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

IN THE MATTER OF	OSPI CAUSE NO. 2022-SE-0042
	OAH DOCKET NO. 03-2022-OSPI-01554
KENT SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A due process hearing was held before Administrative Law Judge (ALJ) Jacqueline Becker on June 13 and 14, 2022, via videoconference. The Mother of the Student whose education is at issue[1] (Parent) appeared and represented herself. The Kent School District (District) was represented by Samuel Chalfant, attorney at law. Also present for the District was Dr. Haley Brown, Assistant Director of Inclusive Education.

PROCEDURAL HISTORY OF THE CASE

The Due Process Hearing Request (Complaint) in this matter was filed by the Parent with the Office of Administrative Hearings (OAH) on March 29, 2022. The Complaint was given Cause No. 2022-SE-0042 and assigned to ALJ Becker. A prehearing conference was held on April 27, 2022, and hearing dates were set by the order issued on May 18, 2022. The Parent's attorneys moved to withdraw via a written motion filed on May 24, 2022. A prehearing conference was held on June 2, 2022, and the Parent's counsels' motion to withdraw was granted. The issues to be heard at the due process hearing were set forth in the order entered on June 3, 2022, and the due process hearing was held as scheduled.

EVIDENCE RELIED UPON

Exhibits Admitted

Parent's Exhibits: P2, P3, P5-P9, P10 page 1 only, P11 pages 1-4 and bottom of page 5 starting at email from Parent to Dr. Brown, and P12-P16.

District's Exhibits: D1-D19.

Witnesses Heard

Gretchen Schmidt Mertes, Academy Schools special education teacher and social/emotional learning specialist

[1] To ensure confidentiality, names of parents and students are not used.

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One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

The Parent

Dr. Haley Brown, District Assistant Director of Inclusive Education

MaryHelen Willert, District special education teacher and special education curricular leader, Meridian Middle School

Amanda Dawson, District school psychologist

Sandra Soto, District paraeducator

Post-Hearing Briefs

The due date for post-hearing briefs was July 22, 2022. The parties' post-hearing briefs were timely filed.

DUE DATE FOR WRITTEN DECISION

The due date for a written decision in this case was continued to thirty (30) calendar days after the close of the record by order dated May 18, 2022. The record closed with the receipt of the post-hearing briefs on July 22, 2022, and the due date for the written decision is August 21, 2022.

ISSUES/REMEDIES

The issues heard at the due process hearing were:

Whether the District violated its obligations under the Individuals with Disabilities Education Act (IDEA) and the IDEA's implementing regulations as follows:

a. Whether the Individualized Education Programs (IEPs) developed on October 4, 2021, and March 4, 2022, were inappropriate and denied the Student a free appropriate public education (FAPE) by failing to place the Student in his least restrictive environment and failing to provide the Student with the appropriate amount of time in the general education setting;

b. Whether the District failed to offer and/or provide the Student with an appropriate placement in September and October of 2021;

c. Whether the District failed to hold a timely IEP meeting in September and/or October of 2021 after the Parent requested a meeting;

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One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

d. Whether the District denied the Parent meaningful participation in the IEP process in October of 2021 and January of 2022 by predetermining the Student's educational placement;

e. Whether the District denied the Parent meaningful participation in March of 2022 by failing to document reasons for decisions in the Prior Written Notice (PWN) it issued and by misrepresenting conversations with the Parent in the PWN; and

f. Whether the private services obtained by the Parent for the Student since September of 2021 were appropriate.

g. And whether the Parent is entitled to her requested remedies, or other equitable remedies as appropriate, including:

    1. Declaratory relief finding that the District violated the IDEA, and that the Student was denied FAPE by the District's actions;

    2. An order that the District shall reimburse the Parent for private services she obtained for the Student between September 2021 and the present;

    3. An IEP that is appropriate and reasonably calculated to meet the Student's unique needs;

    4. Compensatory education and related services for the Student to allow him to obtain the educational benefit he would have received but for the District's violations of the IDEA and denial of FAPE; and

    5. Whatever additional relief the court finds just and equitable.

FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness, and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence conflicts, the evidence adopted has been determined to be more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence is set forth below as necessary.

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One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
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Background

1. The Student is currently [redacted] years old and was in seventh grade during the 2021-22 school year when this action was filed. D7 p.3.[2] The Student resided with the Parent in the District at all times relevant to this action. The Student has been eligible to receive special education services since 2011 when he was determined to have a developmental delay. D2 p.5. He is currently eligible for special education under the disability category of autism. D7 p.3.

2. The Parent unilaterally placed the Student at Academy Schools (Academy) during the 2018-19 and 2019-20 school years. The Student had difficulty transitioning when first placed at Academy and was unable to access the fifth-grade curriculum during most of the 2018-19 school year. D2 p. 12. He repeated fifth grade the following year, and was placed in a classroom containing nine students who were in grades four, five and six. *Id.* at 12, 28.

3. Academy is a small, nonpublic agency day school. Tr. 37. Currently, there are approximately 60 students at Academy, ten of whom are placed there by school districts. *Id.* at 38. Academy has small class sizes, usually less than ten students, and focuses on social/emotional learning as a core principle. Many of the students at Academy attend the school because they are struggling in public school, and the smaller class sizes and relationships that can be built at Academy better meet their needs. *Id.* at 51.

4. Gretchen Schmidt Mertes[3] is a special education teacher and social/emotional learning specialist at Academy. She is the only special education teacher at the school.

5. The Student performed below expected levels for his age in reading, writing and math during the 2019-20 school year. D2 p13. The District conducted a triennial special education eligibility reevaluation of the Student in September of 2019 at the Parent's request. *Id*. at 3-6. The reevaluation showed the Student to be "at risk" in the areas of hyperactivity, depression, attention problems, learning problems, school problems, adaptability, leadership, functional communication, and adaptive skills. He demonstrated clinically significant findings in the areas of anxiety, atypicality, withdrawal, and somatization. *Id*. at 14-15. The September 2019 reevaluation also showed that the Student's level of reading comprehension was far below what was expected, as were his math skills. Tr. 255.

[2] Exhibits are cited by party ("P" for Parent, "D" for District), exhibit number, and page number. For example, a citation to "P1 p.5" is to the Parent's Exhibit 1 at page 5. The hearing transcript is cited as "Tr." and page number. For example, a citation to "Tr. 50" is to the transcript at page 50.

[3] Ms. Mertes has a Bachelor of Arts degree in elementary education, and a master's degree in special education. She has experience as a general education teacher and special education teacher in public schools. She also worked as an autism educational specialist for 14 years in the Bethel School District prior to joining Academy in 2018. P12 pp. 1-2, 6-7.

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6. The Student qualified for specially designed instruction (SDI) in the following areas during the 2019-20 school year: basic reading, reading comprehension, math calculation, math problem solving, written expression, adaptive skills, social/emotional, and communication. He also qualified for occupational therapy (OT) as a related service. D2 p.28.

7. During the 2020-21 school year, the Student was again unilaterally placed at Academy by the Parent. In October of 2020, the District developed an annual IEP for the Student. The IEP placed the Student in public school with his instructional time divided between the special education and general education settings.[4] D3 p.3. In November of 2020, the Parent requested a change of placement and advocated that the Student be placed at Academy via an IEP. The District denied this request and maintained that the Student's IEP as written offered him FAPE. The Student was partially enrolled in the District for part of the 2020-21 school year, as requested by the Parent, so that he could access speech/language and OT services. *Id.*

8. The Parent and the District entered into a settlement agreement on February 24, 2021, to resolve a due process complaint the Parent had filed in 2020. D4. As part of that settlement, the parties agreed as follows:

> Enrollment. Immediately upon execution of this Agreement, the Parent will withdraw the Student from the District, and he will not be re-enrolled in the District through at least July 31, 2021. If so desired by the Parent, the Student's IEP team will meet prior to October 16, 2021 to discuss an annual IEP.
>
> Release of claims. In consideration for the promises from the District as set forth in this Agreement, the Parent agrees to release and waive all claims under the IDEA, known or unknown, of any kind, on her behalf and on behalf of the Student, against the District through August 31, 2021, related to the Student's status as a student in the District, or his education, including any claims arising from the facts set forth in OSPI Cause No. 2020-SE-0192.
>
> Stay-put. The parties agree that Academy School will not be the Student's stay-put placement after the 2020-21 school year.

