



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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October 23, 2019

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In re: West Valley School District
OSPI Cause No. 2019-SE-0087
OAH Docket No. 06-2019-OSPI-00793

Dear Parties:

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

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

Sincerely,

A handwritten signature in cursive script that reads "Dana Diederich".

Dana Diederich
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:

OSPI CAUSE NO. 2019-SE-0087

OAH DOCKET NO. 06-2019-OSPI-00793

WEST VALLEY 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 Yakima, Washington, on August 14 – 16, 2019. The Mother of the Student whose education is at issue¹ appeared and was represented by Kerri Feeney, attorney at law. The West Valley School District (District) was represented by Kevin O'Neill and Jon Dalley, attorneys at law. Judi Lewis, Special Services Coordinator for Assessment and Mental Health Liaison also appeared for the District.

STATEMENT OF THE CASE

Procedural History

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on June 5, 2019. The Complaint was assigned Cause No. 2019-SE-0087 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered on June 6, 2019, which assigned the matter to ALJ Courtney Beebe.

On June 10, 2019, the Parents filed a Motion of Prejudice pursuant to Revised Code of Washington (RCW) 34.12.050, requesting the case be assigned to a new ALJ. An Order of Reassignment of Administrative Law Judge was entered on June 13, 2019, reassigning the case to ALJ Diederich.

The District filed its Response to the Complaint on June 17, 2019. On June 19, 2019, the parties agreed in writing to waive the resolution meeting. As such, an order was issued on June 25, 2019, adjusting the decision due date to August 3, 2019.

Prehearing conferences were held on July 3 and July 12, 2019. The First Prehearing Order was entered on July 26, 2019. In the order the original hearing date set for July 18, 2019, was stricken, and the hearing was set for August 14 – 16, 2019. The decision due date was also continued to thirty days after the close of record.

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."

On July 25, 2019, the District filed a Motion to Dismiss. On July 29, 2019, the Parents filed a response to the Motion to Dismiss and also filed a motion requesting a restatement of the issues. On July 30, 2019, the District filed a Motion to Compel Discovery. A prehearing conference was set for August 1, 2019, to discuss these issues.

The Second Prehearing Order was issued on August 5, 2019. In response to the Parents' request for a restatement of the issues, the request was granted in regards to issues one through four. The fifth issue stated by the Parents was not raised in the initial Complaint, thus was not included in the final issue statement. Also, the District's Motion to Dismiss was denied and the District's Motion to Compel Discovery was denied in part. At the prehearing conference the District requested it be allowed to recall witnesses who were called by the Parents. This request was granted.

Due Date for Written Decision

As set forth in the First Prehearing Order dated July 26, 2019, the due date for a written decision in this matter was continued to thirty days after the record of the hearing closes at the District's request. An Order Setting Due Date for Post-Hearing Briefs was issued on August 21, 2019. This order set the deadline to submit post-hearing briefs and the close of the record on September 16, 2019. The decision due date was set for October 16, 2019.

The parties and ALJ were notified on September 4, 2019, that the court reporter would not be able to provide the completed transcript by September 9, 2019, as she had previously stated. The court reporter informed the parties the completed transcript would be available by September 16, 2019. Based on this change, the District requested the due date for post-hearing briefs be extended to September 23, 2019. This request was granted and an order was issued on September 6, 2019, setting the due date for post-hearing briefs and the close of the record on September 23, 2019. The record closed when the parties timely submitted their briefs on that date. As such, the decision due date is October 23, 2019.

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D14, D16; and

Parents' Exhibits: P1 - P3, P4 (except page 5), P5 – P7, P8 (only pages 1-3), P9 (only pages 1-2), P10 - P49, P51 – P52.

Witnesses Heard (in order of appearance):

Judi Lewis, District Special Services Coordinator for Assessment and Mental Health Liaison;
Shelly Jaeger, Secretary at Wide Hollow Elementary School;
Richard Ferguson, Principal at Wide Hollow Elementary School;
Russ Tuman, Principal at West Valley Middle School;
Kathy Perez, 5th grade Humanities teacher at West Valley Middle School;
Tricia Parker, MEd, LMHC;
Heather Rodriguez, MSW, LICSW, CMHP;
Student's Mother;

Lionel Enns, Ph.D., BCBA-D;
Nick Clark, Assistant Principal at West Valley Middle School;
Amber Stiles–Gill, District Response to Intervention (RTI) Instructional Coach/Intervention Teacher;
Crystal McDonald, Assistant Principal at West Valley Middle School;
Edwin Johnson, 5th grade Math and Science teacher at West Valley Middle School;
Lisa Forrest, District School Psychologist.

ISSUES

As set forth in the First and Second Prehearing Orders, the issues for the due process hearing are:

- 1) Whether the District violated its affirmative ongoing child find obligation by ignoring red flags raised by the Student's poor academic record, attendance, behavior, discipline issues, and parental input by failing to evaluate the Student by the end of the first quarter of the 2018-2019 school year;
- 2) Whether the District misapplied standards set out in the Washington Administrative Code related to Specific Learning Disability by determining without evaluation that the Student's lack of progress was due to "chronic absenteeism;"
- 3) Whether the District misapplied standards set out in the Washington Administrative Code by determining that the Student has a mental health diagnosis that precludes him from being eligible for special education without evaluation;
- 4) Whether the District misapplied the standards set out in the Washington Administrative Code applicable to the discipline of students who have been referred for a special education evaluation and who subsequently violate a school disciplinary code of conduct;
- 5) And, whether the Parents are entitled to their requested remedies:
 - i. Declaratory relief that the District denied the Student a free appropriate public education (FAPE) during the 2017-2018 and 2018-2019 school years up to and including the date of his complaint;
 - ii. A complete initial evaluation to determine all areas of need, based on his documented social, emotional, and academic deficiencies. Due to the District's inappropriate refusal to evaluate the Student earlier in response to the Parents' referral, the evaluation should be expedited;
 - iii. Training for school staff involved in making Individualized Education Program (IEP) eligibility decisions regarding the factors to be considered. The District's failure to apply eligibility factors correctly is potentially denying numerous students appropriate supports. The training should be provided by an individual who is not employed by a school district or an educational service district;

- iv. Training for school staff involved in manifestation determination review (MDR) meetings regarding the factors to be considered when a student is suspected of having a disability, or has been referred for determination of Individuals with Disabilities Education Act (IDEA) eligibility, and has engaged in conduct that violates a code of student conduct and results in disciplinary action;
- v. Compensatory education and supplemental services in an amount to be proven at trial. The purpose of compensatory services is to allow the Student to obtain the educational benefit he would have received but for the District's violations of the IDEA and denial of FAPE;
- vi. Or other equitable remedies, as appropriate.

