms. Green, and the Student walked from the bus area into the grass area nearby. Jones T684. The Student dropped to the ground while Ms. Green was still standing and holding his hand. Jones T685; Green T794. At this point, the Mother arrived at the school and saw the Student on the ground upset and crying. Mother T95. Ms. Green tried to explain to the Mother what was going on and the Mother tried to calm down the Student. Green T795. Ms. Green eventually dropped to the ground to be at the same level as the Student. *Id.* The Mother asked Ms. Green to let go of the Student so that she could handle the situation. Mother T95; Jones T685. Ms. Green refused and stated she wanted to “finish this,” which was a reference to completing her dismissal routine. Mother T95; Jones T685; Green T796.

38. Eventually, Ms. Green released the Student to the Mother and the Student ran towards the school building. Green T796; Jones T685; Mother T98. The Student was redirected and walked with his Mother and Sister as well as Ms. Jones and Ms. Green to the Mother’s car. The Student held onto his Mother and was tugging on her clothing during the walk back to the car. Green T797. The Student’s Sister helped get him into his car seat while the Mother remained on the grass with Ms. Green and Ms. Jones. Mother T101; Jones T686. Eventually after some discussion, the Mother got in the car and drove away.

39. The Student’s Sister testified that Ms. Green was holding the Student by his wrist during the period before her Mother arrived and that Ms. Green was digging her nails into the Student’s skin. Sister T607. She also testified that Ms. Green made multiple derogatory remarks about the Student. Sister T610. However, the Sister testified she joined the group after they were already near the busses, after Ms. Green reported the Student had tried to run away. Further, Ms. Jones and Ms. Green testified that while the Sister was nearby the group at first, she left to call the Mother. Jones T844; Sister T608; Green T844. It is unclear how close the Sister was to the group and how much of the encounter she witnessed. As such, the Sister’s testimony about this event is given limited weight.

40. On September 28, 2018, the Mother emailed Mr. Perkins to report the events that happened after school on the previous day. P14p3. She reported that when she arrived at the school Ms. Green was grabbing the Student tightly by the wrist, and Ms. Green told her the Student had tried to run towards the busses. *Id.* She explained that she was angry with the situation and did not want Ms. Green touching the Student like this, but did not want to have an altercation with Ms. Green. *Id.* She also reported the earlier incident from September 19, 2018, when Ms. Green led the Student back to class. *Id.* The Mother reported she had witnessed bruises on the Student’s arm from Ms. Green and that she was not ok with Ms. Green touching the Student in this way. *Id.* The Mother reported that she tried to address these concerns with Ms. Jones and Ms. Green the day before, but felt like Ms. Green was getting defensive in response. *Id.* Finally, the Mother stated that the Student’s medical diagnosis caused many of his behaviors and that Ms. Green’s strategies were not working and would result in more outbursts. *Id.* She requested Mr. Perkins step in and help with the situation. *Id.*

41. Later on September 28, 2018, the Mother again emailed Mr. Perkins to provide more information about the event that happened on September 19, 2018, in Ms. Jones’s office. P14p4. She stated that Ms. Green’s aggressive behavior that day increased the Student’s anxiety and that she could not continue to allow the Student to be treated in this way. *Id.* She again asked Mr. Perkins to step in and address the problem. *Id.*

42. Mr. Perkins did not witness the events of September 27, 2018. Perkins T905. When he was informed of the event, he watched the school surveillance video of the event and spoke to the staff members present. Perkins T899. It was Mr. Perkins's opinion that Ms. Green handled the situation appropriately. Perkins T908. Because Mr. Perkins was able to speak with witnesses and watch a video of the event, and is an experienced teacher and administrator, his opinion is given significant weight.

Speech and Language Services

43. On October 1, 2018, the Student had a fifteen-minute session with the District's speech language pathologist assistant (SLPA) Adele Muratore. D26p1; Blair T1021. This is the only speech and language service the Student received while at the District.

44. At the District, the speech language pathologist (SLP) is at the school on Thursdays and the SLPA is at the school on Mondays. Green T862; Blair T1045. Services for students normally start the second week of classes to allow students and teachers to settle into their class schedule. Blair T1021. If students are absent on a day when they are supposed to receive speech services, those services will be made up on following weeks. Blair T1022.

45. Ms. Blair and Ms. Green testified that the Student didn't receive all of his speech services because he was absent on his service days. Green T839; Blair T1046, 1048. However, neither was aware of what days he missed and what days he was scheduled to receive services. As such, I give little weight to their testimony regarding the reason Student failed to receive speech services.

Eye Contact Incident – October 3, 2018

46. On October 3, 2018, the Mother picked the Student up from school and witnessed an interaction between the Student and Ms. Green. Ms. Green was attempting to have a conversation with the Student about him having difficulty returning to class after recess. Mother T138-39. The Student was not looking at Ms. Green, so she put her hands on his shoulders and turned his body towards her. Then she put her face close to his and asked him multiple times to look at her while she was speaking to him. *Id.* Ms. Green reported that she did this because, while some students with an ASD diagnosis have difficulty making eye contact, the Student was able to do this and she wanted to work on this skill. Green T810.