D4 pp. 1-2.

[4] This IEP was not entered into evidence at the due process hearing. No evidence was presented as to the time called for in special education versus general education.

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The 2021-22 school year

9. On July 28, 2021, the Parent requested an IEP meeting via an email to Elizabeth Stoughton, District Assistant Director of Inclusive Education. D9 p.1. In that email, the Parent stated:

> My son [Student] is a special education student, he will be in the 7th grade attending Academy School for the incoming school year. During the most recent IEP meeting we determine [sic] Academy school placement was appropriate.[5] Speech and OT was [sic] following up with [Student] during the last school year. I am writing to inform you that I will like for him to remain in his current school placement, which is a private school at public expense. If the plan is different please let me know and I will [sic] like to request for an IEP meeting as soon as possible to discuss the plan before school starts. I did inform the Academy school team that he will remain in the same school.
>
> [Student], D.O.B. [omitted][6] will be attending Academy School 14601 Interurban Ave S. Tukwila WA 98168 private school, effective Sep [sic] 7th 2021.

D9 p.1.

10. Jon Robinson, District Director of Inclusive Education, responded to the Parent later on July 28, 2021, and informed her that the Student's placement is within the purview of the IEP team. He stated that the District would schedule an IEP meeting once the staff had returned from summer break. D9 p.1.

11. In August of 2021, the Parent received multiple telephone calls from the District informing her that the Student's assigned school that year would be Mill Creek Middle School (Mill Creek). Tr. 137. The Parent thought the District had placed the Student at Mill Creek for a "tryout" period, in order to observe him and see how he would do in public school. *Id.* at 136. The Parent brought the Student to Mill Creek on August 26, 2021, but there was no record of him being enrolled. Staff members in the school office took her contact information and told the Parent that the school psychologist would call her to tell her where her son was placed. *Id.* at 138-39. The Parent was later told that the Student should attend Meridian Middle School (Meridian). P11 p.1; tr. 87-88, 139-40.

[5] The Parent conceded during her testimony that this statement in the email is inaccurate. Tr. 127-31.

[6] For privacy purposes, the Student's date of birth is not recited in this quotation, although it was set forth in the original document.

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600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
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12. On August 27, 2021, Ms. Stoughton emailed the Parent and Dr. Brown, and stated:

> I want to ensure we meet as quickly as possible, and certainly, in accordance with the settlement agreement from last year, prior to October 16, to convene an IEP meeting.
>
> If [Student] were to attend [the District], the school which houses the program that would best meet his needs is Meridian Middle School. Dr. Haley Brown is the Assistant Director who works with that school, and I would like this email to serve as an introduction, so that you may work to schedule an IEP meeting with the Meridian team. In order to have accurate information about progress and present levels, it would be helpful if Academy has any progress notes they would be able to share with [the District]. ….
>
> Please let me know how I can best help.

D10 pp. 3-4.

13. Dr. Brown[7] then sent the Parent a release of information document to sign so the District could obtain information from Academy. D11.

14. On August 30, 2021, the next school day after the email exchange, the Parent took the Student to Meridian, but staff at the school had no record of him being enrolled. D1; tr. 87-88.

15. On August 31, 2021, Dr. Brown emailed the Parent and stated she would work with the team at Meridian to coordinate an IEP meeting. D10 pp. 2-3. The Parent replied on September 1, 2021, and stated, in part:

> I left multiple messages for Beth regarding an IEP meeting because during last year IEP settlement agreement [sic], we agreed on having IEP meeting prior to school starts.[8] [Student] has been attending Academy school for the last four years and the school provides personalized learning for grades K to 12. [Student's] school starts on Sep [sic] 7th. I am requesting an IEP meeting as soon as possible because [Student] will benefit from least restrictive environment, which is staying in Academy school where he will attend general education class in small class size room [sic].

[7] Dr. Brown has a Bachelor of Science degree in communication sciences and disorders. She has master's degrees in deaf education and special education, as well as educational administration. Dr. Brown has a doctoral degree in education and organizational leadership. She has worked in a variety of special education settings for approximately 10 years. Tr. 202.

[8] The settlement agreement does not contain a provision that required the parties to hold an IEP prior to the start of the 2021-22 school year.

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D10 p.2.

16. On September 2, 2021, Dr. Brown emailed the Parent and stated:

> It appears that [Student] is enrolled as a [District] student and we would happily welcome him back.[9] I am happy to connect further with next steps. Can we connect via phone tomorrow or Friday at your convenience? Let me know what will work and I will give you a call.

D10 p.1.

17. The Parent did not follow up in any way to pursue the Student attending Meridian. Rather, she wanted to see the Student's new IEP before placing the Student back in the District. Tr. 46. She intended to review the IEP and then discuss placement with the District. She was hoping the District would agree to place the Student at Academy. *Id.* at 146-47.

18. The Parent never expressed to Dr. Brown, with whom she was in frequent contact, that she wanted the Student to attend school in the District. Tr. 187. The IEP that had been developed in October of 2020 was available for the Student and would have been implemented had he enrolled in the District in August or September of 2021. *Id.* at 176.

19. Academy classes started on September 7, 2021, and the Parent did not want to lose the Student's spot. She told the District at that time that she was keeping the Student at Academy because she did not know where the District was going to place him. Tr. 92, 141. Dr. Brown's understanding at the time was that the Parent intended to keep the Student at Academy. *Id.* at 175.

20. The Parent returned the release of information for Academy on September 20, 2021. Dr. Brown requested information from Academy that same day. D15. Academy responded with information on September 28, 2021. D16.

21. The Student attended Academy for most of the 2021-22 school year. He was one of two seventh graders, and one of twelve middle schoolers,[10] enrolled in Academy that year. Tr. 50. Of the twelve middle schoolers, four (including the Student) had IEPs. Three were placed at Academy by school districts. *Id.* at 64.

[9] It is unclear from the evidence presented whether the Student was ever disenrolled from the District and how or when he was reenrolled.

[10] Middle school consists of sixth, seventh and eighth grades. Tr. 57.

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22. During the 2021-22 school year, the Student's classes at Academy included life science, music, American Sign Language, physical education, U.S. history, math, English language arts (ELA), library, drama, art, "exploratorium," social/emotional learning, "advisory," and strategic gaming. P5. His English language arts class, which instructs students in reading and writing, met three days per week, once for 55 minutes, and twice for 110 minutes. *Id*.; tr. at 54-55. The Student's math class met three times per week, once for 50 minutes, and twice for 105 minutes. P5. The math and language arts classes each contained three students, though instruction in ELA was provided one-to-one. P12 p.8; D6 p.23.

23. The Student received grades of "C" in language arts and "C+" in math for the first semester at Academy. P6 p.7. He received A's and B's in all other subjects. His first semester report card notes that the history curriculum was an "adaptive" curriculum created for the Student by the history teacher.[11] It also notes that the Student was receiving "adaptive instruction" in life science. *Id.*

The October 4, 2021 IEP

24. By email dated September 16, 2021, Dr. Brown offered the Parent three dates for an IEP meeting: September 28th, September 30th, and October 4th. The Parent chose October 4th. D13 pp. 1-2. On October 4, 2021, a new IEP was developed for the Student. The invitation to the IEP meeting noted that there were three purposes of the meeting: to discuss annual goal progress, review the current IEP, and review instructional needs. Although "determine placement" is listed as a possible meeting topic on the invitation form's listing of topics, it was not marked as a topic for the meeting. D5 p.1. This is not significant to Dr. Brown because, in her opinion, placement is always a topic of discussion when an IEP is reviewed at an IEP meeting. Tr. 192.