FINDINGS OF FACT

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

Educational History

1. During the 2014-2015 school year, the Student was in first grade at Wide Hollow Elementary School in the District. During that year, the Student had 2.5 excused absences, 1.5 unexcused absences, and 15 tardies. Exhibit P4p1². On the Student's report card for that year, under the category of "Self-Directed Learner – Work Independently, Stays on Task, Follow Directions and Expectations, Makes Appropriate Learning Choices, Plans and Manages Time/Material," the Student scored a 1 for the first semester, indicating he was below standard, and scored a 2 for the second semester, indicating he was working towards standard. *Id.*
2. During the 2015-2016 school year, the Student was in second grade and attended school in the Selah School District. Exhibit P5. At the end of his second grade year, the Student's reading proficiency grade level was 2.4. *Id.* at 2.
3. During the 2016-2017 school year, the Student was in third grade in the Selah School District. Exhibit P6. The Student had just under 9 excused absences, less than .5 unexcused absences, and 27 tardies during the school year. *Id.* at p2. He was found to be performing below grade level in reading and not meeting grade level expectations in math. *Id.* at p1-2. On the standardized Smarter Balanced test, the Student tested at Level 2 in Mathematics, indicating he "has nearly met the achievement standard and may require further development to demonstrate the knowledge and skills in mathematics needed for likely success in future coursework." *Id.* at p3. This score was below the school, district, and state averages. *Id.* On the standardized Smarter Balanced ELA/Literacy test, the Student scored a Level 1, meaning he "has not met the

² Citation to the exhibits of record is by exhibit and page number, e.g. Exhibit P4p1 is a citation to Parents' Exhibit P4 at page 1.

achievement standard and needs substantial improvement to demonstrate the knowledge and skills in English language arts/literacy needed for likely success in future coursework.” *Id.* at p.4. This score was also well below the school, district, and state averages. *Id.*

2017-2018 School Year

4. During the 2017-2018 school year, the Student was in fourth grade. The Student started the 2017-2018 school year in the Selah School District. Exhibit P7. The Student transferred to the West Valley School District and began attending Wide Hollow Elementary on April 16, 2018. Exhibit P8p3; P51p1. The Student had 19 disciplinary incidents at the Selah School District during the 2017-2018 school year.

5. When a student transfers into the District, records are requested from the previous school district. These records include education information, attendance records, and student grades. Jaeger T157³.

6. Upon transferring to the District in April 2018, the Selah School District provided the District records for the Student from the 2015-2016, 2016-2017, and 2017-2018 school years. Exhibits P5 – P7. Richard Ferguson, the principal of Wide Hollow Elementary in the District, also spoke with the principal of the school the Student transferred from in the Selah School District. Ferguson T166-67. Mr. Ferguson requested information on any pending discipline for the Student and inquired about what types of programs were successful for the Student. Specifically, he discussed a Check In / Check Out⁴ (CICO) system that the Selah School District had used with the Student and found to be successful. Ferguson T168. A CICO system was not implemented for the Student at this time in the District.

7. The Student completed Smarter Balanced standardized tests in Literacy and Mathematics in the spring of 2018 after starting at Wide Hollow Elementary. Exhibit P10. The Student scored in the Level 1 range, the lowest level, on both tests. Scores in the Level 1 indicate “[t]he student has not met the achievement standards and needs substantial improvement to demonstrate the knowledge and skills” in both subject matters “needed for likely success in a career and entry-level credit-bearing college coursework after high school.” *Id.* These scores are below the state, District, and school averages. *Id.*

8. The Student received services from the Learning Assistance Program (LAP) during the 2017-2018 school year. This program is a general education program that assists students who are not reaching appropriate academic levels. Ferguson T179, 197. In the District, students who

³ Citation to the testimony of a witness is by the witness’s last name or the term Mother followed by the hearing transcript page number. For example, Jaeger T157 is a citation to the testimony of Shelly Jaeger at page 157 of the transcript.

⁴ Check In / Check Out is a program where a Student speaks with an adult at the beginning and end of the school day about how they are feeling. It is intended to create a more successful school environment for the student. Ferguson T168.

are in the bottom quartile of scores on the i-Ready⁵ assessment automatically receive LAP services. Stiles-Gill T602-03.

9. The Student's report card shows that he earned scores of 1 or 2 in all assessed subject areas, indicating he was working either below standard or working towards standard, respectively. Exhibit P10p1. A score of 3 indicates a student meets standards and a score of 4 indicates the student exceeds standards. *Id.*

10. On June 11, 2018, the Student was assessed at Central Washington Comprehensive Mental Health. Exhibit P11. The Student's Mother reported to the evaluator that the Student was having behavioral concerns in school and at home and reported that the Student had previously been diagnosed with Post Traumatic Stress Disorder (PTSD) and "[o]ther specified disruptive, impulse-control, and conduct disorder." *Id.* at 1. The Mother also reported that current treatment was "not working." *Id.* After an initial assessment, the Student was found to meet the criteria for other specified disruptive, impulse-control, and conduct disorder. *Id.* at 3.

2018-2019 School Year

11. During the 2018-2019 school year the Student was in the fifth grade at West Valley Middle School (West Valley). Exhibit P22p1.

12. The 2018-2019 school year at West Valley began on August 28, 2018. The first semester had 88 school days and ended on January 18, 2019. The second semester had 92 school days and started on January 23, 2019, and ended on June 14, 2019. Exhibit P1p2.

13. During the 2018-2019 school year at West Valley, Russ Tuman was the Principal, Nick Clark and Crystal McDonald⁶ were Assistant Principals, Lisa Forrest⁷ was the School Psychologist, and Amber Stiles-Gill was the Response to Intervention Instructional Coach and Intervention Teacher. Exhibit P2p1; Stiles-Gill T600.

14. The Student received Title reading and math services during the 2018-2019 school year. Exhibit P30p1. Title services are similar to services provided in LAP, but apply to students in different grade levels. Students who are eligible for LAP services are automatically enrolled in Title services upon moving to fifth grade unless there is indication additional services are no longer needed. Stiles-Gill T602.

15. The District uses a tiered intervention model to change problematic student behaviors. Tier 1 is the lowest level of intervention and Tier 3 is the highest level of intervention. Clark T551.

⁵ i-Ready is an electronic assessment tool used by the District for all students to assess grade level equivalence in mathematics and reading. Parker T318.

⁶ Ms. McDonald has a bachelor's of arts in elementary education and a master's degree in school administration. She has been a school administrator for twenty-one years.

⁷ Ms. Forrest has a bachelor's degree in developmental psychology and master's degree in mental health counseling. She is also certificated in school counseling and school psychology and is also a member of the National Association of School Psychologists (NASP). Forrest T718.

Title services is considered a Tier 2 intervention. Clark T551, 581. Special Education referrals are considered Tier 3 intervention. Students must go through Tier 1 and Tier 2 before moving to Tier 3. Clark T551, 580-81.

16. The Student was subject to multiple disciplinary actions during the 2018-2019 school year. This included multiple in-school suspensions and lunch detentions. P24; P25. Many of these disciplinary actions were for disruptive behavior or disrespect, defiance, or failure to comply with District staff. Exhibit P24.

