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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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November 14, 2014

Parents
[REDACTED]

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In re: Clover Park School District - Special Education Cause No. 2014-SE-0032

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,

Anne Senter
Administrative Law Judge

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

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SUPERINTENDENT OF PUBLIC INSTRUCTION
ADMINISTRATIVE RESOURCE SERVICES

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OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

SEATTLE-OAH

IN THE MATTER OF:

SPECIAL EDUCATION
CAUSE NO. 2014-SE-0032

CLOVER PARK SCHOOL DISTRICT

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter in Lakewood, Washington, on August 19 and 20, 2014. The Parents of the Student whose education is at issue¹ appeared and were represented by Kammi Mencke Smith, attorney at law. The Clover Park School District (District) was represented by William A. Coats, attorney at law. Ann Jones-Almlie, District director of special education, and Audra Walters, District supervisor of special education, also appeared.

STATEMENT OF THE CASE

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on May 19, 2014. The Complaint was assigned Cause No. 2014-SE-0032 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered May 20, 2014, which assigned the matter to ALJ Anne Senter. The District filed its Response to the Complaint on May 29, 2014.

A prehearing conference was held on June 24, 2014. Prehearing orders were entered on June 25 and August 12, 2014.

Due Date for Written Decision

As set forth in the Prehearing Order dated June 25, 2014, the due date for a written decision in this matter was continued at the District's request to 30 days after the record of the hearing closes. The parties decided at the conclusion of the due process hearing that their post-hearing briefs would be postmarked on October 13, 2014. The parties later realized that this was a holiday, and agreed that they would instead postmark their post-hearing briefs on October 14, 2014. The District's brief was timely received on October 14, 2014, and the Parents' brief was timely received on October 15, 2014. The record closed with the receipt of the Parents' brief on October 15, 2014, so the due date for a written decision in this case is **November 14, 2014**.

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."

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Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 – D8;

Parents' Exhibits: P1 – P49; and

Court's Exhibits: C1 – C2.

Witnesses Heard (in order of appearance):

The Student's Mother;
Diane Mitchell, Mead School District special education teacher;
Ann Jones-Almlie, District director of special education;
Audra Walters, District supervisor of special education;
Lindy Stormberg-O'Keeffe, District autism specialist;
Misty Casner, District educational specialist;
Sherry Knutson, District transition specialist and special education teacher;
Jack Schneider, Community Crisis Stabilization Services residential services coordinator; and
Dr. Mark Derby, Gonzaga University professor of special education.

ISSUES

As set forth in the Prehearing Order dated June 25, 2014, the issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by failing to provide the services required by the Individualized Education Program (IEP) developed by the Mead School District;
- b. And whether the Parents are entitled to their requested remedies:
 - i. Placement of the Student at a traditional District school;
 - ii. Extended school year services;
 - iii. Compensatory education in the areas of speech therapy and occupational therapy;
 - iv. And/or other equitable remedies, as appropriate.