25. The October 2021 IEP was drafted by MaryHelen Willert,[12] District special education teacher. Ms. Willert's understanding was that the Parent had requested a new IEP in order to determine the Student's placement. Tr. 231, 248. Ms. Willert testified that it was a "technical oversight" on her part that the "determine placement" box was not marked on the IEP meeting invitation. *Id.* at 237. The invitation does note that review of instructional needs and discussion of goal progress were purposes of the meeting, and these would drive a placement decision in Ms. Willert's experience. *Id.*

[11] The Parent explained that the history teacher rewrote parts of the history textbook in a way the Student could understand. Tr. 156.

[12] Ms. Willert is a certificated special education teacher. She holds endorsements to teach elementary education, English, English literature, literacy K-12, and special education K-12. Tr. 286. She has been teaching for 34 years, 24 of which have been in special education. *Id*. at 247. Ms. Willert has worked at Meridian for 23 years and is in charge of the special education curriculum at the school. *Id.* at 232, 287.

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26. Ms. Willert sent the draft IEP to the Parent by email on October 1, 2022. In the email, Ms. Willert stated, "Here is the draft of [Student's] IEP for Monday's meeting. Remember, this is just a starting point." D17 p.1. By this, Ms. Willert meant that "anything and everything can be changed and altered. Nothing is set in stone." Tr. 249.

27. The "Present Levels of Educational Performance" section of the October 2021 IEP note that the Student would be unable to progress in the District's seventh-grade English language arts curriculum or in the seventh-grade math curriculum due to his low skill levels in those areas. D5 p.7. The section further notes that the Student does not generally interact with peers and typically keeps to himself, singing or talking on his own. It notes that he does not usually respond to social cues, and that he has a great deal of "learned helplessness," i.e. tending to ask for help on tasks that he is capable of completing on his own and becoming very demanding if he deems a task to be difficult. *Id.*

28. The October 2021 IEP describes the Student's most recent educational setting as follows:

> [Student] is currently enrolled at Academy Schools, a private school in Tukwila, WA. This school seems to be a perfect fit for [Student] as it focuses on social emotional development and independence to the fullest extent possible. There are 45-50 students school wide, PK-12, and usually 5-7 students in each classroom allowing most students to be in general education classes for most of their day. While many of our students have some social emotional challenges, we do not serve aggressive students and serve academics at all levels from remedial to advanced. We offer a Creative Learning and Support Center (CLSC) which is similar to a resource room in the public schools, and in this setting, students can get even more specialized academic support. [Student] is enrolled in CLSC for math and that teacher pushes into his class for English Language Arts. The rest of his classes are considered general education classes. Accommodations and strategies are used and provided frequently and often in this setting and vary depending on the level of student need each day and each period.

D5 p.9. This description of Academy and the Student's classes was written by Ms. Mertes. Tr. 66.

29. The IEP further notes that the Student consistently asks staff at Academy whether it is lunchtime, even when he first arrives at school, and that his maturity level is "quite a bit lower" than that of his classmates. For example, when discussing favorite movies or books, the Student mentioned Sesame Street characters while his classmates mentioned more age-

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appropriate options. D5 p9. Additionally, if the Student is not receiving one-to-one attention from an adult, he will draw rather than do his classwork. *Id.*

30. The October 2021 IEP contains a total of 15 annual goals in the areas of social/emotional, adaptive, basic reading, reading comprehension, written expression, math problem solving, math calculation, and speech/language. D5. It provides a lengthy list of accommodations including use of a calculator, extra time to complete assignments, and preferential seating. *Id.* at pp.17-18.

31. The October 2021 IEP provided the following special education and related services to the Student:

Services 10/11/2021 - 10/10/2022

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Reading Comprehension	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	10/11/2021	10/10/2022
No	Written Expression	Special Education Teacher	Special Education Teacher	300 Minutes / 1 Times Weekly	Special Education	10/11/2021	10/10/2022
No	Social/Emotional	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	10/11/2021	10/10/2022
No	Adaptive Skills	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	10/11/2021	10/10/2022
No	Speech Language - language	Speech Language Pathologist &/or SLPA	Speech Language Pathologist	30 Minutes / 2 Times Weekly	Special Education	10/11/2021	10/10/2022
No	Math Calculation	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	10/11/2021	10/10/2022
No	Math Problem Solving	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	10/11/2021	10/10/2022
No	Basic Reading Skills	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	10/11/2021	10/10/2022
Related							
No	Occupational Therapy	Occupational Therapist &/or COTA	Occupational Therapist	30 Minutes / 3 Times Monthly	Special Education	10/11/2021	10/10/2022

Total minutes per week student spends in school:	1880 minutes per week
Total minutes per week student is served in a special education setting:	1378.5 minutes per week
Percent of time in general education setting:	26.68% in General Education Setting

D5 p.20.

32. As indicated, the IEP placed the Student in the general education setting for 26.68% of the school week for health class, fitness class, electives, lunch, assemblies, clubs, and sporting events. D5 pp. 20-21. The District's general education setting typically consists of classes that provide access to core curriculum instruction and contain between 27 and 30 students, some of whom may have disabilities but most of whom do not. Tr. 167-68.

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One Union Square, Suite 1500
600 University Street
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33. The Student's placement was discussed at the October 2021 IEP meeting. After the District offered placement in a "support classroom" at Meridian, and the Parent and her attorney raised the issue of placing the Student at Academy. Ms. Willert recalls "a big push from the Parent's attorney for a decision to be made to place the Student at Academy" at District expense. Tr. 288. The Parent and her attorney requested a reevaluation of the Student in order to "have a fresh eye look at [the Student's] placement." *Id.* at 147-48. The District agreed to perform a reevaluation. D5 p. 23; tr. 94. The Parent's understanding of the purpose of the reevaluation was to assess whether the Student could access his IEP at Academy. Tr. 149. A "diagnostic placement" at Academy was rejected[13] at the IEP meeting. *Id.* at 188.

34. Dr. Brown opined at the due process hearing that placement in the Student's home school district, i.e., the District, is his least restrictive environment. Tr. 207.

35. The PWN issued on October 4, 2021, proposed that the IEP be initiated on October 11, 2021. The PWN indicated that "Academy or other alternate school enrollment" was considered and rejected by the IEP team.

The 2021 Reevaluation

36. Amanda Dawson,[14] District school psychologist, performed a reevaluation of the Student in late 2021. The reevaluation notification and consent form states that the reevaluation was requested by the Parent because she wanted a placement change. D6 p.3. The reevaluation summary recommends that the Student receive SDI in eight areas: speech/language, adaptive, social/emotional, basic reading, reading comprehension, math calculation, math problem solving, and written expression. It also recommends related services in the area of OT. D6 p.8. There is no evidence that the Parent challenged the appropriateness of the reevaluation.

37. The social/emotional portion of the reevaluation report notes that the Student was rated in the "at risk" category for hyperactivity, atypicality, withdrawal, anxiety, depression, and attention problems. D6 pp. 11 -12.

38. Some of the Student's teachers at Academy were interviewed as part of the reevaluation. His science teacher stated that she was not able to determine the Student's level of comprehension or his ability to synthesize material. D6 p. 22. She noted, for example, that he was able to memorize the periodic table of elements but was not always able to apply the information to his classwork. *Id.* The Student's math and language arts teacher also noted that

[13] A "diagnostic placement" occurs when the school district cannot provide a safe and accessible environment for a student. The student is placed in a temporary environment so an evaluation can be conducted. Tr. 205.