17. At times, the Student's behavior was severe enough to warrant out-of-school suspensions or expulsions. On October 15, 2018, the Student was expelled for 3.5 days for possession of a vape pen. Exhibit P22p1; P24p7. The Student was expelled again on January 23, 2019, for 5.5 days for destroying two smart phones in the boys' locker room. Exhibit P22p2; P24p5. On March 13, 2019, and March 26, 2019, the Student was suspended for 1.5 days each for disrespect, defiance, and failure to comply. Exhibit P22p2; P24p4.

18. The Student's behavioral problems were well known by District staff. Assistant Principal Nick Clark testified that there were "many conversations about Student throughout the year with many people." Clark T543. The conversations revolved around the Student's behaviors in class, academic progress, and potential interventions the school should try. *Id.* at T543. Further, Ms. Stiles-Gill testified that she knew of Student's behavior problems and that concerns regarding the Student's behavior had been coming into the office all year consistently from the beginning of the school year. Stiles-Gill T626-27.

19. By the end of October 2018, Principal Tuman was aware the Student had frequent disciplinary incidents. Tuman T217. As a result, he called the Student's Parents to discuss the issue. He did not suggest a functional behavioral assessment be conducted. *Id.* Principal Tuman has never recommended a functional behavior assessment for a student. Tuman T217.

20. On November 6, 2018, the Student's Mother was trespassed from West Valley Middle school for one year by Principal Tuman. Exhibit P13. The Mother had come to the school upset about the Student being disciplined and gotten into a verbal altercation with school employees in the front office of West Valley. Exhibit P47p2.

21. In January 2019, one of the Student's teachers referred him to the District's CARE⁸ team. Exhibit P15p6-7. The CARE team met on January 15, 2019, and discussed the Tier 1 interventions already in place for the Student, which included "[c]hunking work time, 1:1 help, [p]rompting, positive/negative reinforcement, [r]emoved from group, [i]gnore behaviors, and 1:1 conversations." Exhibit P16p1. The team also recommended Tier 2 interventions including a CICO system and reward system for the Student, allowing the Student to mentor others, keeping the Student in physical education every term, and following up with a behavior plan if needed. *Id.* The CICO system was put into place starting January 16, 2019. *Id.* at 4; Clark T550.

⁸ A CARE team is a Tier 2 intervention that creates a support team for the student including classroom teachers, Mr. Clark, and paraprofessionals. The team meets weekly to determine ways to help a student who is struggling in school. Clark T544.

22. The Student was transferred to different teachers for humanities, math, and science in April 2019 due to his behavioral problems. Stiles-Gill T627; Perez T251.

23. Kathy Perez was the Student's humanities teacher during part of the fifth term and all of the sixth term of the 2018-2019 school year⁹. Perez T251. The Student started with Ms. Perez somewhere around April 10, 2019. *Id.* at T271. The Student received failing grades for both terms. *Id.* at T251. Ms. Perez testified that the Student struggled due to a lack of effort and a lack of motivation and that his attendance was an issue. *Id.* at T251. She noted he had difficulty sticking to tasks, completing tasks, and concentrating on tasks. *Id.* at 255. Ms. Perez reported the Student was successful on tasks when she worked with him in a 1:1 setting. *Id.* at T252.

24. Edwin Johnson¹⁰ was the Student's math and science teacher during the fifth and sixth terms of the 2018-2019 school year. The Student received C and D grades in math and received an A in science for both terms. Johnson T708-09. Mr. Johnson attributed the poor math grades to the Student's failure to turn in assignments and his lack of motivation. *Id.* at T710-11. Mr. Johnson attempted to help the Student in class by providing preferential seating, allowing extra time for assignments, providing 1:1 teaching, and rephrasing test questions. *Id.* at T711. Mr. Johnson testified the Student often had difficulties paying attention in class and would sometimes distract himself or others. *Id.* Also, Mr. Johnson testified the Student would rush through tests, which led him to think the Student was not trying his best. *Id.* at T713.

Mother's Request for Evaluation

25. On April 8, 2019, the Mother spoke with Ms. McDonald by telephone and requested the Student be evaluated for special education. Mother T411. The Mother reported to Ms. McDonald that the Student had been diagnosed with multiple impairments, including Attention Deficit Hyperactivity Disorder (ADHD), Post Traumatic Stress Disorder (PTSD), and some type of conduct disorder. Mother T421; McDonald T682. Ms. McDonald asked the Mother to provide documentation of these diagnosis. Mother T423; McDonald T682. The Mother understood this to mean the District would not proceed unless she provided documentation of the Student's diagnoses. Mother T423.

26. The Mother's request that the Student be evaluated for special education services was referred to Ms. Forrest, the School Psychologist. Exhibit P20p2. She created staffing notes related to the Student to be used during the evaluation team meeting. Exhibit P30; Forrest T726.

27. In response to the Mother's request, Ms. Stiles-Gill completed a Staffing Request document. Exhibit P26p1. Ms. Stiles-Gill indicated the areas of concern for the Student were academic, including reading, writing, and math, as well as behavioral. *Id.* Stiles-Gill T625. She also indicated the Student had already received LAP in elementary school and Title 1 supports in 5th grade. Exhibit P26p2. In addition to the Mother's request, she indicated "[t]eachers & admin having [sic] been sharing concerns [about the Student] all year." The request stated the Student had a lot of

⁹ The school year is divided up into six terms. Terms five and six are the last two terms of the school year.

¹⁰ Mr. Johnson is a certificated teacher and has taught for three years.

discipline notes from the Selah School District in his file and that his schedule had been changed multiple times “in an attempt to help him be more successful.” Exhibit P26p2.

Manifestation Determination Meeting

28. On April 30, 2019, the Student was given a short term suspension of five days because he was “caught stealing juice from the kitchen” at school. Exhibit P23p1. The disciplinary note indicated the Student had been warned previously about this behavior and was disrespectful and uncooperative when confronted by a staff member. *Id.*

29. On May 1, 2019, the District held a manifestation determination meeting to discuss the incident involving the Student from April 30, 2019. Exhibit P23p4. The meeting was attended by Principal Tuman; Ms. McDonald; Ms. Forrest; Judi Lewis, the Special Services Coordinator for Assessment and Mental Health Liaison; and three of the Student’s teachers, Charity Caprile, Danielle Urakawa, and Ms. Perez. *Id.* at 4, 6. No paperwork was reviewed during this meeting and the meeting lasted approximately twenty minutes. Lewis T63, 69. The notes from the meeting indicate the Student had 34 discipline referrals during the 2018-2019 school year and that he had missed 53 full or partial days of school. It also noted the Assistant Principal had been informed the Student has been diagnosed with “Onset PTS (possibly PTSD) and a behavior or conduct disorder.” *Id.* at 4. The team determined that the Student’s conduct was not caused by and did not have a direct and substantial relationship to the Student’s disability because “[w]e don’t have documentation of a traumatic event, so we can’t speak to a possible triggering event.” The team also noted the Student “has a long history of stealing.” *Id.* at 5. The team determined the Student’s conduct was not a manifestation of the Student’s disability. *Id.*

30. The Parents did not participate in the manifestation determination meeting. The Mother reported she had never been told about the meeting. Mother T419. Ms. McDonald testified that the Parents were invited. McDonald T690. However, no evidence beyond Ms. McDonald’s statement has been presented to indicate either of the Student’s Parents were invited to the manifestation determination meeting, and none of the other District witnesses indicated they were aware of the Parents being invited to the meeting. There are no emails or notes indicating the District made any attempt to contact the Parents and invite them to attend the meeting. As such, the Mother’s testimony regarding this fact is given greater weight than that of Ms. McDonald and I find that Parents were not invited to the manifestation determination meeting.