47. The same day, the Mother emailed Mr. Perkins and Ms. Jones about this interaction between the Student and Ms. Green. P19p1. She reported that when she picked up the Student at school, Ms. Green forced the Student to look her in the eyes, which the Mother found to be aggressive due to the Student's ASD. *Id.* After this, while walking to the car, the Mother reported that the Student told her that Ms. Green was mean to him and hurt him on his arms. *Id.* The Mother stated in the email that she would file a police report and a "citizen's report" with OSPI if another incident occurred. *Id.* She also asked whether anything would be done regarding this incident and again reiterated that she did not feel Ms. Green understood the Student or his diagnosis. *Id.* The Mother also expressed that she did not feel the Student was safe at school anymore. *Id.*

48. Mr. Perkins replied to the Mother's email stating that she should bring up her concerns during the meeting set for the following day, October 4, 2018, with Ms. Green, Ms. Jones, and the special education director. P19p1. The Mother replied to that email informing Mr. Perkins the meeting had been changed to October 9, 2018. *Id.* at p2.

49. Thirty minutes later, the Mother again replied to Mr. Perkins's email asking to know what plan was in place to ensure the Student's safety at school until the meeting scheduled for October 9, 2018. P19p2. Mr. Perkins replied the same date stating the Student is safe at school and that "policies and procedures [are] in place to keep all students safe." *Id.* He also stated that he spoke with Ms. Green and that she would love to meet with the Mother in the morning and asked the Mother to schedule that meeting with Ms. Green. *Id.* Mr. Perkins indicated he had spoken with Ms. Green after his phone conversation with the Mother and Ms. Green stated the Mother had yet to meet with her. *Id.*

50. The Mother replied to Mr. Perkins's email stating that she had spoken to Ms. Green that day after school. P19p3. She also stated that she did not feel comfortable having a one-on-one meeting with Ms. Green after all of the incidents that have taken place with the Student. *Id.* The Mother again expressed that the Student's behaviors are a result of his ASD and that punishing him would only exacerbate his symptoms. *Id.* She stated she would be keeping the Student home until the meeting set for October 9, 2018. *Id.*

51. The Mother sent another email to Mr. Perkins and Ms. Jones on October 3, 2018, stating she would need to reschedule the appointment set for October 9, 2018, to October 11, 2018, because she wanted the Student's preschool teacher to be able to attend so she could share the strategies that worked well for the Student in the past. P19p3. The Mother emailed again, providing additional dates and times that would work for her and the preschool teacher. *Id.* at p4. No meeting was ever held with the Mother. Perkins T980.

The Student's Withdrawal from the District

52. On October 4, 2018, Ms. Jones called the Mother and left two messages because the Student was not in school and the occupational therapist was at the school to do testing on the Student. D21p2.

53. On October 4, 2018, the Mother emailed Mr. Perkins and Ms. Jones stating that she and her husband did not feel the District was the right place for the Student and that they would not be bringing the Student back to school in the District. P19p4. Mr. Perkins replied stating he respected the Parents decision and to let him know if they reconsidered. *Id.* at p5. October 3, 2018, was the last day of school the Student attended in the District. Mother T202.

54. The Student attended school in the District for fifteen days. Between September 10, 2018, and October 3, 2018, the Student's last day at the District, there were 18 school days. D1p1. Per

his attendance report, he was absent from school on September 14, 17, and 25, 2018, during that time period. D5p1⁸.

55. The attendance report shows, on October 5, 2018, that the Student was tardy but attended most of the school day. However, this information contradicts the Mother's testimony as well as the email sent by the Mother to Mr. Perkins on October 4, 2018. Mother T202; P19p4. As such, I find that the Student's attendance report regarding October 5, 2018, is inaccurate.

56. While in Ms. Green's class, the Student exhibited multiple behavior difficulties. Ms. Green testified the Student was noncompliant fifty percent of the time in her class, and sometimes that led to him eloping. Green T808. She also testified that the Student didn't want to follow directions ninety-nine percent of the time and he would often cry when he did not get his way. Green T828-29. Ms. Green described times when the Student would flop to the ground when he was frustrated. Green T830. However, Ms. Green also testified that, despite these behaviors, she did not feel like the Student was struggling in class. Green T789.

57. The Mother emailed Mr. Perkins and Ms. Jones again on October 4, 2018, and requested the District release the Student so the Parents could enroll him in the Washington Virtual Academy (WAVA) program. P19p5. The Mother completed the Choice Transfer Request for WAVA on October 5, 2018. P21. The Student's choice transfer request was granted as of November 19, 2018. P22p1. On that date, the Omak School District would take over responsibility for the Student's education through the WAVA program. *Id.* The Student never attended school through WAVA because his Mother felt his symptoms had gotten too severe for homeschooling. Mother T146.

58. On October 25, 2018, Ms. Jones emailed the Mother asking if she wanted the Student to come into the District to receive his speech therapy services and if she wanted to continue moving forward with an OT assessment. P23p1. The Mother did not respond to the email. *Id.* Jones T701. The Mother was aware the District would provide speech and OT services to the Student if he returned to the District. Mother T195. She did not accept the offer because the District had not addressed her concerns regarding the Student's safety. *Id.*

59. Ms. Jones testified that she offered to deliver the Student's speech services in his home so he would not have to come in contact with Ms. Green. Jones T701, 747. However, this information was not included in any of the emails or voicemails in the record, and Ms. Jones was not positive how or when she conveyed this offer to the Mother. Further, Mother did not testify to receiving such an offer. As such, I find that the District did not offer to provide services to the Student in his home.

⁸ The Student's name is not listed on D5. However, Ms. Jones testified she could identify it as the Student's attendance record based on the address and the details of the record. Jones T663.

Private Services

60. The Student and his Mother started psychotherapy with Terri Allen⁹, MS, LMHC, on April 20, 2017. P29p1; Allen T450. The therapy involved individual therapy with the Student as well as sessions with the Student and Mother together. Allen T452. They saw Ms. Allen once or twice monthly until February 23, 2018. P29p1-39. The Student was diagnosed with unspecified mental disorder, which was chosen to give Ms. Allen additional time to determine the appropriate diagnosis for the Student. Allen T451.