[14] Ms. Dawson has an undergraduate degree in psychology, a certificate in autism studies, and an educational specialist degree in school psychology. She is a nationally certified school psychologist. Tr. 316-17.

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One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
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"it can be hard to find out what he knows academically because he doesn't like to show what he knows." *Id.* at 23.

39. Ms. Dawson administered the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V) as part of the cognitive portion of the reevaluation. The Student performed in the "extremely low" category for visual-spatial, fluid reasoning, working memory, processing speed, and nonverbal index. D6 p.18.

40. Ms. Dawson administered the Kaufman Test of Educational Achievement – Third Edition (KTEA-3) as part of the academic assessment. The Student scored "below average" in letter and word recognition, scored "low" in reading comprehension and math computation, and scored "very low" in math concepts/applications and written expression. D6 p.21. Significant findings from this portion of the reevaluation include that the Student is able to memorize information but cannot use the information functionally. For example, he was able to accurately memorize song lyrics in Spanish, but he is unable to speak Spanish and did not show any sign of understanding the lyrics. *Id.* at 23. Additionally, when asked to write a paragraph retelling a story, the Student's writing was "incomprehensible," and his punctuation was "random." *Id.* at 21. The Student was unable to respond correctly to math concepts/applications questions above a first-grade level. *Id.* at 22.

41. The communication portion of the reevaluation was conducted by Lolita Arevalo, speech-language pathologist (SLP). D6 p.23. Ms. Arevalo concluded that the Student demonstrated below normal receptive and expressive language skills, and below normal pragmatic language skills, and that he continued to qualify for SDI in the area of communication. *Id.* at 25-26.

42. Emily Morgan, District occupational therapist, conducted the OT portion of the reevaluation. She determined that the Student's fine motor skills were well below average, as were his visual perceptual skills. D6 pp. 28-30. However, his handwriting skills were strong, and his overall motor skills were sufficient to meet the demands of the school setting. Ms. Morgan recommended that the Student received OT as a related service to support his SDI in other areas. *Id.* at 30.

43. A meeting was held to review the reevaluation on January 10, 2022, via video conference call. The Parent attended the meeting. D6 p.37.

<u>The February 2022 IEP</u>

44. The Student's IEP was scheduled to be reviewed on February 2, 2022. D7. The IEP meeting invitation lists "review current IEP" as the sole purpose of the meeting. It does not list "determine placement" as a purpose. *Id.* at 1. Ms. Willert testified that this was a mistake on her part and the entire purpose of the meeting was to make a placement decision. Tr. 245-47.

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A draft of the new IEP was sent to the Parent by Ms. Willert prior to the IEP meeting. The email transmitting the IEP to the Parent states, "Here is a draft. I wanted to make sure you had plenty of time to go over so I sent ahead."[15] D18; tr. 262.

45. Because Ms. Dawson was not present at the meeting on February 2, 2022, the Parent requested that the meeting be rescheduled so that Ms. Dawson could attend. Tr. 95-96. The meeting was rescheduled and held on February 9, 2022. *Id.*

46. The February 2022 IEP indicates that no instruction had been provided at Academy with regard to many of the Student's prior IEP goals, including those in the areas of social/emotional, adaptive, and reading. D7 pp. 8-11. It further indicates that the Student continued to demonstrate significant delays in academic skills which adversely affected his ability to benefit from a general education curriculum. *Id.* at 11. The February 2022 IEP contains 15 goals in the same areas as contained in the October 2021 IEP, as well as in OT. D7.

47. The February 2022 IEP provides the following special education and related services to the Student:

Services 02/04/2022 - 02/03/2023

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Adaptive - SDI	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	02/04/2022	02/03/2023
No	Social/Emotional - SDI	Special Education Teacher	Special Education Teacher	300 Minutes / 1 Times Weekly	Special Education	02/04/2022	02/03/2023
No	Basic Reading - SDI	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	02/04/2022	02/03/2023
No	Reading Comprehension - SDI	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	02/04/2022	02/03/2023
No	Speech Language - Language - SDI	Speech Language Pathologist &/or SLPA	Speech Language Pathologist	30 Minutes / 2 Times Weekly	Special Education	02/04/2022	02/03/2023
No	Math Calculation - SDI	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	02/04/2022	02/03/2023
No	Math Problem Solving - SDI	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	02/04/2022	02/03/2023
No	Written Expression - SDI	Special Education Teacher	Special Education Teacher	166 Minutes / 1 Times Weekly	Special Education	02/04/2022	02/03/2023
Related							
No	Occupational Therapy - Related	Occupational Therapist &/or COTA	Occupational Therapist	30 Minutes / 3 Times Monthly	Special Education	02/04/2022	02/03/2023

Total minutes per week student spends in school:	1880 minutes per week
Total minutes per week student is served in a special education setting:	1378.5 minutes per week
Percent of time in general education setting:	26.68% in General Education Setting

[15] The date on which this email and the IEP were sent to the Parent is not clear, but it appears to be January 27, 2022. D18 pp. 1-2.

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D7 p. 20. The percentage of time the Student spends in general education is unchanged from the October 2021 IEP.

48. At the February 2022 meeting, the IEP team considered the Parent's concerns, which she described as "his placement." According to the Parent, the Student performs better in small classroom settings with typically developing children. She was concerned about his tendency to mimic other children and noted that being in a "support" classroom (i.e., a special education classroom) had affected his behavior and learning ability in the past. The Parent requested that the Student be placed at Academy. D7 p.5. According to the Parent, "We talked about it at the meeting. I also had multiple meetings with Dr. Brown and Spencer Pan, Executive Director of Inclusive Education, regarding the issue" after the IEP meeting. Tr. 151-52, 194.

49. Ms. Mertes attended the February 2022 IEP meeting. She opined at the due process hearing that Academy is the Student's least restrictive environment (LRE) because he "steps up" when he is in a class with higher-level peers. He tends to mimic behaviors and "resort to the lowest common denominator." She believes he would not engage with the curriculum in a general education classroom with 30 students and that he would "just check out." Tr. 42-43.

50. Ms. Mertes further opined that the Student is much more capable than he first appears because he frequently engages in task avoidance behavior that masks his abilities. He requires intentional and consistent monitoring but, in her opinion, with such monitoring he is able to perform at grade level in some areas. P12 pp. 7-8.

51. The Parent estimates the IEP meeting lasted for 30-45 minutes. Tr. 153. Ms. Willert described the meeting as "basically discussing the placement recommendations." *Id.* at 264. At the meeting, Ms. Dawson expressed her opinion that the Student was doing well at Academy but could be served by the District in a District building. Ms. Willert and Dr. Brown agreed with Ms. Dawson. *Id.* After these opinions were expressed, the Parent's attorney stated that the District had predetermined the Student's placement. After that statement, according to the Parent, there was no further discussion of placement. *Id.* at 151-52, 194. Ms. Willert recalls that the meeting was "abruptly" concluded by the Parent and her attorney, and that the attorney spoke for a significant portion of the meeting. *Id.* at 264, 289, 300.

52. The PWN from the February 9, 2022 IEP meeting proposes that the IEP be initiated on February 10, 2022, and that the Student be placed at Meridian. D7 p.23. The PWN notes that the team considered and rejected placing the Student at Academy as requested by the Parent. The reason stated for the rejection is, "The IEP team believes the IEP will provide FAPE and that placement in a public school constitutes Least Restrictive Environment for [Student]." The PWN concludes by stating, "The District stands ready to serve [Student] within the Kent School District." *Id.*

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53. Ms. Willert opined at the due process hearing that the seventh-grade curriculum in math and English language arts would not be appropriate for the Student because he would not be able to access the curriculum content even if he could read the words. Tr. 269. She also opined that the Student needs daily SDI in math, reading, writing and social/emotional in order to make progress, and that the minutes set forth in the February 2022 IEP are more appropriate for the Student than are the shorter amounts of instructional time he receives in those areas at Academy. *Id.* at 265-71.