FINDINGS OF FACT

Background

1. At the time of the hearing, the Student was 15 years old and in the ninth grade. Exhibit D1. He was living in a residential facility operated by the Department of Social and Health Services (DSHS) within the District.
2. The Student has profound developmental disabilities, severe autism spectrum disorder, and extreme problem behaviors including aggression, noncompliance, self-injury, and toileting issues. Exhibit P39, p.1. The Student is nonverbal and communicates on a very limited basis using a picture exchange communication system (PECS). (Mitchell, Tr. 85 - 86)
3. The Parents voluntarily placed the Student with the Department of Social and Health Services (DSHS) approximately seven years ago. Exhibit P39, p. 1; (Mother, Tr. 35) The Parents took this step because the Student's needs were so great that they could not care for him, and it was difficult to give their other children the attention they needed. *Id.* at 35-36. The Parents retain their parental rights under this arrangement, including the right to make educational decisions for the Student. (Mother, Tr. 60).
4. The Student has changed school districts multiple times as he has moved from one DSHS residential facility to another. Exhibit D39, p. 1.
5. Prior to arriving in the District, the Student most recently resided within the Mead School District (Mead) near Spokane, Washington. (Mother, Tr. 37) He lived at Youth Educational Services (YES), a residential facility there. Exhibit D39; Mother, Tr. 37.
6. The Student attended school in Mead for approximately a year. (Mitchell, Tr. 74) While there, Mead developed an IEP for the Student on November 26, 2013. Exhibit D1. Under the IEP, the Student was to receive 120 minutes per day of adaptive special education services from a special education teacher, 140 minutes per day of functional academic special education services from a special education teacher, 20 minutes per week of fine motor services from an occupational therapist (OT), and 30 minutes per week of language services from a speech language pathologist (SLP). Exhibit D1, p. 21. He was to receive a total of 1,725 minutes per week of education, 23.48% of which would be in a general education setting, including general education physical education. Exhibit D1, pp. 21, 22. He was to receive special transportation, including paraeducator support and a harness. Exhibit D1, pp. 19, 22. The Student also had an aversive intervention plan and a behavioral intervention plan. Exhibits D2; P3, pp. 3-5; P4, pp. 3-5.
7. The Student was served in a special education classroom with a two-to-one ratio of educators working with him at all times. (Mitchell, Tr. 106 – 07) The educators had protective pads with them at all times and wore Kevlar arm pads in case of biting. *Id.* at 108 - 09. They spent significant time working with the Student on his toileting, communication, and behavior issues. *Id.* at 83 - 95. This included "first/then cards" to explain to the Student what needed to happen next and what preferred activity would take place after that. (Mitchell, Tr. 83) Additionally, he always had the option to request a break, and he had access to a swing and a bike. (Mitchell, Tr. 83 – 84, 90) He attended a Mead middle school five full school days per week until he moved. *Id.* at 75.

8. The Student had significant behavioral problems at the YES residential facility, resulting in emergency room visits and a hospitalization at Children's Hospital in Seattle. (Mitchell, Tr. 104; Derby, Tr. 382) Other than when he was hospitalized, his behavioral problems at YES did not prevent him from attending school. (Mitchell, Tr. 104 - 05; Mother, Tr. 67) Despite his problems at YES, the Student was successful at school. (Mitchell, Tr. 99) He had significant periods of time without behavioral incidents. (Mitchell, Tr. 94-95; Derby, Tr. 383) There were, however, four significant behavioral incidents that were disruptive to everything in the classroom and caused concerns about the Student's safety. (Mitchell, Tr. 95) Two of these incidents took place when a substitute teacher was present and the Student's program was not followed. (Mitchell, Tr. 95-96)

Arrival In The District

9. When the YES facility could no longer properly care for the Student, he was transferred to Community Crisis Stabilization Services (CCSS) in Lakewood, Washington, within the District.

10. CCSS is a residential home in a residential neighborhood. (Schneider, Tr. 313) It serves three students at a time. *Id.* The facility is staffed with one attendant counselor for each student during the day as well as two behavior technicians, a program manager, an attendant counseling manager, and a registered nurse. (Schneider, Tr. 315) A psychologist also provides services to the students. *Id.*

11. CCSS serves students who have unsuccessfully used all other community resources and are in crisis. (Schneider, Tr. 317) They go to CCSS for stabilization. *Id.* Students typically reside at CCSS for a maximum of six months. *Id.*

12. At the time the Student was to arrive, District staff were providing educational services to another CCSS resident in the home. (O'Keefe, Tr. 208)

13. On March 4, 2014, Jack Schneider, CCSS residential services coordinator, was expecting that the Student would arrive that day. Exhibits D6, p.2; P10, p.1. He emailed the Student's Mead IEP to Audra Walters, District supervisor of special education. *Id.*

14. The Student arrived at CCSS in an ambulance strapped to a gurney. (Schneider, Tr. 319) CCSS staff had learned little about him before his arrival. *Id.* at 320. They had difficulty communicating with him and did not know how he used the PECS system. (Schneider, Tr. 320)