31. A prior written notice (PWN) was issued on May 2, 2019, proposing to continue the Student’s disciplinary action. Exhibit P23p7. It stated that the team decided the Student “does not have an identifiable disability that significantly impacted his behavior...” *Id.* In noting what was considered in making the determination, the PWN stated “Teacher input” and “Parent input: prior to the meeting, both parents were spoken to over the phone. Each parent contributed information that was presented during the meeting.” *Id.* at 8. No evidence was provided to indicate what diagnosis the team looked at in making the manifestation determination. Further, there is no evidence indicating what information from the Parents the District considered at this meeting.

32. The Student underwent an initial assessment at Comprehensive Mental Health on May 10, 2019. Exhibit P36p3. The Student was diagnosed with Oppositional Defiant Disorder. *Id.* at 8.

Evaluation Team Meeting

33. On May 10, 2019, a team met to discuss the special education referral for the Student. The team included Ms. Perez, Ms. Caprile, Mr. Johnson, Ms. Forrest, Ms. Lewis, Ms. Stiles-Gill, Principal Tuman, and the Student's Mother. Exhibit P31p2. The Student's Mother appeared by telephone. Exhibit P47p7. The staffing notes created by Ms. Forrest indicate the Student was performing below grade level in Math and Reading and had been for his 4^h and 5th grade school years. Exhibit P30p1; Forrest T726. They also indicate the Student had missed 54 full and partial days of school during the 2018-2019 school year, and 33 of those days were due to office visits or suspensions. *Id.* at 3. The notes also indicate the Student had 34 discipline referrals for disruptive behavior, unsafe and dangerous behavior, tobacco use, vandalism, and theft. *Id.* The team decided not to assess the Student for special education and instead refer him for a 504 Plan. Exhibit P31p1.

34. In determining whether to evaluate the Student for special education, the team considered whether he should be evaluated under the category of specific learning disability (SLD) or emotional/behavioral disability (EBD). Stiles-Gill T641; Forrest T731. In regards to SLD, the team considered the Student's absenteeism as well as his grades, assessments, failure to complete assignments, discipline history, history of difficulty learning, and the many years of intervention the Student had undergone. Lewis T108; Stiles-Gill T645; McDonald T689. The Student's attendance was discussed generally, and the team did not consider whether the Student missed specific classes or the reasons for his absences. *Id.* at T100. The team concluded that attendance was the reason the Student was not succeeding in school and the data was insufficient to indicate an SLD was a possibility. Forrest T734.

35. The District uses the discrepancy model when determining if a Student has an SLD. Forrest T754. This is the only method the District is able to use per directive from Lucas Jaeger, the Director of Special Services for the District. *Id.*

36. In regards to EBD, the team concluded that the Student would not be eligible under this category because he met the definition of social maladjustment. Forrest T733; McDonald T687. None of the District witnesses were able to provide the definition of social maladjustment that was used by the team. However, Ms. Lewis provided some explanation of this term to the team during the meeting. McDonald T693. Further, Ms. Forrest testified that a conduct disorder can be thought of as social maladjustment. Forrest T737.

37. While not noted in the District's documentation of the evaluation team meeting, the District had been notified by the Mother prior to the meeting that the Student had a previous diagnosis of ADHD. McDonald T682; Forrest T754. However, testimony from District witnesses conflicts regarding whether the team considered this diagnoses when determining whether to evaluate the Student for special education services. Ms. Lewis testified that the team did not consider Other Health Impairment (OHI) as a potential eligibility category because the Student had no documented health impairment that would fall in that category. Lewis T129. ADHD would fall under the OHI category, so Ms. Lewis's testimony seems to imply the District did not consider ADHD because the Mother did not have medical documentation of the diagnosis. Ms. Lewis also testified that the team relied heavily on the June 2018 mental health evaluation from Comprehensive Mental Health, which diagnosed the Student with other specified disruptive, impulse-control, and conduct disorder. *Id.* at T131; Exhibit P11p3. In contrast, Ms. Stiles-Gill and Ms. McDonald testified that OHI was considered, but did not explain why the team decided not to

evaluate the Student under this category or why the team failed to document any such discussion. Stiles-Gill T641. Because nothing in the documents created by the evaluation team includes any indication that ADHD or OHI was considered, I find that the evaluation team did not consider the Student's potential ADHD diagnosis when deciding not to evaluate.

38. A PWN was issued on May 13, 2019, indicating the District was refusing to initiate a special education evaluation for the Student. Exhibit P32p3. The PWN indicated the decision was based on "classroom data, standardized test scores, parent and teacher input, administrator input, Comprehensive Mental Health diagnosis, and information gathered from [the Student's] record." *Id.* The PWN also indicated the reason it was refusing to initiate a special education evaluation is because of the Student's "long standing history of missing school...which has greatly impacted his ability to benefit from instruction." *Id.* The PWN further stated:

Currently missing more than 10% of the school year is considered chronic absenteeism, whether it be due to excused or unexcused absences, as well as suspensions. Chronically absent students are more likely to fall behind academically, which would not constitute a learning disability. In addition, [Student's] diagnosis would preclude him from being eligible for special education in another category due to exclusionary factors in the Washington Administrative Code (WACs).

Id.

39. The District admits that a student being absent 10% of the school year does not bar him or her from being eligible for special education services. McDonald T689; Forrest T735; Lewis T103. A student would need to be evaluated to determine if a student's absenteeism was the cause of a student's poor academic performance. Lewis T103. However, if evidence of one of the exclusionary factor applicable to SLDs, such as absenteeism, is present, the District may decide not to evaluate the student for special education based on the assumption that the student would not be eligible for services. Lewis T106.

40. The District also admits that social maladjustment does not preclude a student from being eligible for special education services. McDonald T689. There is no diagnosis that would preclude a student from being eligible for special education. Parker T324; Lewis T98-99.

41. The District witnesses provided limited and confusing explanations for what was meant by the statement in the PWN that "In addition, [Student's] diagnosis would preclude him from being eligible for special education in another category due to exclusionary factors in the Washington Administrative Code (WACs)." Exhibit P32p3. Ms. Stiles-Gill testified that the statement meant that, based on the Student's diagnosis, which she did not remember, it would not "qualify him for other health impairment based on what it says in the WACs." Stiles-Gill T635. Ms. McDonald testified that the statement meant the Student's diagnosed conduct disorder "didn't automatically qualify him for special education. That doesn't mean that he couldn't have some other diagnosis or disability that would qualify him." McDonald T701-02. Based on a plain reading of the statement and because the evaluation team seemed to rely heavily on the evaluation from Comprehensive Mental Health, I find that the District determined that the Student's diagnosis of other specified disruptive, impulse-control, and conduct disorder, meant he was socially maladjusted and not eligible under the EBD category.

