



STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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MAILED
DEC 16 2015
SEATTLE-OAH

December 16, 2015

Parents

[Redacted]

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Sultan, WA 98294

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In re: Sultan School District
OSPI Cause No. 2015-SE-0038
OAH Docket No. 04-2015-OSPI-00069

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,

MATTHEW D. WACKER
Administrative Law Judge

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SUPERINTENDENT OF PUBLIC INSTRUCTION
ADMINISTRATIVE RESOURCE SERVICES

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

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DEC 16 2015

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION **SEATTLE-OAH**

IN THE MATTER OF:

SULTAN SCHOOL DISTRICT

OSPI CAUSE NO. 2015-SE-0038

OAH DOCKET NO. 04-2015-OSPI-00069

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Sultan, Washington, over three days on October 27 – 29, 2015. The Parents of the Student whose education is at issue¹ appeared and were represented by Jenny Cochrane, attorney at law. The Student also appeared for the hearing. The Sultan School District (hereafter the District) was represented by Carlos Chavez, attorney at law. Also present for the District was Robin Briganti, District executive director for Student Programs, Teaching and Learning, and School Support. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (hereafter the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on April 24, 2015. The Complaint was assigned Cause No. 2015-SE-0038, and forwarded to the Office Of Administrative Hearings (OAH) for assignment of an ALJ. On April 24, 2015, the Complaint was assigned OAH Docket No. 04-2015-OSPI-00069, and ALJ David Hansen was assigned the Complaint pursuant to a Scheduling Notice entered the same day. The Complaint was reassigned to ALJ Matthew D. Wacker pursuant to a Notice of Reassignment of Administrative Law Judge entered September 28, 2015. Prehearing conferences were held May 21, June 9, and October 19, 21, 23, and 26, 2015. A post-hearing conference was held on November 11, 2015. Pre-hearing orders were entered on May 22, June 10, and October 20, 2015. An Order on District's Motion in *Limine* was entered on October 26, 2015. A Post-hearing Order was entered on November 5, 2015.

The due date for the written decision was continued to 30 days after the close of the hearing record, pursuant to a request for continuance made by the District. See First Prehearing Order. The hearing record closed with the filing of post-hearing briefs on November 16, 2015. Thirty days thereafter is December 16, 2015. The due date for the written decision is therefore **December 16, 2015**.

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

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents Exhibits: P6-P7, P14-P26, P32-P34, P36, P38-P40, P43-P45, P47-P49, P54-P56, P60-P63, P70, P73-P75, P81, and P83.

District Exhibits: D1-D27.

The following witnesses testified under oath. They are listed in order of their appearance:

The Mother
The Father
Susan Jacobs, private tutor
Eli Dimsha, District paraeducator
The Student
Rebecca Kmita, former District school psychologist (via telephone)
Rebecca Manduchi, District special education teacher
Dale Pittman, District special education teacher
Nathan Plummer, District principal, Sultan Middle School
Robin Briganti, District executive director for Student Programs, Teaching and Learning, and School Support.

ISSUES²

1. The Issue statement below reflects the claims made and remedies requested in the due process hearing complaint. The inclusion of alleged violations of the IDEA in an Issues statement does not guarantee that they constitute violations of the IDEA. The inclusion of requested remedies in an Issue statement does not guarantee that the tribunal has the authority to award them.

2. The Issue statement in this case is as follows:

Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:

- a. Failing to provide reading instruction to the Student using the Barton reading program during nearly all of the 2013-2014 and 2014-2015 school years;
- b. Removing the Barton reading program from the Student's individualized education program (IEP) without the Parents' consent;
- c. Declining the Parents' request for an IEP meeting in the earlier part of the 2013-2014 school year on the grounds that the Student's annual IEP review was not due until early 2014;

² See, Prehearing Order entered October 20, 2015.

- d. Failing to provide the Student's IEP accommodations and/or services in his math and History/American Studies classes during the 2014-2015 school year.
- e. Failing to make speech-to-text software available to the Student;
- f. Asking the Parents to administer the Barton reading program to the Student themselves instead of having his teachers administer it;
- g. Evaluating the Student without the Parents' consent and failing to discuss the evaluation results with the Parents; and,

Whether the Parents are entitled to the following requested remedies, or other equitable relief as appropriate:

- a. A copy of the Barton reading program for the Student to have, purchased at District expense;
- b. Compensatory education in the form of private tutoring at District expense for a period of two years;
- c. Return the Student's notebook containing his Barton progress work to the Parents (or provide a copy of all of the contents of that notebook to the Parents);
- d. Provide an apology from teacher Ms. Manduchi to the Parents and the Student; and
- e. Discipline of teacher Mr. McIver for refusing to follow the Student's IEP.

FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence.