15. The Student had behavioral difficulties during his first weeks at CCSS. (Schneider, Tr. 321 - 23) The Student wanted to sit on the couch and watch television and CCSS staff had difficulty getting him to follow their schedule. *Id.* The Student engaged in aggressive behavior and destructive outbursts, including assaultive incidents with staff and self-injurious behavior. *Id.*

16. CCSS staff and District staff jointly determined that the Student was not yet ready for school. (Schneider, Tr. 306.) Mr. Schneider believed the Student was not ready for educational services because of his level of aggressiveness, assaultiveness to staff, and destructive behaviors. *Id.* at 305. He did not believe the level of safety was where it needed to be to move forward with beginning an education program for the Student. *Id.* at 306. Additionally, Mr. Schneider did not feel comfortable transporting the Student to a District classroom. *Id.* at 306.

17. The Mother had hoped that the Student would begin attending a District school immediately upon his arrival at CCSS because the Student had done well at school and it is best to get programming in place for him right away. (Mother, Tr. 39)

18. By April 7, 2014, the District had received special education documents from CCSS and completed an acceptance form, meaning it had determined that the Student was eligible for special education services and his IEP was current. Exhibits D6, p.1; P18; Almlie, Tr. 131. If the necessary records are available, the District will determine whether students have a current IEP before they arrives in the District so they can begin attending school as soon as possible upon arrival. (Almlie, Tr. 131) Students have to be registered before they can attend school. *Id.* at 131-32.

19. On April 7, 2014, Lindy O'Keefe, District autism specialist, met with the Student at CCSS for an initial interview. Exhibit D7. She also met with Mr. Schneider to discuss programming and set dates to conduct site visits at CCSS. Exhibits D6, p. 5; P14, p.1.

20. Ms. O'Keefe conducted site visits at CCSS on April 8 and 9, 2014, and reviewed the Student's IEP. Exhibit D7.

21. On April 9, 2014, Ms. O'Keefe and CCSS staff met at CCSS with Diane Mitchell, the Student's Mead special education teacher. Exhibits D7; Mitchell, Tr. 96. Ms. Mitchell was in Western Washington on her own spring break and wanted to deliver the Student's PECS book to him and talk about his special education program. (Mitchell, Tr. 96 - 97)

22. On April 15, 2014, Mr. Schneider emailed Ann Jones-Aimlie, District director of special education, and other District staff. Exhibit P15. He stated that it had not made sense to have the Student in school earlier, but CCSS now believed he was ready to move forward with schooling. *Id.* He stated that he had a conversation with the Student's Mother about the Student being a candidate for home schooling, but that she was adamant that the Student attend a classroom and not remain in the residential home. *Id.* He stated that he would pick up the enrollment paperwork. *Id.* Ms. Jones-Aimlie responded that she could not make a commitment to having the Student in school but could discuss it. Exhibit P16.

23. On or about April 16, 2014, the Mother called the District asking if it had received the paperwork necessary to enroll the Student. Exhibit D5, p.11.

24. On April 17, 2014, CCSS attempted to transport the Student in a van to a medical appointment in Seattle. (Schneider, Tr. 309) The Student became very agitated, banging on the windows forcefully enough that staff worried he might break them. *Id.* at 330. He also tried to elbow and kick CCSS staff. *Id.* CCSS staff turned the car around and took the Student home. *Id.* Following that experience, CCSS did not attempt to transport the Student again. Instead, it created a "car program" to ease the Student into being transported. Exhibit P9; Schneider, Tr. 310. CCSS did not begin work on the car program until June 5, 2014. (Schneider, Tr. 310)

25. Mr. Schneider completed a student enrollment form for the Student on April 17, 2014. Exhibit P5; Schneider, Tr. 329. This form is alternately referred to as a registration form and an enrollment form. (Almlie, Tr. 134). There is no evidence that CCSS or the Parents attempted to

register or enroll the Student before this date, or that the District did anything to prevent earlier registration or enrollment.

26. An IEP meeting was held on April 17, 2014, with the Student's Mother participating by phone. Exhibit D7; Mother, Tr. 42. On April 17, 2014, the District sent a Prior Written Notice (PWN), proposing programming to gather diagnostic data. Exhibits D3, p.1; P7, p. 7. Only Mr. Schneider's name was on the PWN, but the District sent the Mother a copy as well. Exhibits D3, p. 1; P7, p. 7; Walters, Tr. 192.