Second Semester 2018-2019 School Year

42. In the spring of the 2018-2019 school year, while in 5th grade, the Student tested at a 4th grade level in Math and at a 2nd grade level in Reading per his i-Ready scores. Exhibits P38p4, P40p4.

43. During the 2018-2019 school year, the Student missed 38.83 school days out of 179 school days. Exhibit 22p2. More than half of those absences were due to in-school or out-of-school suspensions. *Id.* However, the number of absences may be higher because the Student's visits to the office for smaller disciplinary issues were not always logged on his attendance sheet. Clark T566.

44. On June 7, 2019, after the Parents filed their Complaint, a PWN was issued by the District proposing an initial evaluation for the Student. On June 10, 2019, the District emailed the Parents and informed them the District would like to initiate an initial evaluation of the Student. Exhibit P52p2. The District requested the Parents sign and return a Parent Consent form to start the evaluation process. *Id.* The consent form was never signed by the Parents. Mother T516.

Tricia Parker Evaluation

45. Tricia Parker, MEd¹¹, completed a mental health evaluation of the Student on June 15, 2019. Exhibit P41p1. As part of the evaluation, Ms. Parker interviewed the Student and his Mother; reviewed records from Selah School District, West Valley School District, Catholic Charities, and Comprehensive Healthcare; and performed the Millon Pre-Adolescent Clinical Inventory (M-PACI) and Woodcock-Johnson IV Tests of Cognitive Abilities (WJIV COG) on the Student. *Id.* Ms. Parker spent roughly 3.5 hours with the Student. She did not observe the Student in the classroom or speak with any of his teachers. Parker T348.

46. The M-PACI administered by Ms. Parker evaluated the Student for emotional, behavioral, or interpersonal difficulties. Exhibit P41p5. The Student received a score of four on the invalidity scale, which indicates the test score is invalid. This type of score "strongly suggests that the child could not complete the inventory coherently due to poor comprehension of the task, limited English reading ability, attention problems, or that he deliberately chose not to answer purposefully and honestly." *Id.* Ms. Parker believed the Student received this score because he had difficulty concentrating and because he chose not to answer honestly. *Id.*

47. On the WJIV COG administered by Ms. Parker, the Student scored in the low to average range. Exhibit P41p5. The Student performed below average in the area of fluid reasoning and processing speed. *Id.* Ms. Parker opined that these scores indicate the Student would have difficulty grasping abstract concepts, generalizing rules, and seeing implications as well as difficulty changing strategies if his first approach was unsuccessful. *Id.* at p9. Ms. Parker also

¹¹ Tricia Parker is a Licensed Mental Health Counselor and Nationally Certified School Psychologist. She has been employed as a School Psychologist with the Toppenish School District since 2007. Prior to that, she was a classroom teacher. Exhibit P42p1. She is currently certificated as a teacher and a school psychologist. Parker T308. The Parents contracted privately with Ms. Parker to do the Student's evaluation.

opined these scores indicate the Student would experience problems in executing cognitive tasks or acquiring new material, especially when under pressure. *Id.* at p10.

48. Ms. Parker diagnosed the Student with Other Specified Trauma or Stress-Related Disorder, Attention-Deficit/Hyperactivity Disorder, combined presentation, and Parent-child Relational Problem. Exhibit P41p8. Ms. Parker recommended the District develop a collaborative and positive relationship with the Parents and implement a Behavioral Intervention Plan to address the diagnoses. *Id.* at 11. Ms. Parker opined the Student may be eligible for special education services under the category of learning disability in reading and/or math or under the category of Other Health Impairment due to his ADHD diagnosis. *Id.* at 12; Parker T335-37. She further opined that because the Student's struggles were present in prior school years, "absenteeism should be ruled out as a contributing factor to his academic achievement struggles." *Id.*

49. Ms. Parker testified that, in her opinion, the discrepancy model was an outdated way to determine if a student qualified under the SLD category. Parker T337. She also opined that "[i]t is not reasonable to accept a full scale intellectual quotient as the only measure of a student's intellectual ability, and interpretation must take into account differential abilities while recognizing the fact that a learning problem can affect scores on tests of cognitive ability as well as other measures of ability, achievement, and behavior." Exhibit P41p12.

50. Ms. Parker recommended the Student receive private tutoring. Parker T343. She also recommended the District perform "normative academic measures, analyze[] curriculum-based achievement data," and perform classroom observations to complete a special education evaluation of the Student. Parker T338-39. She further opined that ADHD can manifest dependent on the cognitive load and demands placed on a child. Parker T347.

51. Ms. Parker's evaluation and opinions are accorded significant weight. She performed a comprehensive evaluation of the Student and reviewed extensive records. While she did not observe the Student in the classroom or speak with his teachers, she did review his educational records for several years. Further, Ms. Parker has significant experience in evaluating students for special education and is competent in the IDEA and corresponding regulations.

Dr. Lionel Enns Evaluation

52. On July 28, 2019, Dr. Lionel Enns¹² completed a psychological assessment of the Student. Exhibit P44. Dr. Enns completed a clinical interview with the Student and the Mother; completed the Behavioral Assessment System for Children, Third Edition (BASC-3), the Developmental Neuropsychological Assessment, Second Edition (NEPSY-II), the Wechsler Individual Achievement Test, Third Edition (WIAT-III), and the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V); and reviewed educational and medical records for the Student. *Id.* Dr. Enns spent approximately three hours with the Student. He never observed the Student in a classroom setting or contacted any of the Student's teachers. Enns T465.

¹² Dr. Lionel Enns is a Licensed Clinical Child Psychologist, a Board Certified Behavior Analyst, and a Nationally Certified School Psychologist. Exhibit P43p1; Enns T438. He completed his doctorate in school psychology in 2012. *Id.*

53. Dr. Enns administered the WISC-V to measure the Student's overall intellectual abilities. Exhibit P44p11. The Student was measured in the area of Verbal Comprehension, Visual Spatial, Fluid Reasoning, Working Memory, and Processing Speed. *Id.* The Student was found to have deficits in the area of Verbal Comprehension, Fluid Reasoning, Working Memory, and Processing Speed, while he was found to have a notable strength in his Visual Spatial abilities. *Id.* The Student's full scale IQ was measured at 84, which is in the 14th percentile and in the low average range. However, due to the range of scores on the subtests including both deficits and strengths, Dr. Enns opined that the full scale IQ may not adequately represent the Student's intellectual functioning. *Id.*

54. Dr. Enns administered the NEPSY-II to measure the Student's overall neuropsychological abilities. Exhibit P44p12. The results of his Auditory Attention and Response Set subtests indicate the Student would have "challenges attending to instruction he finds boring" and would "struggle[] to attend to complex auditory demands." *Id.* The Student's performance on the Comprehension of Instruction subtest indicated he would have difficulty following complex verbal directions and his performance would dramatically degrade over time. *Id.* On the Narrative Memory subtest, the Student demonstrated a notable challenge in recalling complex and unfamiliar narrative information. *Id.* On the Word List subtest, the Student's score demonstrated challenges related to auditory memory. *Id.* On the Inhibition subtest the Student showed struggles with interpreting visual information efficiently. Finally, on the Phonological Awareness subtest, the Student's scores showed he would have difficulty reading and that difficulty would be increased as time elapsed. *Id.* Overall, Dr. Enns found that:

[T]esting showed broad, notable challenges across multiple domains, suggestive of deeply impacted neurological functioning. In regards to attention, [the Student] showed a marked decline in abilities as he became mentally fatigued. He showed challenges across a range of tasks targeting auditory attention, including both complex and core aspects of memory and attention. He was challenged by phonological awareness, which is unsurprising given his difficulties with reading. Efficiency of visual interpretation appears highly diminished.