61. The Student and his Mother reengaged in therapy with Ms. Allen on October 22, 2018, due to the Student's diagnosis of ASD. P29 p42. Ms. Allen noticed the Student's frustration tolerance seemed to be more compromised and volatile than during the previous treatment period and the Student was having issues with eloping. Allen T462-63. The therapy continued until January 2019, when it was stopped to allow the Student to start ABA therapy. *Id.* at p63.

62. On November 6, 2018, the Student along with his Mother began therapy with Jeff Blair, MS, LMHC. P25. The therapy continued through March 21, 2019. *Id.* at p19. Mr. Blair diagnosed the Student with Post-traumatic Stress Disorder. *Id.* at p20.

63. The Student underwent speech and language services at Kittitas Valley Healthcare with Ceri Betts¹⁰, SLP, starting on November 14, 2018. P32. At the start of treatment, the Student was five years, eleven months old, but was testing at a speech level of a three year, one month old. Betts T541. This therapy was discontinued on April 24, 2019, because the Student was starting an ABA program that would be four days per week. *Id.* at 102. The Student was evaluated by Ms. Betts again in August 2019. Betts T544. At that point he tested at a three year, four month old level and exhibited severe articulation delay. Betts T545-56

64. The Mother was present during treatment sessions with Ms. Betts. The sessions were also sometimes done in conjunction with his OT treatment. Betts T546. Ms. Betts observed behavior problems with the Student during sessions including anger and attempts to flee the room or throw chairs and push Ms. Betts. Betts T551. The Student had a hard time receiving direction. Betts T552.

65. On November 27, 2018, the Student underwent a developmental and behavioral pediatric follow-up visit with Dr. Liebe at Children's Village Pediatrics. P35. She continued to diagnose the Student with ASD and noted the Student also demonstrated anxiety and rigid thinking. *Id.* at p3. She recommended the Student start ABA therapy. *Id.*

⁹ Ms. Allen has a master's degree in counseling psychology and is licensed in Washington State. Allen T447-78. She works as a private mental health practitioner and previously worked on the autism diagnostic team at Children's Village. *Id.* at T448-89.

¹⁰ Ms. Betts has an associate's degree in paralegal studies, a bachelor's degree in communicative disorders and senior services, and a master's degree in communicative disorders. Betts T537. She is a licensed speech language pathologist in the state of Washington and is nationally certified by the American Speech and Hearing Association. Betts T537.

66. The Student began OT treatment at Kittitas Valley Healthcare on December 18, 2018. P33. This treatment was started to address sensory and emotional regulation and transition difficulties related to his ASD diagnosis. *Id.* at p1. The Student's OT treatment was discontinued in April 2019, to allow the Student to participate in an ABA program. *Id.* at p13; Betts T545.

67. On January 24, 2019, the Student began ABA services with Catholic Family and Child Services. P36. This program involved three hours per day, four days per week of direct patient support and one hour per week of parent training. *Id.* at p1. This treatment continued through June 27, 2019. *Id.*

68. The Student and his Mother began seeing Ms. Allen again in July 2019 and continued treatment through the date of the hearing. P29p63-68.

Gersh Academy Cougar Mountain

69. Gersh Academy Cougar Mountain (Gersh) is a private school located in Issaquah, Washington that provides customized educational programming for children diagnosed with ASD. Sanchez-Nilsen T328. The school has eight classrooms and thirty-eight students in total, ranging in age from five to twenty-one. *Id.* The school has a six-to-one student to teacher ratio as well as support staff including paraprofessionals and registered behavioral technicians. *Id.* at T333. The school divides students into programs based on the severity of their impairments. Students with less severe limitations are in the "IMICAN" program, and students with the most significant impairments are in the "Base" program. *Id.* at T329. There is also a blended program for students who fall somewhere in the middle. *Id.* The school provides all common core academic classes, including English/language arts, mathematics, social studies, physical education, science, art, and music as well as therapeutic services such as speech, OT, and counseling. *Id.* at T329. Gersh can also provide ABA services. *Id.*

70. Gersh is board certified by the state of Washington and aligned with all Washington Board of Education requirements. Sanchez-Nilsen T330. All students at Gersh have IEPs and contact with typically developing peers is limited to field trips and community building projects. *Id.* at T331; Yu T597. All staff members at Gersh are trained in Crisis Prevention Intervention, which teaches individuals how to deescalate children using verbal strategies and other approaches prior to using restraints. Sanchez-Nilsen at T326, 339, 385. Staff undergo this training yearly. *Id.* All Students at Gersh receive extended school year services. *Id.* at T386.

71. On March 27, 2019, the Student visited Gersh. P40. During the visit at the school, the Student attempted to elope and was put into a hold by staff member Andrea Vanhorn. *Id.* at p3. Based on the observations done at that visit, Gersh determined the Student would be a "great fit" for the school and recommended he be in the IMICAN K-2 program. *Id.* at p2.

72. Luisa Sanchez-Nilsen¹¹ is the executive director and principal at Gersh. Sanchez-Nilsen T324. Ms. Sanchez-Nilsen observed the Student during his visit at the school and opined that Gersh would be able to serve the Student. Sanchez-Nilsen T362. She stated that it would take roughly two weeks for the school to do a baseline assessment and set up appropriate programming for the Student. *Id.* at 363.

73. Ms. Katy Yu¹², clinical supervisor at Gersh, testified at the hearing. Yu T564. Ms. Yu is a Board Certified Behavior Analyst (BCBA) and conducts assessments and writes treatment plans for the students at Gersh. Yu T563, 565, 568. She does not provide direct services to the students, but supervises the behavior technicians who do provide direct services. *Id.* at T568.