27. The PWN stated that the IEP team, including the Student's Mother, met to discuss programming for the Student during his stay at CCSS. Exhibits D3, p. 1; P7, p. 7. The notice stated that the Student's Mother wanted him to receive services on a comprehensive school campus. *Id.* It further stated that there was a need for diagnostic observations within the CCSS facility due to reported significant aggressive and dangerous behaviors. *Id.* The team wished to get current data prior to placing him outside the CCSS facility. *Id.* The team IEP team would reconvene to review the diagnostic data collected in order to update the IEP and assist in determining placement in the Student's least restrict environment. *Id.*

28. On or about April 21, 2014, Mr. Schneider and Ms. O'Keefe planned a schedule for Ms. O'Keefe to work on diagnostic programming with the Student for one hour per day, Monday through Thursday. Exhibits D6, p. 16-17; P20, p. 1-2. Ms. O'Keefe planned to do this through April and then determine staffing and any scheduling changes for May. *Id.*

29. District staff observed the Student between April 25 and May 13, 2014. Exhibits D5, p. 1; D7; P8, pp.1, 1.5, 2; Almlie, Tr. 135. These sessions consisted of meeting the Student and observing how he interacted with CCSS staff. Exhibits D8, pp. 1, 1.5, 2; O'Keefe, Tr. 212. No instructional activity took place during these observations. Exhibits D5, p. 1; D7; P8, pp. 1, 1.5; O'Keefe, Tr. 212.

30. Following these initial observations, the District began providing instruction to the Student at CCSS. Exhibits D7, P8, pp. 1.5, 2. No IEP meeting was held and no changes were made to the Student's Mead IEP before this instruction began. See Almlie, Tr. 159-60. District staff perceived that it was providing as much instruction as the Student could tolerate. (O'Keefe, Tr. 224)

31. The District's school year ended on June 13, 2014. (O'Keefe, Tr. 219)

32. Under the Mead IEP, the Student would have been entitled to 2.7 hours of OT services between enrollment in the District on April 17, 2014, and the end of the school year on June 13, 2014 (20 minutes per week x 8.2 weeks = 164 minutes ÷ 60 minutes per hour = 2.7 hours).

33. During this time period, the District did not provide any OT services to the Student. (O'Keefe, Tr. 214) Thus, the District failed to provide 2.7 hours of OT services to which the Student was entitled under the Mead IEP.

34. Under the Mead IEP, the Student would have been entitled to 4.1 hours of SLP services between enrollment in the District on April 17, 2014, and the end of the school year on June 13, 2014 (30 minutes per week x 8.2 weeks = 246 minutes ÷ 60 minutes per hour = 4.1 hours).

35. During this time period, the District did not provide any SLP services to the Student, only observation. (Almlie, Tr. 165; Walters, Tr. 191) Thus, the District failed to provide 4.1 hours of SLP services to which the Student was entitled under the Mead IEP.

36. Under the Mead IEP, the Student would have been entitled to 182 hours of special education instruction between enrollment in the District on April 17, 2014, and the end of the school year on June 13, 2014 (260 minutes per day x 42 school days = 10,920 minutes ÷ 60 minutes per hour = 182 hours).

37. During this time period, The District provided the following instruction to the Student at CCSS between May 12, 2014, and June 13, 2014:²

<u>Date</u>	<u>Minutes</u>	<u>Citation</u>
May 12	30	Exhibit D8
May 14	30	Exhibits D8, P8, p. 1.5
May 20	30	Exhibit D8
May 27	30	Exhibits D8, P8, p. 1.5
May 28	30	Exhibit D8
June 13	<u>50</u>	Exhibit P8, p.2
Total	200	

38. Thus, the District failed to provide 179 hours of special education instruction to which the Student was entitled under the Mead IEP (182 hours – (200 minutes ÷ 60 minutes per hour = 3.3 hours) = 179 hours)(rounded).