Id. 13.

55. The BASC-3 administered by Dr. Enns involved questionnaires completed by the Student and by the Student's Mother. Exhibit P44p13. The Mother's questionnaire suggested the Student had typical emotional regulation abilities. *Id.* The Student's questionnaire responses indicated "clinically significant behaviors related to attitude to school and attitude to teachers" as well as "at-risk levels of behavior related to relations with parents." *Id.*

56. Dr. Enns administered the WIAT-III to measure the skills underpinning the Student's academic abilities. Exhibit P44p14. Dr. Enns found that:

Overall, testing indicated that [the Student] struggles across all academic subjects, with impairment in math, reading and writing. In regard to reading, decoding skills appear most capable, but higher order abilities related to fluency and comprehension seem less well developed, particularly reading accuracy. Math fluency abilities appear quite impaired. Spelling skills seem typical.

In regard to process (underlying) skills, listening comprehension appears to be a deficit, particularly passage recollection abilities. Oral expression skills appear to be more typical.

Id. at 15.

57. Based on a review of the records, testing, and clinical observations, Dr. Enns opined the Student is impacted by significant neurological and learning deficits. Exhibit P44p16. Dr. Enns diagnosed the Student with Attention Deficit Hyperactivity Disorder, Combined Type as well as Specific Learning Disorders in mathematics, reading, and written expression. *Id.* at 19. Dr. Enns recommended the Student undergo a full medical evaluation and that a stimulant trial be considered. He also recommended the Student maintain regular conjoint therapy. *Id.* Dr. Enns opined the Student would require “specially designed instruction and flexible educational supports.” *Id.*

58. Dr. Enns made several recommendations for the Student in regards to his educational program. Dr. Enns recommended school-based counseling and suggested the Student’s teachers “elucidate specific goals and teach self-monitoring techniques.” Exhibit P44p20. Dr. Enns also recommended the Student receive specially designed instruction (SDI) in written expression and 1:1 or small-group instruction in math. *Id.* Further, Dr. Enns recommended the Student receive structured interventions in reading and tutoring to provide direct individualized instruction to fill gaps in his learning. *Id.* Dr. Enns recommended the Student be allowed alternate formats for tests and access to teacher or peer notes in various classes. *Id.* Dr. Enns recommended the Student’s teachers use checklists and step-by-step guidance to help the Student complete complex tasks. Dr. Enns recommended the Student be allowed to choose audio books and other assistive technology such as calculators and voice recognition software as needed. *Id.* at 21. The Student should be seated closer to the teacher and instruction materials and provided extra time and a quiet space for test taking. Finally, Dr. Enns recommended the teachers use multiple methods of instruction in combination to improve the Student’s capacity to retain information. *Id.*

59. Dr. Enns has worked with 20-25 school districts over the past year doing assessments. He contracts with parents as well as school districts to complete assessments. Enns T438.

60. Under the discrepancy model for SLDs the Student would not qualify for special education based on Dr. Enns’s testing. Forrest T746. However, Dr. Enns warned that the discrepancy model would be difficult to apply to the Student because of the variability in the Student’s IQ scores. Exhibit P44p17; Forrest T754.

61. Dr. Enns’s evaluation and opinions are accorded significant weight. While he did not communicate with the Student’s teachers or observe the Student in the classroom setting, similar to Ms. Parker, he reviewed significant medical and educational records. Additionally he performed multiple assessments and made his conclusions and opinions based on the results of those assessments. The District failed to perform any assessments of the Student, and the only medical information considered was an assessment performed almost a year prior to the evaluation team meeting. Further, Dr. Enns has extensive experience performing special education evaluations of students.

Heather Rodriguez Expert Witness Report

62. On August 5, 2019, Heather Rodriguez¹³ completed an Expert Witness Report regarding the Student. Exhibit P46p2. Ms. Rodriguez reviewed the Student's school records from the District and from Selah School District for grades kindergarten through fifth grade. *Id.* at 3. She also reviewed email correspondence between teachers, school administration, and the Student's Parents, grade reports, academic testing reports, and discipline referrals and reports. *Id.* Ms. Rodriguez reviewed both mental health evaluations from Comprehensive Mental Health as well as the evaluations from Ms. Parker and Dr. Enns. *Id.* Based on this review, Ms. Rodriguez made multiple mental health recommendations, including family therapy and individual therapy for the Student. *Id.* at p8. In regards to school, Ms. Rodriguez recommended an IEP be developed for the Student to address the Student's ADHD and specific learning disabilities as diagnosed by Dr. Enns. *Id.* She also recommended school-based counseling for the Student and that the District provide appropriate training for staff regarding trauma-informed educational models. *Id.*

63. Ms. Rodriguez did not meet the Student or his Parents or observe the Student in a classroom setting. Rodriguez T393-94. Further, she did not speak with anyone in the District and she has no experience evaluating special education students. *Id.* at 395. As such, her opinions are accorded limited weight.

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

¹³ Heather Rodriguez completed her masters of social work in 2000 and is currently a licensed social worker in the State of Washington. Exhibit P45p1. She is a Certified Clinical Trauma Professional and is currently employed as an Assistant Professor of Social Work at Walla Walla University. *Id.* Ms. Rodriguez has sixteen years of direct clinical practice providing mental health services.

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 . . .

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 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 its affirmative ongoing child find obligation by ignoring red flags raised by the Student's poor academic record, attendance, behavior, discipline issues, and parental input by failing to evaluate the Student by the end of the first quarter of the 2018-2019 school year

6. This issue essentially encompasses two separate issues: whether the District violated its child find obligation and whether the District erred in failing to evaluate the Student. The issue of whether the District erred in failing to evaluate the Student will be addressed along with issues two and three.

7. Districts are required to “conduct child find activities calculated to reach all students with a suspected disability for the purposes of locating, evaluating and identifying students who are in need of special education and related services, regardless of the severity of their disability.” WAC 392-172A-02040(1). A disability is “suspected,” “when the district has notice that the child has

displayed symptoms of that disability.” *Timothy O v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016).