54. On March 29, 2022, the Parent filed the due process complaint in this action.

55. A PWN dated March 31, 2022, states that the District is proposing to continue the Student's IEP. The PWN documents that since the February 2022 IEP meeting, the Parent has contacted District administrators to discuss questions regarding the District's inclusive practices and "hypothetical scenarios regarding possible ways [the] IEP could be implemented." D8; P14. The PWN also states that that District remains "ready and willing" to implement the Student's IEP. D8.

56. The Parent did not request that the IEP team reconvene at any point after its February 2022 meeting. Tr. 194.

57. The Parent feels the Student was "flourishing" at Academy and doing well academically, although he was not performing at grade level. Tr. 98-99. He was able to explain science concepts, such as DNA, to the Parent and he gave a presentation to his science class about horses. *Id.* at 99-100.

58. In May of 2022, the Parent decided "to give the District's offer of FAPE a try." D19. She wanted the District to "see how the Student was doing." Tr. 101-102. The Student worked with a paraeducator when he moved to school at Meridian, but he had not done so at Academy. Tr. 105. The Student had two general education classes, heath/fitness and cooking/sewing. He did not perform well in those classes because he was unable to follow the curriculum. Ms. Willert opined that the Student's academic level is so low that he requires significant modifications in general education classes. He also needs frequent prompting from the paraeducator to pay attention, sit down, and not blurt out responses. *Id.* at 241.

59. The Student's math skills are currently far below grade level. He performed at the second-grade level at Meridian in the spring of 2022. Tr. 256. He performed at a mid-sixth grade level in word decoding, and at a kindergarten to first grade level in reading comprehension. *Id.* at 291. He performed at a second to third grade level in writing, but was unable to construct a meaningful sentence. *Id.* at 292.

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60. The Student does quite well at breakfast and lunch with the general student body, and during passing time between classes. Tr. 294-95. The Parent does not want the Student placed in general education in the District for more time than indicated in his current IEP if the general education classes have 26-30 students because that "would be setting him up to fail." *Id.* at 118-119.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49, 126 S.Ct. 528 (2005). Since the Parent is the party seeking relief in this case, she has the burden of proof. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S.Ct. 999 (1981*); Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). Therefore, the Parent's burden of proof in this matter is preponderance of the evidence.

The IDEA

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

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One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
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> benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

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

4. A free appropriate public education (FAPE) consists of both the procedural and substantive requirements of the IDEA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

> [A] "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" [FAPE] as defined by the Act.

Id. at 188-189.

5. Procedural violations 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 decision-making process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefit.

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

6. The Supreme Court clarified the substantive portion of the *Rowley* test quoted above in 2017:

> 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 . . .

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Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 137 S.Ct. 988, 999-1000 (2017).

7. A school district is not required to provide a "potential-maximizing education" in order to provide FAPE, but only a "basic floor of opportunity" that provides "some educational benefit" to the student. *Rowley,* 458 U.S. at 200-01.

8. The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry that must focus on the unique needs of the student at issue. As the U.S. Supreme Court has made clear, "A focus on the particular child is at the core of the IDEA," and an IEP must meet a child's "*unique* needs." *Endrew F.,* 137 S.Ct. at 999 (emphasis in original). "An IEP is not a form document" and the "essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.* "Above all, an IEP team is charged with developing a 'comprehensive plan' that is 'tailored to the unique needs of a particular child.'" *L.C. on behalf of A.S. v. Issaquah Sch. Dist,* 2019 U.S. Dist. LEXIS 77834 *21, 119 LRP 18751 (W.D. Wash. 2019), *aff'd sub nom. Crofts v. Issaquah Sch. Dist. No. 411*, 2022 U.S. App. LEXIS 907 (9th Cir. 2022), (*quoting Endrew F.*, 137 S.Ct. at 994).

Whether the Individualized Education Programs (IEPs) developed in October of 2021 and February of 2022[16] were inappropriate and denied the Student a FAPE by failing to place the Student in his least restrictive environment and failing to provide the Student with the appropriate amount of time in the general education setting

9. The Parent contends the IEPs developed in October of 2021 and February of 2022 were inappropriate because they failed to place the Student in his LRE and failed to provide adequate time in the general education setting. The Parent argues that the Student's LRE is Academy because he "spent over 100% of his classroom time[17] in a general education classroom" at Academy, and he needs connection with typically developing peers in order to continue to improve his social skills. Parent's Post-Hearing Brief (Parent's Brief) at 14.[18] The Parent does not take issue with the appropriateness of the IEPs other than with regard to placement and time in general education.

10. The IDEA requires that an IEP team, including the parents, make a decision about the educational placement of a student after formulating the IEP and based on the following criteria:

[16] The original phrasing of this issue referenced a March 2022 IEP. The issue has been rephased here to comport with the findings of fact as to when the Student's IEPs were developed.

[17] It is unclear what the Parent means by "over 100%" of time.

[18] Pages in this brief are not numbered, so citations are to pages as counted by the ALJ.

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One Union Square, Suite 1500
600 University Street
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(206) 389-3400 1-800-845-8830
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(a) the Student's IEP;
(b) the least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070;
(c) the placement option(s) that provide a reasonably high probability of assisting the student to attain his or her annual goals; and
(d) a consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

WAC 392-172A-02060.

11. The IDEA's LRE requirements mandate that school districts educate students eligible for special education in the general education setting with their nondisabled peers to the maximum extent possible. WAC 392-172A-02050.[19] This is referred to as "mainstreaming." Removal of an eligible student from the general education environment should occur only if the nature or severity of the student's disability is such that education in the general education classroom, with the use of supplementary aids and services, cannot be achieved satisfactorily. *Id.* As the U.S. Court of Appeals for the Ninth Circuit has observed, mainstreaming "is a policy which must be balanced with the primary objective of providing handicapped children with an 'appropriate' education." *Wilson v. Marana Unified Sch. Dist.,* 735 F.2d 1178, 1183 (9th Cir. 1984). Notably, "[w]hile every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals." *City of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996). The inquiry into what constitutes a student's LRE is individualized and fact-specific, and the IDEA's preference for educating disabled children alongside nondisabled children is not "an absolute commandment." *Poolaw v. Bishop*, 67 F.3d 830, 834, 836 (9th Cir. 1995).

12. The IDEA provides that a "continuum of alternative placements" must be made available by school districts in order to meet the special education and related services needs of students eligible for special education. Such placements include general education classes, special education classes, special schools, home instruction, and instruction in hospitals and institutions. WAC 392-172A-02055. Additionally, "unless the IEP of a student requires some other arrangement, the student shall be educated in the school that he or she would attend if nondisabled." WAC 392-172A-02060(3).

[19] WAC 392-172A-02050, entitled "Least restrictive environment," provides as follows:
Subject to the exceptions for students in adult correctional facilities, school districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided:
(1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and
(2) Special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.

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(206) 389-3400 1-800-845-8830
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13. The Ninth Circuit has adopted a four-part test to determine whether a student's placement is the LRE. *Ms. S. v. Vashon Island Sch. Dist.,* 337 F.3d 1115, 1136-37 (9th Cir 2003). Factors to be considered include: the academic benefits of placement of the student in a mainstream setting, the non-academic benefits of a mainstream placement, any negative effects the student's presence may have on the general education classroom, and the cost of educating the student in a mainstream environment. *Id.* The first factor is weighed most heavily and can be dispositive of the analysis. *Katherine G. v. Kentfield Sch. Dist*., 261 F. Supp. 2d 1159, 1173-74 (N.D. Cal. 2003), *aff'd,* 112 Fed. Appx. 586 (9th Cir. 2004).