General Background

1. The Student began attending school in the District during September 2010 in fourth grade. The Student entered the District with an individualized education program (IEP) from the [REDACTED] School District in [REDACTED].
2. The Student had been evaluated and determined eligible to receive special education and related services as early as June 2008 by the Lake Stevens (Washington) School District. Lake Stevens determined the Student had a learning disability involving reading comprehension. Exhibit D1p1.³
3. In preparing his first District IEP in fourth grade, a resource room teacher gave the Student two, fourth-grade reading comprehension assessments. It was noted that the Student displayed the same strategy taking the assessments as he displayed in the classroom; as the material became more difficult, the Student "rushes through, makes guesses and does not refer back to his material to make correct spellings." Exhibit D1p1.

³ Reference to exhibits is by exhibit and page number. For example, Exhibit D1p1 is a reference to District's Exhibit D1 at page 1.

4. The Student was reevaluated by the District during March and April 2011. The reevaluation concluded that the Student presented as a student with dyslexia with indications of a phonological processing disorder, and was in need of specially designed instruction (SDI) in reading and spelling. Exhibit D1p4.

5. The Student was a sixth grader at the District's Sultan Middle School during the 2012-2013 school year.

The Student's January 2013 IEP

6. An IEP meeting was held on January 8, 2013, to develop a new annual IEP for the Student. The Parents attended the meeting and signed the IEP. Exhibit D3p11.

7. Regarding the Student's present levels of academic performance, the IEP noted:

[The Student] is successful with passing grades in his general education classes in spite of his reading and writing disability. In Lexia, a reading program specifically for dyslexic students, he is doing exceptionall[y] well...He is using **Barton** four days a week and is making good progress.

Exhibit D3p1, emphasis added.

8. The IEP states that the Student's progress toward his annual goals would be evaluated using "**Barton Reading**, Lexia, and daily work. Assessment will be with Star Diagnostic Reading test, WJ III test and teacher evaluation of daily work." Exhibit D3p4. Progress toward his goals would also be measured by "Midterm, report cards, teacher evaluation, WJ III tests and MSP scores." Exhibit D3p7, emphasis added.

9. The Student's January 2013 IEP does not identify, mention, or reference the Barton Reading program apart from the two instances noted above.

10. The Student's January 2013 IEP does not include provision and/or use of speech-to-text software as an accommodation, modification, or assistive technology. Exhibit D3p8.

11. The January 2013 IEP developed five annual goals for the Student. Four goals were reading comprehension, vocabulary, reasoning, and story-element goals. The fifth goal involved an expository-writing goal. Exhibit D3pp4-5.

Seventh Grade at Sultan Middle School

12. The Student was a seventh grader at Sultan Middle School during the 2013-2014 school year.

13. Rebecca Manduchi is a special education teacher employed by the District and certificated in Washington State. As of the due process hearing, she has six years' experience as a special education teacher, and has earned undergraduate and graduate degrees in History and Special Education, respectively. Ms. Manduchi is presently in the process of attaining her National Certification.

14. Ms. Manduchi was the Student's Reading/Written Language teacher during seventh grade. She was also the Student's IEP case manager for seventh grade. Ms. Manduchi reviewed the Student's January 2013 IEP, as that IEP was in effect for the first approximately four months of the Student's seventh-grade school year. In her opinion, the inclusion of the Barton Reading Program as *one of the means by which to assess the Student's progress* toward his IEP goals did not limit her choice of instructional methodology or curriculum to provide the Student's specially designed instruction (SDI) in reading. Ultimately, the majority of the Student's SDI in reading was provided by Ms. Manduchi during seventh grade using another instructional methodology; the Rewards Program. Testimony of Manduchi.

15. No evidence was presented on behalf of the Parents by an individual equally or more qualified by education, training, and experience than Ms. Manduchi to offer an opinion on the interpretation of the Student's January 2013 IEP. Accordingly, it is found as fact that the inclusion of the Barton Reading Program as one of the means or tools by which to assess the Student's progress toward his IEP goals did not limit Ms. Manduchi's choice of instructional methodology or curriculum to provide the Student's SDI in reading.

The Student's IEP Goal Progress and General Education Grades Under the January 2013 IEP

16. For the grading period ending October 4, 2013, the Student earned the following grades in his seventh-grade general education classes: Read/Writ Lang A-; Math 7 B+; Band A; Social Studies B; Science 7 A; Physical Ed A. Exhibit D15p1.

17. The Student earned the following grades in his general education classes for the *first quarter* of seventh grade ending November 8, 2013: Read/Writ Lang B+; Math 7 B+; Band A; Social Studies C+; Science 7 C-; Physical Ed A-. Exhibit D15p2.

18. By December 2, 2013, the District's evaluation of the Student's IEP goal progress reflected the Student was expected to meet, or master, three of his reading goals by the end of the IEP period in January 2014. And while he was making progress on his other two goals, it was unclear if the Student would master his story-elements goal or his expository-writing goal. Exhibit D4pp1-2.