8. The Student reentered the District in April 2018, during the end of his fourth grade year. In his previous school district, the Student was struggling academically, and the District had access to that information. From April 2018 forward, the Student continued to demonstrate poor academic performance. The Student’s report card showed he was performing below standard in all areas. Further, the Student scored in the lowest level, well below state, District, and school averages, in both literacy and math on the Smarter Balance standardized testing. The Student also performed in the bottom quartile on the i-Ready assessment in reading and math qualifying him for LAP assistance, a Level 2 intervention.

9. Further, during the first semester of the 2018-2019 school year, while in fifth grade, the Student continued to have poor academic performance. The Student’s fall i-Ready scores showed him performing at a fourth grade level in mathematics and a second grade level in reading. During the winter i-Ready assessment, the Student’s math score regressed to a third grade level and his reading stayed at a second grade level. Further, the Student’s scores on the Smarter Balance test remained in the lowest level in math and literacy, well below state, District, and school averages. Due to the Student’s test scores, he qualified for and received Title reading and math supports throughout his fifth grade year, a Tier 2 intervention in the District.

10. In addition to the Student’s notable academic problems, the Student had an excessive number of disciplinary referrals during the 2018-2019 school year. By the end of January 2019, the Student had nineteen disciplinary actions, many for disruptive behavior, or failure to comply with District staff. Further, multiple District employees testified that the Student’s behavior challenges were well known from the start of the 2018-2019 school year and consistent throughout the year. Further, Mr. Ferguson testified he had spoken to the Selah School District when the Student transferred to the District about previous behavioral issues and discussed attempted solutions the District could employ, demonstrating the District’s knowledge of the Student’s persistent behavioral problems.

11. The Student exhibited no noticeable improvement in in academic performance or in his behavior during the first semester of the 2018-2019 school year despite Tier 2 interventions. In fact, his academic performance declined in some areas while his behavioral incidents remained consistent. The District even referred the Student to the CARE team on January 15, 2019, for further discussion of interventions needed for the Student, indicating the District was aware that what it was currently doing was not working. As such, the District had ample notice by January 18, 2019, the end of the first semester of the 2018-2019 school year, that the Student’s academic struggles and behavioral challenges may indicate he had a disability that would require special education services.

12. Once a district is on notice that a Student may have a disability that requires special education services, a District must decide whether or not to evaluate a student within a reasonable time period. See *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995). Here, the District was on notice as of January 18, 2019, the last day of the first semester of the 2018-2019 school year. Despite this, the District failed to determine whether the Student should be evaluated or notify the Parents of such a decision until May 2019, after the Mother requested an evaluation. Waiting almost four months is not a reasonable time period. As such, the District violated its affirmative child find obligation by failing to identify the Student as an individual with a disability who may need special

education services by January 18, 2019, and making a determination whether to evaluate within a reasonable time period.

13. The District's failure to identify the Student and timely determine whether or not to evaluate the Student at the end of the first semester of the 2018-2019 school year, violated the IDEA. As will be discussed later in the decision, the Student is eligible for special education services. Had he been properly identified by the District in January 2019, he likely would have received services during the 2018-2019 school year. As such, the District's violations deprived the Student of educational benefits for the second half of the 2018-2019 school year and denied the Student FAPE.

Whether the District misapplied the standards set out in the WAC related to SLDs by determining without evaluation that the Student's lack of progress was due to chronic absenteeism and whether the District misapplied standards set out in the WAC by determining that the Student has a mental health diagnosis that precludes him from being eligible for special education without evaluation

14. Issues two and three both relate to the District's decision not to evaluate the Student in May 2019, after the Mother's request for an evaluation. As such, they will be addressed together.

15. The Ninth Circuit has held that "the 'informed suspicions of parents, who may have consulted outside experts,' trigger the requirement to assess, even if the school district disagrees with the parent's suspicions because '[t]he identification [and assessment] of children who have disabilities should be a cooperative and consultative process.'" *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Further,

Whether a school district had reason to suspect that a child might have a disability must be evaluated in light of the information the district knew, or had reason to know, at the relevant time, not "exclusively in hindsight." *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3^d Cir. 1993)). However, some consideration of subsequent events may be permissible if the additional data "provide[s] significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date." *E.M. v. Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 1006 (9th Cir. 2011) (quoting *Adams*, 195 F.3d at 1149).

E.S. v. Conejo Valley Unified Sch. Dist., 2018 U.S. Dist. LEXIS 126251 (C.D. Cal. 2018).

16. Once a parent requests a student be evaluated to determine if the student is eligible for special education, the District has twenty-five days to determine whether or not to evaluate the student. WAC 392-172A-03005. A student must be evaluated to determine if he or she is eligible for special education services. See WAC 392-172A-01070. If a district decides to do an evaluation, it must comply with the requirements laid out in WAC 392-172A-03005 to 03040.

17. A student is eligible for special education if the student has a disability in one of thirteen eligibility categories and, because of the disability and an adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services. WAC 392-172A-01035(1)(a); 34 CFR § 300.8(a).

18. In this case, the Mother affirmatively requested the Student be evaluated for special education services on April 8, 2019. At the request of the District, she provided a June 2018 psychological assessment from Comprehensive Mental Health and told the District the Student also had a history of being diagnosed with PTSD and ADHD. The District held a meeting on May 10, 2019, to discuss the referral and issued a PWN notifying the Mother that the District was denying the request for an evaluation on May 13, 2019. This determination was made within twenty-five school days of the Mother's request in compliance with WAC 392-172A-03005. However, the District's decision not to evaluate the Student was erroneous.

Specific Learning Disability

19. One category of disability considered by the District was whether the Student should be evaluated for an SLD. See WAC 392-172A-01035(2)(k). Additional evaluation procedures must be followed when determining whether a student has an SLD. See WAC 392-172A-03045. Districts must "develop procedures for the identification of students with specific learning disabilities which may include the use of: (1) A severe discrepancy between intellectual ability and achievement; or (2) A process based on the student's response to scientific, research-based intervention; or (3) a combination of both within a school district..." *Id.*

20. The evaluation team may determine a student has an SLD if he or she does not achieve adequately for his or her age or meet grade level standards when provided with appropriate learning experiences and instruction. WAC 392-172A-03055. An SLD can be found in several areas, including written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. *Id.* The evaluation team must also determine that the student's lack of progress is not primarily due to other factors, sometimes called exclusionary factors, including lack of appropriate instruction in reading or math. *Id.*

21. The District argues it was correct not to evaluate the Student for an SLD because poor academic performance alone is not sufficient to trigger a district's need to evaluate. The District cites to multiple cases that support this conclusion. However, the District fails to note that the Student wasn't *only* displaying poor academic performance. He was also demonstrating significant behavioral and disciplinary issues often involving defiance, disruption in the classroom, and failure to follow instructions. In combination, these symptoms were sufficient to trigger the District's duty to evaluate the Student.