74. Ms. Yu reviewed a psychological evaluation performed by Dr. Steve Tutty¹³ and his recommendations for the Student. In her opinion, Gersh would be able to implement all of the recommendations. Yu T587. Further, she observed the Student when he visited Gersh and believes he would be a good fit at the school. *Id.* at T594.

75. Ms. Blair opined that Gersh would not be an appropriate placement for the Student because it would be too restrictive in that it would prevent the Student from having access to typically developing peers. Blair T1028, 1031. She also opined that the distance between the Student's home and the school would be difficult for the Student as it would require a long commute or living away from portions of his family during the school week. *Id.* at T1029.

Terri Allen

76. On July 23, 2019, Ms. Allen wrote a letter on the Mother's behalf giving her opinion of the Student and his impairments. P30. Ms. Allen opined that the Student's behavior difficulties were the result of both lagging skills and distress from external trauma. *Id.* at p1. In regards to lagging skills, Ms. Allen opined the Student was lagging in all five primary categories – executive functioning, language/communication skills, cognitive flexibility, emotional regulation, and social skills. *Id.* at p3. In her opinion, the focus should be on these skill deficits rather than the resulting behavioral problems. *Id.* Ms. Allen opined that her recommendations for the Student could probably be implemented in a public school setting. Allen T521.

77. In regards to external trauma, Ms. Allen noted that the Student engaged in "fight or flight" behaviors during his therapy period of October 2018 to January 2019. P30p4. These were new behaviors for the Student. She also noted the Student had weight gain which may be attributed

¹¹ Ms. Sanchez-Nilsen has a bachelor's degree in business, a credential in reading recovery, and a doctorate in educational leadership. Sanchez-Nilsen T324-25.

¹² Ms. Yu has a master's degree in applied behavior analysis and a bachelor's degree in psychology. Yu T563. She has never been employed as a teacher or worked in a public school. Yu T596, 597.

¹³ Dr. Tutty is a licensed clinical psychologist and the clinical director of NW Family Psychology. P26p1. He has a bachelor's degree in psychology, a master's degree in counseling psychology, and a PhD in clinical psychology. Tutty T222.

to self-soothing behaviors for the Student. *Id.* at p5. Ms. Allen attributed these changes in the Student to “mistreatment by his teacher” based on the Mother’s report to Ms. Allen. *Id.* Ms. Allen also concurred with the diagnosis of Post-traumatic Stress Disorder that was rendered by Mr. Blair. *Id.*

78. Ms. Allen did not observe any instruction of the Student at the District or speak with anyone at the District regarding the Student or his behaviors. Allen T491. Ms. Allen formed all her opinions of the Student based on her own observations, communication with the Parents and Student, and review of medical records from Dr. Liebe, Mr. Blair, and Dr. Tutty. Allen T521. As a treating provider, Ms. Allen’s opinions regarding the Student’s impairments are given significant weight.

79. However, Ms. Allen did not speak to anyone at the District about the Student’s school experience, and the Student had been removed from the District for over nine months at the time she wrote her recommendations. As such her opinion that Ms. Green’s actions caused the Student’s behavior regression is given limited weight.

Dr. Steve Tutty

80. On September 9, 2019, Dr. Tutty, completed an Independent Psychological Evaluation of the Student. P27. As part of this evaluation he had four sessions with the Student. Tutty T222. Dr. Tutty conducted a clinical interview and a mental status evaluation of the Student. He also conducted the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), Woodcock-Johnson Test of Achievement (WJ-III), Behavioral Rating Inventory of Executive Function (BRIEF), Asperger Syndrome Diagnostic Scale (ASDS), Social Communication Questionnaire (SCQ), and Autism Diagnostic Observation Schedule – Second Edition (ADOS-II). P27p3. In addition to the testing, Dr. Tutty reviewed the Student’s school record, surveillance videos of the Student’s interaction with Ms. Green on September 27, 2018, and the Student’s medical records from Ms. Allen, Mr. Blair, Catholic Family and Child Services, and Kittitas Valley Healthcare. *Id.* Dr. Tutty also interviewed the Student’s Sister on September 8, 2019. *Id.* at p4.

81. Based on the testing completed and the documentation reviewed, Dr. Tutty diagnosed the Student with ASD (Level 3) and Intermittent Explosive Disorder (IED). P27p8. Dr. Tutty noted that based on a review of the medical records, the Student’s ASD had worsened since his initial diagnosis in 2018. *Id.* at p9. Dr. Tutty also noted that he did not find any documentation that would account for the Student’s worsening condition other than the interactions between the Student and Ms. Green. *Id.* Based on this, Dr. Tutty opined that it is “with reasonable medical certainty that [the Student’s] autistic disorder has been exacerbated, as well as the development of a second disorder – intermittent explosive disorder – is [sic] due to the direct and proximate cause of the aggressive behavior by Ms. Green.” *Id.* Dr. Tutty further opined that if the Student returned to the District, it is likely his conditions would worsen over time. *Id.* at p10.

82. Dr. Tutty made several recommendations for the Student. In regards to the classroom setting, Dr. Tutty opined that the Student’s impairments would make mainstream education difficult and would require a specialized curriculum. P27p10. He did not believe the District could provide the type of curriculum necessary, and, even if it could, the conflicts with Ms. Green and the Student’s fear of Ms. Green would “jeopardize his academic and mental health competencies.”