14. When analyzing the issue of LRE, the first inquiry is whether the educational placement offered by the District is appropriate, not whether the Parent's preferred placement is appropriate. If the placement offered by the District is appropriate and is the Student's LRE, the issue of appropriateness of the placement preferred by the Parent need not be reached. As explained in *D.M. V. Seattle Sch. Dist.,* 2016 U.S. Dist. LEXIS 122519 (W.D. Wash. 2016):

> The Court must, however, first consider whether [the district] provided an appropriate educational placement for [the student]. As stated by the Ninth Circuit:
>
> > Our de novo review ... must focus primarily on the District's proposed placement, not on the alternative that the family preferred. Even if [the Parents' preference was better for the student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate. We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide [the student] with educational benefits.
>
> *Gregory K. v Longview Sch. Dist*, 811 F.2d 1307, 1314 (9th Cir. 1987). *Accord M.D. v. Dep't of Educ.*, 864 F. Supp. 2d 993, 1003 (D. Haw. 2012) ("[A]lthough a family's preferred schooling may be more beneficial for the student than the DOE's proposed placement, this alone does not make the DOE's placement inappropriate.") In other words, if the Court finds [the district] identified an appropriate educational placement, the inquiry stops there. *Cf. Briggs v. Board of Educ.*, 882 F.2d 688, 693 (2d Cir. 1989) (stating the role of the district court is limited to determining whether a school district complied procedurally and substantively with the IDEA, not to decide whether the same services offered in a district's placement could be provided in a "less segregated" private school setting).

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> Consideration of the LRE forms part of the Court's inquiry. *See Lachman v. Ill. State Bd. of Educ.*, 852 F.2d 290, 294 (7th Cir. 1988). However, the IDEA's preference for the education of disabled children alongside nondisabled children is not "an absolute commandment." *Poolaw v. Bishop*, 67 F.3d 830, 834, 836 (9th Cir. 1995). Indeed, the IDEA's implementing regulations account for this fact by requiring school districts to provide a continuum of alternative placements to meet the needs of disabled children, ranging from "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions[,]" as well as supplementary services, such as a resource room, to be provided in conjunction with "regular class placement." 34 C.F.R. § 300.115. *See Rowley*, 458 U.S. at 181 n.4, 197 n.21 (despite the preference for mainstreaming, the IDEA expressly acknowledges that a satisfactory education in "regular classes" may not be achieved and "thus provides for the education of some [disabled] children in separate classes or institutional settings."); *Board of Educ. v. Illinois St. Bd. of Educ.*, 41 F.3d 1162, 1168 (7th Cir. 1994) (in requiring a continuum of program options, "the regulations contemplate that mainstreaming is not required in every case.")

Id. at *70-72.

The Placement set forth in the Student's October 2021 and February 2022 IEPs is his least restrictive environment

15. Both the October 2021 and the February 2022 IEPs place the Student in a District building, in general education for 26.68% of the time and in special education for the remainder of the school day. Both IEPs specify that SDI and related services will be delivered in a special education setting. With respect to the four-part test used to determine whether the Student's placement under the IEPs is his LRE, the first factor requires analysis of the educational benefits available to the Student in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom. The evidence presented at the hearing convincingly demonstrates that the Student does not have the skills to garner educational benefits in a general education setting. Although he was in seventh grade, the Student was often unable to work independently. His reading comprehension was at a kindergarten level. His writing was incomprehensible, and he was unable to apply math concepts above a first-grade level. No evidence was presented that provision of supplementary aides and services would enable the Student to be satisfactorily educated in general education classes in the areas in which he required SDI. In the two general education classes he did take in the District, the Student did not perform well even with significant modification and frequent prompting. Moreover, the Parent acknowledged that

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600 University Street
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placing the Student in general education for more time than set forth in the IEPs the would be "setting him up to fail."

16. A school district is not required to attempt placement in a general education classroom before choosing an alternative to mainstreaming. *Poolaw*, 67 F.3d at 835. It is concluded that the SDI and related services offered by the District are appropriate for the Student, and that the first part of the LRE analysis weighs in favor of placing the Student in a special education setting. This conclusion is given considerable weight.

17. The second of the four factors requires analysis of the non-academic benefits of a mainstream placement. The evidence indicates that the Student "steps up" and may perform better when placed with nondisabled peers. He tends to mimic behavior of those around him, so placement with nondisabled peers would likely be beneficial, depending on their behavior. While in the District, the Student performed well at mealtimes and during passing time with the general student body. Additionally, he had good rapport with his classmates at Academy. However, he was noted to keep to himself, avoid interaction with peers, and fail to respond to social cues at times, as well. On balance, it is concluded that the second factor of the LRE analysis weighs in favor of placing the Student in general education.

18. The third of the four factors requires examination of the negative effects the Student's presence may have on the teacher and other students in general education. Given that the Student would require extensive modifications of the general education curriculum to be able to access it, if he could access it even then, this would be a burden on the general education teacher. Moreover, the Student has difficulty paying attention and sitting down, and blurts out responses, even with frequent prompting from a paraeducator. This behavior would likely be a significant distraction to other students in seventh grade and higher grade levels. Thus, this factor weighs in favor of placement in special education.

19. The fourth factor pertains to the cost of educating the Student in a mainstream environment versus special education within the District. No evidence was presented as to this factor so no conclusion is reached.

20. Based on the above analysis, it is concluded that placement of the Student in special education for 73.32% percent of his school day, as recommended in the October 2021 and February 2022 IEPs, is his least restrictive environment. The placements set forth in both IEPs are appropriate. The Parent has not proved by a preponderance of the evidence that the IEPs failed to place the Student in his LRE or failed to provide him with an appropriate amount of time in the general education setting.

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One Union Square, Suite 1500
600 University Street
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Academy is not the Student's LRE

21. While the issue of whether Academy is the Student's LRE need not be reached given the analysis and conclusions set forth above, for purposes of clarity and to directly address the gravamen of the dispute between the Parent and the District, the issue will be addressed here.

22. The Parent contends that the Student was performing well in "general education" classes at Academy. The evidence does not support this assertion for several reasons. First, little to no evidence of the Student's actual learning and/or progress was presented at the hearing. Ms. Mertes's opinion that the Student was able to perform at grade level in some areas is not well supported and is not based on current observations. Her opinion is given less weight than the reliable and unchallenged findings of the 2021 reevaluation which document the Student's very low academic skill levels in several areas that cause him to be far below grade level.

23. Second, the Student was *not* in a general education setting at Academy. The Parent's misunderstanding as to this appears to be the source of her ongoing frustration with the District. "General education is what is provided to non-disabled students in the classroom. Special education, on the other hand, is 'specially designed instruction' to meet the unique needs of a child with a disability." *L.J. v. Pittsburg Unified Sch. Dist*., 850 F.3d 996, 1004 (9th Cir. 2017). SDI entails adapting the content, methodology, or delivery of the instruction to address the unique needs of a student, and to ensure access to the general curriculum so a student can meet the educational standards within the jurisdiction. *Id.;* WAC 392-172A-01175. If a student is receiving special services not offered to general education students in the district, the student is not receiving general education. General education instruction does not provide one-to-one instruction or specially designed curricula. *L.J. v. Pittsburg*, 850 F.3d at 1005. In *L.J. v. Pittsburg*, the Ninth Circuit made clear that a student who was in general education classes but received one-to-one instruction from a paraeducator, specially designed mental health services, and specially designed behavioral interventions, was not receiving a general education available to all students. Rather, he was receiving special education.