Extended School Year (ESY) Services

39. An IEP meeting was held on June 17, 2014, to review the Student's instructional needs and develop an extended school year (ESY) IEP. Exhibit P6, p.2. The Mead IEP stated that the Student was entitled to ESY services, but did not set forth the ESY services to be provided. Exhibit D1. Accordingly, the District determined it would need to amend the IEP to provide for ESY services. (Almlie, Tr. 161)

40. On June 19, 2014, the IEP team, including the Mother, prepared an ESY addendum to the IEP, under which the Student would receive 450 minutes of ESY services per week, including functional academic, adaptive, motor, and language services. Exhibits D4, P7, pp. 4-5; P36, pp. 2-3. The services would take place at CCSS, and the plan included criteria for increasing programming time as the Student's negative behaviors decreased. Exhibits D4, p.3; P7, p.9; P36.

² Ms. O'Keefe testified that data existed through June 4, 2014, and that all her visits with the Student were not included in her summaries. (O'Keefe, Tr. 212) Because her summaries were very detailed and there was no explanation as to when other visits took place, the length of the other visits, whether instruction took place on the visits, and why they were not included on her summary sheets, other visits are not included in this calculation.

41. After the Student successfully completed the "car program" on or about July 28, 2014, he began receiving his ESY services at a District high school for approximately one and a half hours per day. Exhibits D6, pp. 43-44; P33.

2014 - 2015 School Year

42. At the time of the hearing, CCSS and the District understood that the Student would be moving to a different residential facility in Eastern Washington on September 2, 2014, and would no longer be residing in the District. (Schneider, Tr.336; Almlie, Tr. 162)

43. The Student's Mother, Dr. Derby, and Ms. Mitchell, his former special education teacher, all believe that he could tolerate additional educational services in the evenings and weekends even if he is going to school full time. (Mother, Tr. 46; Derby, Tr. 424, 431; Mitchell, Tr. 105 - 06)

Alleged New Developments

44. In their Post-Hearing Brief, mailed October 14, 2014, the Parents assert that, although it was expected the Student would be moving outside the District, he still remained there. The Parents assert that the Student was not provided educational services during the first few weeks of the 2014 - 2015 school year and continued at the time of the briefing to receive fewer services than those provided for in the Mead IEP. As there is no evidence of these alleged new developments in the record, no findings are made with respect to the 2014 - 2015 school year.

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, 126 S.Ct. 528 (2005). As the Parents are the party seeking relief in this case, they 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 *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

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

Rowley, 458 U.S. at 206-207.

4. A "free appropriate public education" 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" as defined by the Act.

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

The District's Obligation To A Student At A Residential School

Whether CCSS is a residential school for purposes of RCW Chapter 28A.190

5. The District argues that its responsibilities to the Student are limited because CCSS is a "residential school." A "residential school" for purposes of RCW Chapter 28A.190 is defined to include "such other schools, camps, and centers as are now or hereafter established by the department of social and health services . . . for the care and treatment of persons who are exceptional in their needs by reason of mental and/or physical deficiency." RCW 28A.190.020.

6. "Crisis stabilization services" provided by DSHS are services provided to persons with developmental disabilities who are experiencing behaviors that jeopardize the safety and stability of their current living situation. RCW 71A.10.020(3). They include temporary intensive services and supports, typically not to exceed sixty days, to prevent psychiatric hospitalization, institutional placement, or other out-of-home placement and services designed to stabilize the person and strengthen their current living situation so the person may continue to safely reside in the community during and beyond the crisis period. *Id.*

7. This statutory definition of crisis stabilization services demonstrates that CCSS is established by DSHS for the care and treatment of persons who are exceptional in their needs by reason of mental and/or physical deficiency. Accordingly, CCSS is a "residential school" for purposes of RCW 28A.190.