Id. Dr. Tutty recommended the Student attend school at Gersh Academy, or somewhere with a similar curriculum that specialized in providing curriculum for students with severe autistic disorder. He also recommended new academic testing if the Student's ASD and IED symptoms improve over time to determine whether any academic delays need to be addressed. *Id.*

83. In regards to the home setting, Dr. Tutty recommended ABA therapy three to four days per week to improve the Student's social and emotional deficits. P27p10. He also recommended the Student and Parents map out the Student's assignments at the beginning of the week and perform homework in short sprints to maintain a higher level of novelty. *Id.* at p11. He further recommended using a timer during breaks to give the Student an opportunity to prepare for transitions and noted the Student would benefit from sketching out different segments of a word passage to help with his perceptual reasoning when doing reading homework. *Id.*

84. Dr. Tutty also provided clinical recommendations. P27p11. He recommended the Student begin working with a counselor skilled in cognitive behavioral therapy and that the Student's Parents work with the counselor on parent management strategies to improve the Student's functioning at home. *Id.* He also recommended the Student continue to receive speech and language services and that the Student experiment with stress management aids at night to improve his sleep quality. *Id.* It was further recommended the Student have regular contact with his pediatrician to monitor any psychotropic medications that could be prescribed and that the Student be reassessed in two to three years to see if other services may be helpful. *Id.*

85. Dr. Tutty did not speak with anyone from the District or with the Student's other medical providers as part of his evaluation. Tutty T272. Further, Dr. Tutty does not have experience teaching and has no knowledge of the services available in the District. Tutty T295.

86. As a treating provider who performed extensive testing on the Student, Dr. Tutty's opinion regarding clinical and home recommendations are given significant weight. However, because Dr. Tutty did not speak with anyone from the District, does not have experience as an educator, and has no knowledge of services available in the District, his opinion regarding Ms. Green being the cause of Student's medical deterioration and his opinions regarding the ability of the District to provide the curriculum needed for the Student is given limited weight.

Mel Blair

87. Ms. Blair opined that the District had adequate programs and providers to appropriately serve the Student. Blair T1031-32.

88. Ms. Blair opined that students with ASD often have behavioral issues because they are experiencing sensory processing issues. Blair T997. She also opined that it is important not to over test students with ASD because it can cause stress for the student. Blair T989.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

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

The IDEA

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

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

Id. at 206-07 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Id.* at 200-01.

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

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

Endrew 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 and warrant a remedy only if they:

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

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

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2018-2019 school year by failing to implement the Student's March 2018 Individualized Education Program (IEP)

6. Washington law specifies the manner in which a school district must handle the transfer of a student eligible for special education within the state of Washington:

If a student eligible for special education transfers from one school district to another 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 either:

- (a) Adopts the student's IEP from the previous school district; or
- (b) Develops and implements a new IEP that meets the applicable requirements in WAC [392-172A-03090](#) through [392-172A-03110](#).

WAC 392-172A-03105(4) (emphasis added).

7. Further, only material failures to implement an IEP violate the IDEA. *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007). Minor discrepancies in the services required by the IEP do not violate the IDEA. *Id.*

"[S]pecial education and related services" need only be provided "*in conformity with*" the IEP. [20 USC §1401(9).] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.

* * *

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

Id. at 821-22 (italics in original).

8. The Parents argue the District failed to implement the Student's March 2018 IEP by failing to deliver any speech and language specially designed instruction (SDI) to the Student during the 2018-2019 school year. The undersigned ALJ agrees.

9. The Student transferred from ESD to the District prior to the start of the 2018-2019 school year. The Student's March 2018 IEP, developed by ESD, was in effect when he started school at the District. The District never developed or implement a new IEP for the Student. The March 2018 IEP called for 30 minutes of speech and language SDI per week delivered by an SLP in a special education setting. The District was aware of the Student's IEP when he started school in the District. However, the Student received only fifteen minutes of SDI from a SLPA during the 2018-2019 school year.

10. The District argues that it tried to implement the IEP and provide SDI to the Student, but that his frequent absences prevented it from delivering the SDI. During the four weeks that the Student attended school in the District, he was absent three times, on Friday September 14, Monday September 17, and Tuesday September 25, 2018. The District witnesses testified that the SLP employed by the District only provides services on Thursdays. The Student did not miss school on a date that the SLP would be present to deliver services, so it is unclear how his absence on other dates would affect his ability to receive his SDI.

11. The District also argues that it attempted to deliver SLP services to the Student, even offering to deliver the services in the Student's home, but the Parents refused. While Ms. Jones testified that she thought she offered to deliver SLP SDI in the Student's home, the evidence did not support a finding that any such offer was ever made to the Parents. However, the District did contact the Mother to see if the Student would come in to the District for his SDI after he was removed from the District.

12. Finally, the District argues that because the Parents did not withdraw the Student from the District because of the lack of SLP services, or bring this discrepancy in services to the attention of the District, the failure to provide the services was not significant such that it denied the Student FAPE. While the lack of SLP services may not have been the Parents' main concern regarding the Student, that does not negate the District's failure to provide any SLP services for the time period he was enrolled in the District. The only session the Student had with an SLP provider was both shorter than his IEP called for (fifteen minutes rather than thirty minutes) and given by the wrong provider (SLPA rather than an SLP).

13. While the Student was only enrolled in the District for a short time, he was still entitled to receive services comparable to the services called for in his March 2018 IEP. Fifteen minutes total with an SLPA is not comparable to thirty minutes per week with an SLP. Further, the failure of the District to provide any services over a four week period is a material failure to implement the Student's IEP. Because the Student was deprived of an educational benefit, this failure to implement the Student's IEP denied the Student FAPE.