24. In the present case, the Parent firmly believes the Student's classes at Academy are general education classes because, in part, some his classmates are nondisabled, and the classes are taught by general education teachers. However, Academy is a small private school. Classes usually contain less than ten students, and the school focuses on social/emotional learning. During the 2021-22 school year, the Student was in Academy's "CLSC" program for math and ELA. These were not general education classes and CLSC provided "specialized academic support." In other words, these were special education classes. They each contained only three students, and ELA was taught to the Student one-to-one. In history class, the Student received an "adaptive curriculum" created specifically for him, and he also received an "adaptive curriculum" in life sciences.

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(206) 389-3400 1-800-845-8830
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25. The Student's very small class sizes, one-to-one instruction, specialized academic support, and specially designed curricula are not offered to general education students in the District. The fact that some nondisabled students were in the Student's classes at Academy does convert the classes to a general education setting. See *D.M. v. Seattle* at *61-82 (private school did not provide a "general education environment" and was not the student's LRE when, although classes were labeled "general education," they contained half the number of students found in a public school class and provided the student with "direct and substantial support" from adults for most of the day).

26. Moreover, it is clear that Academy was not providing the instruction needed to help the Student attain his IEP goals. He was not taught by special education teachers. He did not receive the quantity of SDI minutes set forth in his IEP. No instruction at all was provided during the 2020-21 and 2021-22 school years as to several of the Student's IEP goals, including adaptive and reading. The Student was in seventh grade but did not have the skills to access a seventh-grade general education curriculum. The law requires that a student's LRE must be *the least restrictive environment which also meets his IEP goals.* Because Academy did not provide instruction designed help the Student attain his IEP goals, Academy was not an appropriate placement for the Student, and it is not his LRE. While the Parent's belief is sincere and her desire to continue a placement she feels best meets her child's significant needs is understandable, the District's proposed placement is the Student's LRE.

Whether the District failed to offer and/or provide the Student with an appropriate placement in September and October of 2021

27. The Parent contends that the Student was not offered an appropriate placement by the District in September and October of 2021. She argues that there was "no educational placement" for the Student and she received no response from the District as to when the Student could begin to attend school at Meridian. Parent's Brief at 6.

28. The evidence is clear that the Parent informed the District in writing in July of 2021 that the Student would attend Academy for the 2021-22 school year ("he will be in the 7th grade attending Academy School for the incoming school year…effective Sep 7th 2021"). She reaffirmed this on August 31, stating that the Student's school started on September 7th.

29. There was a current IEP available for the Student that would have been implemented had he returned to the District in the fall of 2021. The evidence shows that the Parent wanted to see the Student's *new* IEP before she decided whether to place him back in the District because she "hoped" the new IEP would place him at Academy. Dr. Brown offered to "connect" to take "further steps" to get the Student into Meridian, but the Parent did not follow up and kept the Student at Academy. An IEP meeting was held on October 4, 2021, and the District

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One Union Square, Suite 1500
600 University Street
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(206) 389-3400 1-800-845-8830
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again offered the Student placement at Meridian. The Parent declined to place the Student in the District and continued his enrollment at Academy.

30. Given these facts, it is concluded that the Parent has not shown by a preponderance of the evidence that the District failed to offer and/or provide the Student with an appropriate placement in September and October of 2021.

Whether the District failed to hold a timely IEP meeting in September and/or October of 2021 after the Parent requested a meeting

31. The Parent contends that the IEP meeting held on October 4, 2021, was not convened in a timely manner and the alleged delay violated her rights under the IDEA. A preponderance of the evidence does not support this contention.

32. The IDEA requires that a school district review and revise a student's IEP periodically and not less than annually to determine if goals are being achieved. WAC 392-172A-03110(3). The IDEA does not specify a time period by which an IEP meeting must be held after a parent requests one. However, the reasonableness of any delay is dependent upon the steps taken by the school district during the relevant period. *Spring Branch Indep. Sch. Dist. v. O.W.,* 961 F.3d 781, 793 (5th Cir. 2020). Although *Spring Branch* pertains to an initial evaluation, the reasoning can be applied to an IEP meeting request. In *Spring Branch*, the court found that the school district's 99-day delay in referring the child for a special education eligibility evaluation was unreasonable because the district did not take proactive steps to pursue the evaluation during the delay period. In contrast, in a previous decision, the same court found that an 89-day delay in referring for an eligibility evaluation was reasonable because the district spent the period "requesting and gathering information on the [student] in an effort to classify her and determine its obligations" and more than a month of the period was spent waiting for the parents to provide specific information. *Id.* at *22-24 (citing *Dallas Indep. Sch. Dist. v. Woody,* 856 F.3d 303, 309 (5th Cir. 2017)). *See D.A. v. Fairfield-Suisun Unified Sch. Dist.,* 2013 U.S. Dist. LEXIS 133741 *55 (E.D. Cal. 2013) (school district "was diligent in its efforts" to obtain an IEE and did not unnecessarily delay when it negotiated contract terms with one evaluator while also searching for an alternate evaluator.)

33. In the present case, the Parent first requested an IEP meeting on July 28, 2021. At that point, the Student was not deemed to be enrolled in the District pursuant to the terms of the settlement agreement entered into by the parties in February of 2021. The agreement provides, "[The Student] will not be re-enrolled in the District through at least July 31, 2021." The settlement agreement further provides that that an IEP meeting, if desired by the Parent, would be held prior to October 16, 2021. The District contacted the Parent on August 27, 2021, to arrange a meeting and sent her a release of information for Academy. The release was not returned until September 20, 2021. After receiving the release, the District acted immediately

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to request information from Academy, and offered the Parent an IEP meeting almost as soon as information was received from Academy. The Parent chose the latter of the three dates offered. Thus, the only period of potential delay by the District was in August of 2021, during which nothing was done to schedule the meeting until August 27th. After that time, the District was working to gather information about the Student and awaiting responses. The Ninth Circuit has observed that "small administrative delays … should not render [a] district's actions unreasonable" and school districts should be allowed "a degree of leeway during summer vacation." *JG v. Douglas County Sch. Dist.*, 552 F.3d 786, 798 (9th Cir. 2008). Given that District staff members were unavailable over the summer break, it is concluded that the 27-day delay in commencing to schedule the IEP meeting was not unreasonable.

34. Moreover, even if the October 2021 IEP meeting was untimely, this was a harmless procedural error. A procedural error does not amount to a denial of FAPE unless the student's right to FAPE is impeded, the Parent's opportunity to participate in the decision-making process is significantly impeded, or the student is deprived of an educational benefit due to the procedural error. The Parent has not shown by a preponderance of the evidence that any of those circumstances exist here. A reevaluation was completed after the October 2021 IEP meeting, and another IEP meeting was held in February of 2022. The Student remained at Academy that entire time, up until May of 2022. There was no showing that the Parent would have done anything differently if the first IEP meeting had been held earlier, and no showing of a denial of FAPE due to the delay. *See C.H. v. Cape Henlopen Sch. Dist.,* 606 F.3d 59 (3rd Cir. 2010) (parents not entitled to any recovery based on harmless delay in IEP formation because the procedural error did not amount to a denial of FAPE); *J.D. v. E. Side Union High Sch. Dist., 2021 U.S. Dist. LEXIS 15686 (N.D. Cal. 2021)* (parent not entitled to any relief when the seven-month delay in holding the IEP meeting did not have any adverse effect on the student or parent, and parent failed to identify any specific harm from the delay); *Myles v. Montgomery County Board of Educ*., 824 F. Supp. 1549 (M.D. Ala. 1993)(student was not denied FAPE when IEP team did not develop a full IEP over the summer and only an interim IEP was in place at the start of the school year, and parents did not demonstrate any harm from the two-week delay in IEP development).

35. For these reasons, it is concluded that the Parent has failed to prove by a preponderance of the evidence that the District violated the IDEA by failing to hold a timely IEP meeting in September and/or October of 2021 after the Parent requested a meeting.