22. The District also argues it was correct to not evaluate the Student for an SLD because the Student's poor academic performance could be attributed to other factors, including his lack of motivation and effort in school, his coming to school tired and hungry, and his frequent absences. Again, these reasons fail to fully consider what was going on with the Student. While several witnesses testified that, at times, the Student would come to school hungry or tired, this was not noted anywhere in the evaluation team notes or PWN and thus does not appear to have been considered by the evaluation team when it decided not to evaluate the Student.

23. The Student's teachers testified that his poor performance in his humanities and mathematics classes were due to his lack of motivation and interest in school. While teachers are experts in administering education, they are not experts in child psychology. Simply attributing a Student's poor academic performance to a lack of effort fails to consider the multiple other factors that could affect a student's effort. This is especially true given the professional opinions

from school. The only diagnoses listed on the document are “[o]nset PTS (possibly PTSD) and a behavior or conduct disorder.”

53. The Parents argue the District erred in failing to look at all of the Student’s suspected disabilities during the manifestation determination meeting. The District was aware, due to the Mother’s request for an evaluation, that the Student had been diagnosed with ADHD. However, the District made no mention of this diagnosis in its manifestation determination documentation and there was no testimony provided to show that ADHD was considered by the manifestation determination team. Further, because the Parents were not invited to the meeting, they cannot provide any information regarding what was addressed. As such, I find that the District failed to consider ADHD during the manifestation determination meeting.

54. The District violated the IDEA during the manifestation determination meeting by failing to consider all suspected disabilities and by failing to include the Parents. These procedural violations significantly impeded the Parents’ ability to participate in the decision making for their child and resulted in a denial of FAPE.

Whether the Parents are entitled to their requested remedies

55. The Parents have proven that the District violated the IDEA and denied the Student FAPE. As such, the Parents are entitled to remedies. The Parents request multiple remedies for the District’s IDEA violations including a finding that the Student be identified as eligible for special education, training for District staff, compensatory education, and reimbursement for the cost of Dr. Enns’s evaluation.

56. As noted above, the Parents have provided sufficient evidence to show that the Student is eligible for special education under the category of OHI and that the Student may be eligible in the SLD category under the “professional judgment” exception to the discrepancy model. As such the District is ordered to find the Student eligible for special education services under the OHI category. The District is also ordered to request consent from the Parents to evaluate the Student to determine if he qualifies for eligibility under any other categories, including SLD under the “professional judgment” exception to the discrepancy model and to determine what special education and related services are appropriate. The evaluation team shall consider the evaluations of Dr. Enns and Ms. Parker when considering what additional assessments are needed so as not to put the Student through unnecessary testing. The evaluation team should also consider whether a functional behavioral assessment is warranted. Once the evaluation is complete, the District shall have 30 days to hold an IEP team meeting to develop an appropriate IEP for the Student. Due to the contentious relationship between the District and the Parents, the IEP team meeting shall be facilitated by a Sound Options facilitator, which shall be arranged by the District. During the IEP team meeting, the team should also consider whether a behavioral intervention plan is appropriate for the Student.

57. The Parents have proven that the District incorrectly applied the regulations dealing with special education eligibility determinations. As such, the District shall provide training on the procedural requirements of the IDEA, specifically regarding the application of the regulations relating to eligibility determinations. This training is required for all staff responsible for determining whether or not to evaluate students as well as staff who conduct special education evaluations at the West Valley Middle School. This shall include special education teachers, school psychologists, and administrative staff (excluding clerical staff). Training is not required

for general education teachers. The training should be provided by a person(s) of the District's choosing who has the necessary education, training, and experience to conduct such training. The training should be provided by a person(s) who is not employed by the District. The training should not be less than four hours in duration. The training shall be received within six months of the date of this order.

58. Parents further request compensatory education in the form of one to one tutoring for the Student. 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 (9^h 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. *Reid v. District of Columbia*, supra, 401 F.3d at 524.

59. The District's delay in identifying the Student and evaluating him for special education resulted in the Student going without any specially designed instruction for the 2018-2019 school year. The Parents' experts both testified that the Student would benefit from one-on-one tutoring in the subjects of reading, writing, and mathematics. This testimony is in line with the testimony from the Student's teachers that he performed better on assignments when the teachers worked with him one-on-one. Therefore, one-on-one tutoring for the Student is an appropriate remedy.

60. As found above, the District was on notice as of the end of the first semester of the 2018-2019 school year that the Student may have a disability that would need special education services. The second semester of the 2018-2019 school year had 92 school days. The Parents requested 1 hour of tutoring per day from the date the District was on notice of the Student's disability. Had the District properly identified the Student after the completion of the first semester, the District would have been able to evaluate the Student and implement an IEP for at least a portion of the second semester. Half of the semester would be 46 school days. As such, the Student is awarded 46 hours of one-on-one tutoring to be delivered by a certificated special education teacher after school hours and in addition to any specially designed instruction included in his IEP. The scheduling of the sessions should be at a time mutually agreeable to the District and the Parents. The tutoring should be provided at the Student's school building unless both parties agree to an alternative location. The tutoring should be in the areas of reading, writing, and mathematics as is determined appropriate based on the Student's need after implementation of the IEP. The tutoring hours should be completed within one year of the date of this order.

61. The Parents also request reimbursement for the cost of the psychological evaluation performed by Dr. Enns. While multiple District witnesses testified that Parents are not required to have a student diagnosed before the District will evaluate, it is clear the District only considered the diagnosis for the Student that was in the medical records provided by the Mother. The District did not consider the Mother's reports that the Student was diagnosed with ADHD or PTSD, demonstrating that, while the District knows they do not need an official diagnosis, they operate in a way that proves the opposite. As such, it was reasonable for the Parents to acquire an

independent evaluation from Dr. Enns to fully evaluate the Student in an effort to demonstrate to the District that the Student is eligible for special education.

62. The District did offer to evaluate the Student after the Parents filed their Complaint. Generally, a District should be allowed to evaluate a Student first before a Parent would be entitled to an Independent Education Evaluation paid for by the District. However, here the District had been on notice that the Student needed to be evaluated for a significant period of time and failed to do so, only offering to evaluate after the Parents filed their Complaint. Based on the facts of this case, it is reasonable that the Parents lost faith in the District's ability and willingness to fairly and appropriately evaluate the Student. As such, the District's request for reimbursement of the cost of Dr. Enns's evaluation is granted. The District shall reimburse the Parents for the cost of Dr. Enns's evaluation upon proof of payment. The District is not required to reimburse the Parents for any cost related to the time Dr. Enns spent testifying or preparing to testify at the hearing.

63. 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 West Valley School District violated the IDEA and denied the Student FAPE during the 2018-2019 school year by:
 - a. Violating its child find obligation and failing to evaluate the Student,
 - b. Incorrectly applying WACs applicable to the SLD and EBD disability eligibility categories,
 - c. Failing to consider all suspected disabilities and include the Parents in the manifestation determination meeting.
2. The Parents are awarded the remedies at Conclusions of Law 56, 57, 60, and 62.
3. All other remedies requested by the Parents are denied.

Signed at Seattle, Washington on October 23, 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. *lan*

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cc: Administrative Resource Services, OSPI