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2018-2019 school year by failing to evaluate the Student after his referral for an evaluation by the Ellensburg School District, after the District became aware of the Student's Autism Spectrum Disorder diagnosis, and after the Student experienced challenges in the classroom because of his disability

14. Special education reevaluations must be completed within "[t]hirty-five school days after the date written consent for an evaluation has been provided to the school district by the parent." WAC 392-172A-03015(3)(a). Further, school districts "must ensure that...[t]he student is

assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” WAC 392-172A-03020(3)(e).

15. The Parents argue the District erred by failing to perform a “full evaluation” of the Student when he was referred for a reevaluation by the Ellensburg School District, when the District became aware of the Student’s ASD diagnosis, and when the Student displayed difficulties in the classroom. Inherent in this argument are the questions of whether the District reevaluated the Student, and whether the District reevaluated or proposed to reevaluate the Student in all areas of suspected disability.

16. By the Mother’s own testimony, the consent for evaluation form was signed on September 7, 2018. The District had 35 school days to complete the reevaluation, which gave the District until October 26, 2018. The District began a reevaluation in the area of OT at the start of the school year. Sensory profiles were completed by Ms. Sanders and Ms. Green and a classroom observation was performed by Ms. Bryant, the District’s occupational therapist. However, before the reevaluation could be completed and a reevaluation team meeting held, the Parents removed the Student from school. After the Student was removed, the District contacted the Parents on October 25, 2018, asking if the Parents wanted to bring the Student in to complete his OT reevaluation to which the Parents did not respond. As such, the District reasonably attempted to complete the Student’s reevaluation within the required timeline, but was unable to do so based on the Parents actions.

17. However, the Parents’ main argument focuses on the type of reevaluation being proposed by the District. The Parents argue they consented to a “full evaluation,” not just an OT reevaluation and that an OT reevaluation was insufficient given the information available to the District.

18. While the Mother testified that she requested a “full evaluation,” none of the District employees remembered her making such a statement.¹⁴ Further, even if she did request a “full evaluation” it is unclear what that would entail. The Mother was unable to explain what was meant by a “full evaluation” during her testimony or what areas she was requesting the Student be assessed in beyond OT. No evidence was presented showing the Parents requested the Student be assessed in any area other than OT.

19. Further, the IDEA does not give Parents the right to dictate the areas in which a school district must assess a student as part of a special education evaluation. See *Letter to Unnerstall*, 68 IDELR 22 (OSEP 2016); *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834, 2019 WL 2023567 (citing *Avila v. Spokane Sch. Dist.* 81, 686 F. App’x 384, 385 (9th Cir. 2017)). The

¹⁴ The Parents argue that even if the District was unaware of the request for a “full evaluation” while the Student was in school, they were aware of the request once the Complaint was filed. However, like IEPs, the appropriateness of an evaluation must be determined in light of what was known, or should have been known, at the time the evaluation was conducted. Whether an evaluation is appropriate should not be judged in hindsight. This is the so-called snapshot rule. See *Adams v. Oregon*, 195 F.3d 1141, 31 IDELR 130 (9th Cir. 2001).

Mother requesting specific assessments alone would not require the District to assess the Student in those areas.

20. The Parents also argue that the reevaluation referral from ESD put the District on notice that the Student needed to be reevaluated in areas beyond OT. However, no evidence was presented showing the District was aware of this referral. It does not appear the referral form was submitted to the District along with the Student's other special education paperwork. Regardless, the referral states that the reason for the reevaluation referral is that "[Student] has been provided a new medical diagnosis of Autism, and his medical provider referred him for further evaluation, specifically with concerns for sensory processing." The District was pursuing an OT reevaluation, which would cover sensory processing issues, from the moment the Student started school in the District. As such, even if the District had seen the reevaluation referral from ESD, it does not appear that the District's proposed reevaluation would have been any different.

21. The Parents further argue the Student's diagnosis of ASD was sufficient to put the District on notice that it should reevaluate the Student in areas beyond OT. However, again, the Parents fail to state in which areas the Student should have been evaluated. Dr. Liebe from Children's Village, who diagnosed the Student with ASD, did not refer the Student for evaluation in any area other than OT. As Ms. Blair testified, performing unnecessary testing on students can be detrimental, so it would not be reasonable for a school district to put every student diagnosed with ASD through the same battery of testing without evidence that such testing was necessary.

22. Finally, the Parents argue the District should have evaluated the Student in areas other than OT based on the Student's behavioral difficulties in the classroom. The reevaluation of the Student was initiated at the beginning of the school year, prior to any behavioral challenges taking place in the classroom. At that point, the District was not aware of any behavioral challenges when it determined in what areas to assess the Student. It based the scope of the reevaluation on the referral from Dr. Liebe.

23. Once the Student started school, the Student did experience behavioral challenges. However, the Student was only in the District for four weeks. Had the Student stayed in the District long enough for the District to complete the OT assessment and hold a reevaluation team meeting, Ms. Green and the Parents could have brought up the Student's behavioral difficulties at that point and discussed whether further assessments were needed.

24. The Mother informed Ms. Green and Mr. Perkins that the Student's behavioral difficulties were symptoms of his ASD. However, Ms. Blair testified that an OT assessment and whatever services could result from that may address the Student's behavioral problems. Again, had the Student remained in the District long enough for the District to hold a reevaluation team meeting, the team could have considered whether the OT assessment was sufficient to address the Student's behavioral challenges.

25. The District proposed to reevaluate the Student in the area of OT. This is the area that was referred by Dr. Liebe and was included in the reevaluation referral from the Student's prior school district. Further, the Student did not attend school in the District long enough for the District to complete any reevaluation or hold a reevaluation team meeting. As such, the District did not violate the IDEA in failing to reevaluate the Student.