Whether the District denied the Parent meaningful participation in the IEP process in October of 2021 and February of 2022[20] by predetermining the Student's educational placement

[20] The original phrasing of the issue references January of 2022. The issue has been rephased here to comport with the findings of fact as to when the Student's IEPs were developed.

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36. The Parent contends the District predetermined the Student's placement in October of 2021 and February of 2022. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342, 344 (9th Cir. 2007). A school district's belief that its proposed placement in public school is appropriate does not establish predetermination so long as it is willing to consider other placements. *Id.* at 345. Predetermination of a student's placement is a procedural violation that can deprive the student of FAPE. According to the Ninth Circuit, a school district violates IDEA procedures "if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.,* 337 F.3d at 1131.

37. The fact that a district may have come to an IEP meeting with pre-formed opinions regarding placement is not dispositive of the issue, so long as district team members were willing to listen to the parent and the parent had the opportunity to make objections and suggestions regarding the IEP. *L.C. v. Issaquah,* 2019 WL at *21. A school district is required to come to the IEP table with an "open mind" but not a "blank mind," and the district may come with a draft IEP for discussion but must not have finalized its placement decision prior to the meeting. *D.M. v. Seattle*, 2016 U.S. Dist. LEXIS 122519 at *10 (citing *Doyle v. Arlington County Sch. Bd.,* 806 F. Supp. 1253, 1263 (E.D. Va. 1992)). A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. *K.D. ex rel. C.L. v. Dep't of Educ., Hawaii,* 665 F.3d 1110, 1123 (9th Cir. 2011). Predetermination violates the IDEA because the IDEA requires that the placement be based on the IEP, not vice versa. *Id.*

38. A parent is not prevented from participating in the IEP process if the school district first prepares an offer to be discussed at the meeting instead of conducting a "free-wheeling discussion and then creating an offer." *Baquerizo v. Garden Grove Unified Sch. Dist*., 826. F.3d 1179, 1186 (9th Cir. 2016).

39. With respect to the October 2021 IEP, the evidence does not support a conclusion that the District predetermined the Student's placement. Rather, the District considered the Parent's position that the Student should be placed at Academy and her reasons for that position. When the Parent and her attorney requested a reevaluation of the Student in order to "have a fresh eye look at placement," the District agreed to perform a reevaluation. The evidence does not support a conclusion that the District lacked an open mind or was unwilling to consider alternatives to placement of the Student at Meridian in the District.

40. With respect to the February 2022 IEP, the evidence, again, does not support a conclusion that the District predetermined the Student's placement. The District agreed to reschedule the IEP meeting so that Ms. Dawson could attend, at the Parent's request. This was

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important to the Parent because Ms. Dawson performed the reevaluation and had observed the Student at Academy. The District's willingness to observe the Student at Academy indicates it was willing to consider Academy as a placement. Notably, Ms. Dawson had documented that Academy provided sufficient accommodations and support for the Student, and that he participated in his classes and seemed to be doing well. The Parent undoubtedly wanted Ms. Dawson to be present at the discussion of placement, given her seemingly favorable view of the Student's experience at Academy. At the rescheduled IEP meeting, Ms. Dawson expressed her opinion that the Student was doing well at Academy but that he could also be served by the District in a District building. Other District members of the IEP team agreed with her. Placement was essentially the only thing discussed at the meeting, and the Parent's counsel spoke at length.

41. Ms. Willert advanced sound reasons supporting the District's position that the Student should be placed in the District, including his pressing need for SDI. The fact that input from the Parent and her counsel did not cause the District to agree that Academy was the appropriate placement does not equate to pretermination. A parent does not have "veto power" over IEP provisions, and sometimes agreement among all team members will not be possible. *Ms. S. v. Vashon*, 337 F.3d at 1131-32. The District gathered extensive information about Academy, and the Parent had the opportunity to give input and make suggestions at the IEP meeting. For these reasons, the Parent has not proved by a preponderance of the evidence that the District was unwilling to consider Academy as a placement in February of 2022, and therefore has not shown that the District predetermined the Student's placement.

42. The Parent attended and actively participated in both IEP meetings. Her opinion as to placement was not the prevailing opinion, but it was presented and considered by the team. For these reasons, it is concluded that the Parent has not proved by a preponderance of the evidence that the District denied the Parent meaningful participation in the IEP process in October of 2021 or February of 2022 by predetermining the Student's educational placement.

Whether the District denied the Parent meaningful participation in March of 2022 by failing to document reasons for decisions in the PWN it issued and by misrepresenting conversations with the Parent in the PWN.

43. 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). "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).

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44. In the present case, the PWN of March 2022 did not set forth any new decisions, proposals or refusals as to the Student. It merely documented that the District remained ready and willing to implement the Student's IEP if he were to attend school in the District, which he ultimately did in May of 2022. A preponderance of the evidence does not support a conclusion that the PWN of March 2022 failed to document reasons for the decisions set forth therein.

45. In addition, no evidence was presented at the due process hearing that the PWN of March 2022 misrepresented conversations between the District and the Parent. Even if the PWN did misrepresent such conversations, the Parent has not proved by a preponderance of the evidence that any such misrepresentations denied her meaningful participation in the IEP process.

46. For these reasons, it is concluded that the Parent has not met her burden to prove by a preponderance of the evidence that she was denied meaningful participation in the IEP process in relation to the PWN issued in March of 2022.

Whether the private services obtained by the Parent for the Student since September of 2021 were appropriate

47. The only private service obtained by the Parent for the Student since September of 2021 about which evidence was presented was his schooling at Academy. As set forth above, Academy was not an appropriate placement for the Student. Moreover, because the District had offered the Student a FAPE, services from Academy were unnecessary. For these reasons, it is concluded that the private services obtained by the Parent for the Student since September of 2021 were not appropriate.

Issue not identified prior to the due process hearing

48. The Parent attempts to raise a new issue in her post-hearing brief. She contends that she asked the District to provide speech and occupational therapy services to the Student throughout the 2021-22 school year, but the services were not provided. Parent's Brief at 10. The Parent seeks 32 hours of speech therapy and 15 hours of occupational therapy as a remedy. *Id.* at 18. A party requesting a due process hearing may not raise issues during a due process hearing that were not raised in the complaint unless the other party agrees. WAC 392-172A-05100(3); 20 U.S.C. § 1415(f)(3)(B). This is consistent with Washington administrative law requiring that prehearing orders identify all issues and provide an opportunity to object. WAC 10-80-130. Because provision of speech and occupational therapy services was not identified as an issue prior to the due process hearing, and the District did not agree to the issue being heard, the issue is not properly before this tribunal and will not be considered.

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600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
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Conclusion

49. Based on the record, it is concluded that the Parent has failed to meet her burden to prove by a preponderance of the evidence that the District violated the IDEA and/or denied the Student FAPE. Having found in favor of the District on all issues, it is concluded that the Parent is not entitled to any remedies or relief.

50. 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 do not substantially affect a party's rights.

ORDER

The Parent has not proved by a preponderance of the evidence that the Kent School District violated the Individuals with Disabilities Education Act, or that she is entitled to any remedies or relief. Accordingly, the Parent's requested remedies are denied.

Served on the date of mailing.

Jacqueline H. Becker
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

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(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

DECLARATION OF SERVICE

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

Parent
[redacted]

Spencer Pan
Executive Director, Inclusive Education Services
Kent School District
12033 SE 256th Street
Kent, WA 98030

Samuel Chalfant
Pacifica Law Group LLP
1191 Second Avenue Suite 2000
Seattle, WA 98101

Dated August 19, 2022, at Seattle, Washington.

Representative
Office of Administrative Hearings
600 University Street, Suite 1500
Seattle, WA 98101-3126

cc: Administrative Resource Services, OSPI

Office of Administrative Hearing
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135