The District's obligation to provide special education and related services to students at residential schools under RCW Chapter 28A.190

8. RCW 28A.190.030 sets forth a school district's obligations with respect to a residential school within the district:

Each school district within which there is located a residential school shall . . . conduct a program of education, including related student activities, for residents of the residential school. Except as otherwise provided for by contract pursuant to RCW 28A.190.050, the duties and authority of a school district and its employees shall be limited to the following:

* * *

(4) The conduct of a program of education, including related student activities, for residents who are three years of age and less than twenty-one years of age, and have not met high school graduation requirements as now or hereafter established by the state board of education and the school district which includes:

(a) Not less than one hundred and eighty school days each school year;

(b) Special education pursuant to RCW 28A.155.010 through 28A.155.100, and vocational education, as necessary to address the unique needs and limitations of residents; and

(c) Such courses of instruction and school related student activities as are provided by the school district for nonresidential school students to the extent it is practical and judged appropriate for the residents by the school district after consultation with the superintendent or chief administrator of the residential school; PROVIDED, That a preschool special education program may be provided for residential school students with disabilities;

9. The District argues that its authority to provide educational services to CCSS residents is limited to those services that are practical and judged appropriate after consultation with its chief administrator, Mr. Schneider. Likewise, it argues that it has no authority under state law to provide an educational program that is inappropriate and in contradiction to the recommendations of CCSS.

10. The District's argument is based on the language in RCW 28A.190.030(4)(c), which limits a district's obligation to provide "such courses of instruction and school related student activities as are provided by the school district for nonresidential students." However, the immediately preceding subsection, RCW 28A.190.030(4)(b), affirmatively requires the District to provide special education as required by state statutes. Accordingly, the District's obligation to comply with special education laws, including those set forth below, is not limited by what is determined to be practical and judged appropriate after consultation with Mr. Schneider.

11. The District also relies on RCW 28A.225.010, which states that children who attend a residential school operated by DSHS may be excused by the superintendent of a school district

from the obligation to attend public school full time if they attend a residential school operated by DSHS. This exception from compulsory attendance laws does not purport to diminish the District's obligations to comply with special education law. Nor is there any evidence in this case that the District's superintendent excused the Student from attendance. Accordingly, this provision has no effect on the District's obligations under the special education laws, including those set forth below.

Transportation

12. WAC 392-172A-02095, a special education rule addressing transportation options for students eligible for special education, states that "[t]ransportation for state residential school students to and from the residential school and the sites of the educational program shall be the responsibility of the department of social and health services and each state residential school pursuant to law." Thus, it was DSHS's obligation to transport the Student rather than the District's.

The District's Obligation To A Student Transferring From Another School District Within The State

13. WAC 392-172A-03105(4) sets forth the District's obligation to special education students transferring from another school district within the state:

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

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

See also 34 CFR §300.323.

14. There is no exception to the obligation to provide comparable services when a district does not believe that those services remain appropriate for a student. In such circumstances, a district's obligation is to develop, adopt and implement a new IEP. See WAC 392-172A-03105(4)(b).

15. Here, the District did not adopt the Student's Mead IEP or undertake to develop a new one during the 2013 - 2014 school year. Accordingly, it was obligated to provide FAPE to the Student, "including services comparable" to those described in the Mead IEP. WAC 392-172A-03105(4).

16. The next question is *when* the District's obligation to provide comparable services arose. Under WAC 392-172A-03105(4), quoted above, that obligation arises when a student "*transfers* from one school district to another school district." (*italics added*). The corresponding federal

regulation makes it clear that enrollment is the triggering event for a transfer student to be entitled to comparable services. The federal regulation provides that the obligation toward a transferring student arises "[i]f a child with a disability (who had an IEP that was in effect in a previous public agency in the same State) transfers to a public agency in the same State, and enrolls in a new school within the same school year . . ." 34 CFR §300.323(e) (italics added).

17. Cases interpreting this regulation hold that a district's obligation toward a student transferring into the district does not exist until the student is enrolled. See, e.g., *N.B. v. State of Hawaii, Dep't of Educ.*, 63 IDELR 216 (D. Haw. 2014) (enrollment, not phone inquiry, triggers obligation); *Arcadia Unified Sch. Dist.*, 114 LRP 44606 (SEA CA 2014) (although parents registered student with new district, he could not be enrolled because he was still enrolled in his prior district).

18. Thus, the District's obligation to provide comparable services began on April 17, 2014, when enrollment paperwork was completed on the Student's behalf.