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2018-2019 school year by denying the Parent full participation in the Student's 2018 reevaluation when it changed the course of the evaluation without informing the Parents

26. A district must provide a PWN to the parents of a child eligible or referred for special education a reasonable time before it proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE to the student, 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; 34 CFR 300.503(a).

27. The IDEA requires school districts to provide written notice to parents *prior* to the effective date of an action, not after the fact. See 20 USC §1415(b)(3) and (c)(1); WAC 392-172A-05010; 34 CFR §300.503. Moreover, written notice must be provided "a reasonable time" prior to the effective date. WAC 392-172A-05010(1); 34 CFR §300.503(a); *Letter to Chandler*, 59 IDELR 110 (OSEP 2012). "The purpose of the notice is to provide sufficient information to protect the parents' rights under the Act." *Kroot v. District of Columbia*, 800 F. Supp. 976, 982 (D.D.C. 1992).

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

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

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

29. The Parents argue the District violated the IDEA and denied the Student FAPE when it initiated a reevaluation of the Student without providing PWN to the Parents. They argue the failure to issue a PWN prior to initiating the reevaluation prevented the Parents from fully participating in the decision-making process regarding the Student's education. The undersigned ALJ agrees.

30. A PWN was issued by ESD on June 4, 2018, proposing a reevaluation of the Student and indicating the reevaluation should be done by the District because the Student had recently moved into the District. The District, however, never received a copy of this prior written notice. Despite this, the District initiated a reevaluation of the Student in the area of OT when the Student started school in the District in September 2018. No evidence was presented to show that a PWN was issued by the District regarding this reevaluation.

31. Further, it is clear that the parties had very different understandings of the scope of the Student's reevaluation. The District initiated an OT reevaluation. However, the Parents believed the Student would be undergoing a "full evaluation." While it is not clear what a "full evaluation" entails, it is clear the Parents believed the Student would be assessed in areas beyond OT. Had a PWN been issued by the District prior to the initiation of the reevaluation, the Parents would have been on notice of the District's intention and had the opportunity to notify the District that they did not agree to the scope of reevaluation proposed. The Parents could have explained what additional assessments they believed the Student needed as a result of his ASD diagnosis. A

PWN is intended to put parents on notice of a District's proposed action so that they can provide valuable input. The failure to issue a PWN here contributed to a miscommunication between the parties regarding the scope of the reevaluation and, in turn, prevented the Parents from actively participating in decision-making regarding the Student.

32. The failure to issue a PWN also prohibited the Parents from providing informed consent to the reevaluation. "A school district must obtain informed parental consent, prior to conducting any reevaluation of a student eligible for special education services..." WAC 392-172A-03000(3)(a). The consent form signed by the Mother was blank and did not provide information regarding the scope of the reevaluation. Had a PWN been issued before the consent form was signed, the Mother may have known what she was agreeing to, even if the form wasn't complete at the time of signature. While the Mother signed the consent form, it is clear she was not providing *informed* consent to the reevaluation.

33. The failure to issue a PWN is a procedural violation. However, because this violation prevented the Parents from meaningfully participating in the reevaluation process, it impeded the Parents' right to participate in decision-making regarding the Student's education. This denied the Student FAPE.

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2018-2019 school year by denying the Parents full participation in developing and/or revising the Student's IEP when it did not provide the Parents with the data and information needed to fully participate

34. The Parents argue that by failing to reevaluate the Student and failing to properly notify the Parents about the scope of the reevaluation, the District denied the Parents their right to participate in the Student's education, thus denying him FAPE. This appears to be a restatement of issues previously addressed. As discussed previously, while the District's failure to evaluate did not violate the IDEA, the District's failure to provide prior written notice and properly inform the Parents of the scope of the proposed reevaluation was a violation. This violation denied the Parents the right to participate and denied the Student FAPE. As such, no further discussion is necessary regarding this issue.

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2018-2019 school year by failing to provide the Student with an appropriate educational program for the 2018-2019 school year, including providing no specially designed instruction or related services

35. The Parents argue the District erred in failing to provide an appropriate educational program for the 2018-2019 school year in four ways: (1) by failing to properly reevaluate the Student, (2) by failing to provide speech services called for in his March 2018 IEP, (3) by failing to provide the supports laid out by Ms. Sanders in the kindergarten transition report, and (4) by failing to intervene when the Mother complained of aggressive acts by Ms. Green.

36. The first two are restatements of issues previously discussed. The District did not err in failing to reevaluate the Student because it was not given adequate time to do the reevaluation due to the Student being removed from the District after four weeks of school. Further, the Parents have not shown that the scope of the reevaluation proposed by the District was

inappropriate. In regards to the delivery of speech services during the 2018-2019 school year, the undersigned ALJ has already found that the District erred in failing to provide the speech services called for in the Student's IEP.

37. The Parents next argue that the District failed to provide an appropriate educational program to the Student by failing to provide all of the behavioral supports laid out in the kindergarten transition summary written by Ms. Sanders. While these supports may have been helpful to the Student, they were not included in his IEP. The Parents have provided no legal authority requiring the District to utilize techniques used by a previous teacher, no matter how successful. Further, no evidence was presented to show anyone from the District received the kindergarten transition summary or was aware of the specific techniques used by Ms. Sanders. As such, the District did not violate the IDEA in failing to provide these behavioral supports.

38. The Parents' final argument is that the District's failure to take action when the Mother expressed concern about Ms. Green's behavior resulted in the Student being denied an appropriate educational placement for the 2018-2019 school year. They argue Ms. Green's behavior amounted to bullying and resulted in the Student being removed from school.

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

40. While the undersigned ALJ in no way minimizes the Parents' concern for their child's safety, the evidence in this case does not support a conclusion that the Student was the victim of bullying by his teacher. It is clear the Student exhibited behavioral challenges in the classroom, and that, at times, Ms. Green's techniques were not successful at managing those behaviors. However, others who witnessed many of the interactions of concern to the Mother did not believe Ms. Green was behaving inappropriately or in an unsafe manner towards the Student. Further, those who had observed Ms. Green's teaching reported no concerns about her being aggressive with students. As such, based on the available evidence, the Parents have not shown that the Student was bullied by Ms. Green.

41. Other than the District's failure to provide speech services, as addressed previously, the Parents have not proven that the District failed to provide the Student an appropriate educational program for the 2018-2019 school year.

Whether the Parents are entitled to their requested remedies

42. The Parents have proven that the District violated the IDEA and denied the Student FAPE when it failed to provide SLP services called for in his IEP and when it failed to issue a PWN for the September 2018 reevaluation. As such, the Parents are entitled to remedies.

43. The Parents request compensatory education in the form of prospective placement at Gersh. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied

in the first place.” *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005), cited with approval in *R.P. v. Prescott Unif’d Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). Compensatory education is not a contractual remedy, but an equitable one. “There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia*, supra, 401 F.3d at 523-524. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Id.* 524.

44. Further, parents who unilaterally enroll a student in a private school are entitled to reimbursement only if 1) the district placement violated the IDEA, and 2) the parents’ private school placement is proper under the IDEA. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Thus, parents who unilaterally change their child’s placement do so at their own financial risk. *Burlington v. Dep’t of Ed. of Mass.*, 471 U.S. 359, 374 (1985).

45. Prospective placement at Gersh is not an appropriate remedy for the District’s IDEA violation. The Student was denied FAPE for the four weeks he was enrolled in the District. After that date, the Parents refused to return the Student to the District for services or to complete the reevaluation proposed by the District. Because of this, the District was unable to perform a reevaluation or develop a new IEP for the Student. This in turn prevented the District from providing the Student with a proposed educational program for the 2018-2019 school year. As such, even if placement at Gersh is proper, the Parents have not proven the District’s placement violated the IDEA, namely because they prevented the District from acquiring the information needed to propose a placement.

46. Further, placement at Gersh would put the Student in a much more restrictive environment than his most recent IEP indicated was appropriate. Gersh would provide the Student with almost no exposure to typically developing peers, which would be a significant change from the Student’s March 2018 IEP, which called for the Student to be in general education 98% of the time. While the severity of Student’s impairments may have increased since the 2018 IEP, the Parents have not proven that placement in a 100% special education setting would be appropriate.

47. Also, Gersh is located a significant distance from the Parents’ home. This would require the Mother and the Student to relocate temporarily during the week, or subject the Student to a significant commute. Both options could have a detrimental effect on the Student as the testimony of Ms. Blair established.

48. Additionally, the District was not given the opportunity to create an appropriate educational program for the Student due to the Student being removed from the District after only four weeks. For these reasons, even if the evidence established that Gersh is an appropriate placement for the Student, prospective placement at Gersh, is not an appropriate form of compensatory education in the given circumstance.

49. As discussed above, the Parents have provided sufficient evidence to show that the Student did not receive any speech and language SDI as required by his March 2018 IEP. As such, compensatory education is an appropriate remedy. Per the IEP, the Student was supposed to receive thirty minutes of SDI per week. The Student attended school in the District for four weeks. After this point, the Parents refused to bring the Student back to the District despite the

District's offer to provide services. The Student was entitled to two hours of speech SDI during his time in the District. As such, the Student is awarded two hours of speech and language SDI to be delivered by a District SLP or other SLP with the appropriate education, training, and skills selected by the District. The SDI should be delivered within three months of the decision and provided at a time and date mutually agreeable to the parties.

50. Because the District was unable to complete the reevaluation it began in September 2018, the District shall conduct a full reevaluation of the Student. This reevaluation should include the OT assessment previously recommended by the Student's medical provider as well as any additional assessments as warranted by the Student's medical records, information provided by the Parents, and current needs identified by the District.

51. The Parents removed the Student from school in the District primarily due to concerns regarding the behavior of his teacher, Ms. Green. Ms. Green teaches kindergarten, and should the Student return to school in the District, he would likely be in first grade. As such, any concern regarding the Student interacting with Ms. Green should be alleviated.

52. The Parents request additional remedies in the form of reimbursement for private services and reimbursement for the evaluation performed by Dr. Tutty. None of these remedies are warranted given the District's violations.

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

ORDER

1. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education by:
 - a. Failing to implement the Student's March 2018 IEP by failing to deliver speech and language specially designed instruction, and
 - b. Failing to issue a prior written notice prior to commencement of the reevaluation of the Student in September 2018.
2. The Parents are awarded the remedies at Conclusions of Law 49 and 50.
3. All other remedies requested by the Parents are denied.

Signed at Seattle, Washington on December 21, 2019.



Dana Diederich
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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

Parents

[REDACTED]

Andrew Perkins, Superintendent

[REDACTED] School District

[REDACTED]

Jeannette A. Cohen, Attorney at Law
2223 112th Avenue NE Suite 202
Bellevue, WA 98004

Curtis M. Leonard, Attorney at Law
Craig S. Peters, Attorney at Law
Patterson Buchanan Fobes & Leitch, Inc., P.S.
1000 Second Avenue, 30th Floor
Seattle, WA 98104-1064

cc: Administrative Resource Services, OSPI