District's Failure To Provide Comparable Services

19. Between the Student's enrollment on April 17, 2014, and the end of the school year, June 13, 2014, the District provided considerably less instructional services than set forth in the Mead IEP, provided the services in a much more restrictive setting that constituted a change of educational placement, and failed to provide OT and SLP services as set forth in the Mead IEP. Accordingly, it is concluded that the District failed to provide comparable services. As explained above, if the District believed comparable services would have been inappropriate, it was required to develop, adopt, and implement a new IEP in compliance WAC 392-172A-03090 through -03110. See WAC 392-172A-03105(4)(b); 34 CFR §300.323. It did not do so.

20. By failing to provide services comparable to those set forth in the Mead IEP, the District failed to provide the Student a FAPE, which is defined as education provided in conformance with a student's IEP. WAC 392-172A-01080(4). See also 34 CFR §300.17(d). The failure led to an actual denial of educational benefit because the Student received only a fraction of the services to which he was entitled under the Mead IEP.

Other Arguments

21. The Parents also argue in the Post-Hearing Brief that the District denied the Parents the opportunity to participate in the educational decision-making process for the Student. Because this argument was not raised in the Parents' Complaint and is not contained in the statement of the issues for hearing, it is not considered.

REMEDIES

Compensatory Education

22. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from the special education services the school district should have provided in the first place." *Reid v. Dist. of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). It is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. Flexibility rather than rigidity is called for. *Id.* at 523-24. "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, 21 IDELR 723 (9th Cir. 1994).

23. The District shall provide 2.7 hours of OT services as compensatory education.

24. The District shall provide 4.1 hours of SLP services as compensatory education.

25. The District shall provide 179 hours of one-on-one adaptive and/or functional academic instruction. The Mead IEP provided for the Student to receive instruction in a 2:1 or 1:1 staff-to-student setting. This intensive model for providing services and instruction to the Student warrants an hour-for-hour award of compensatory education services.

26. The compensatory services ordered above shall be provided by fully certificated District staff with the education, training, and experience to provide such services. In the alternative, in the event the Student resides where it would not be practical for District staff to provide the ordered services, the District may provide the services through private providers with comparable certification, education, training, and experience. The compensatory education may be delivered at any time during the calendar year following the entry of this decision, at the duration and frequency requested by the Parents. Once such a schedule is set, the Parents (or representative of a residential facility where the District resides if delegated by the Parents) shall, except in an emergency, give notice 24 hours in advance of a scheduled session. Without such notice and in the absence of an emergency, that session will count towards the compensatory education award. The instruction shall take place at the residential facility at which the Student resides at the time the services are provided unless the Parents and the District agree that the services shall be provided elsewhere. Any compensatory services not used during the calendar year will be forfeited.

Other Requested Remedies

27. The Parents' Complaint also requested that the Student be prospectively placed at a traditional District school. As of the date of the due process hearing, it was expected that the Student would be moving to a different residential facility outside the District for the 2014-2015 school year. Accordingly, the Parents did not pursue prospective remedies at the hearing and no such remedies are considered here. See Smith, Tr. 21.

28. The Parents' Complaint also requested that the Student receive ESY services. At the due process hearing, the Parents clarified that they were no longer requesting ESY services or compensatory education related to ESY services. (Smith, Tr. 163-64) Accordingly, no remedies related to ESY services are considered.

29. The Parents also request attorney fees and costs. Because only a court has the authority to award attorney fees and costs, this request is also not considered. WAC 392-172A-05120; 34 CFR §300.517.

ORDER

1. The District violated the IDEA and denied the Student a FAPE from April 17, 2014, through June 13, 2014, by failing to provide comparable special education services to those set forth in his IEP from the Mead School District.
2. The District shall provide the Student with the following compensatory education services: 2.7 hours of occupational therapy services, 4.1 hours of speech language therapy services, and 179 hours of one-on-one adaptive and/or functional academic instruction to be delivered as set forth above.

Signed at Seattle, Washington on November 14, 2014.



Anne Senter
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. *W*

Parents



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