19. For the grading period ending December 12, 2013, the Student earned the following grades in his seventh-grade general education classes: Read/Writ Lang A-; Math 7 C-; Band A; Social Studies B-; Science 7 F; Physical Ed D+. Exhibit D15p3.

The Student's January 2014 IEP

20. An IEP meeting was held on January 2, 2014, to develop a new annual IEP for the Student. The Parents attended the meeting and signed the IEP. Exhibit D8p13.

21. Regarding the Student's present levels of academic and functional performance, the IEP noted:

According to his most recent STAR assessment, [the Student] is reading at mid-3rd grade level. In class he demonstrates a much higher ability. The difference between the two has much to do with the fact that [the Student] does not like to take assessments and rushes through them. Based on data collected in the

classroom [the Student] is currently achieving a 47% accuracy on vocabulary assessments, a 60% on comprehension, and is able to read 110 cwpm. [The Student] struggles with writing as well...When given the opportunity to type he refuses and chooses to physically write instead.

...The majority of his General Education teachers feel that [the Student's] inability to focus is his greatest hindrance in their class (sic).

Exhibit D8p1.

22. The January 2014 IEP developed four annual goals for the Student. Three goals were reading comprehension, vocabulary, and speed goals, and the fourth goal was a paragraph-writing goal. The Exhibit D8pp3-5.

23. The IEP states that the Student's progress toward his annual goals would be evaluated using "CBA"⁴ and student writing samples. Exhibit D8pp3-5.

24. The Student's January 2014 IEP does not identify, mention, or reference the Barton Reading program.

25. The Parents were aware that the January 2014 IEP did not include any mention of the Barton Reading Program, but they did not consent to its "removal" from the Student's IEP by Ms. Manduchi. Testimony of Mother.

26. The Student's January 2014 IEP identifies the following items as accommodations, modifications, or assistive technology for the Student:

- Shortened Assignments
- Provide test/quiz study guide
- Reader for tests
- Extra time to complete assignments
- Extra time on tests/quizzes
- Provide study outlines/guides/graphic organizers
- Take test in separate location (for math, science, social studies, health, and physical education)
- Preferential seating
- Spelling and grammar devices
- Speech-to-text software
- Use of computer for longer writing assignments
- iPod during quiet time.

Exhibit D8p7-8.

⁴ The acronym "CBA" is understood from the contents of the IEP and testimony of witnesses to mean Classroom Based Assessment.

The Student's IEP Goal Progress and General Education Grades Under the January 2014 IEP

27. The Student earned the following grades in his general education classes for the *second quarter* of seventh grade ending January 24, 2014: Read/Writ Lang A-; Math 7 C-; Band A; Social Studies B-; Science 7 C; Physical Ed C-. Exhibit D15p4.
28. For the grading period ending February 27, 2014, the Student earned the following grades in his seventh-grade general education classes: Read/Writ Lang A-; Math 7 B-; Band A; Social Studies C+; Science 7 P; Health C. Exhibit D15p5.
29. The Student earned the following grades in his general education classes for the *third quarter* of seventh grade ending April 4, 2014: Read/Writ Lang B; Math 7 C+; Band A; Social Studies C+; Science 7 C; Health A-. Exhibit D15p6.
30. For the grading period ending May 13, 2014, the Student earned the following grades in his seventh-grade general education classes: Read/Writ Lang D; Math 7 B; Band A-; Social Studies C+; Science 7 C-; PE Exploratory B+. Exhibit D15p7.
31. The Student earned the following grades in his general education classes for the *fourth quarter* of seventh grade ending June 12, 2014: Read/Writ Lang C+; Math 7 C; Band A; Social Studies D+; Science 7 B-; PE Exploratory A. Exhibit D15p8.
32. The District administered the AIMSweb⁵ Reading – Curriculum Based Measurement to the Student on two occasions during seventh grade. The results reflected:

[The Student] improved from **105** Words Read Correct (WRC) from Grade 7 passages at the Winter Benchmark to **112** Words Read Correct (WRC) at the Spring Benchmark. The rate of improvement (ROI) from the Winter Benchmark is **0.4** WRC per week, which is greater than the ROIs of 35 percent of students in a national sample who started at a similar level. Currently [the Student's] score is **Below Average** compared to Sultan Middle School Spring Percentiles. This was a score **at the 15** percentile compared to other students in the Sultan Middle School Spring Percentiles.

Exhibit D16p1, emphasis in original.

33. The District administered the AIMSweb MAZE – Comprehension to the Student on two occasions during seventh grade. The results reflected:

[The Student] improved from **11** Responses Correct (RC) from Grade 7 Probes at the Winter Benchmark to **18** Responses Correct (RC) at the Spring Break. The rate of improvement (ROI) from the Winter Benchmark is **0.4** RC per week, which is greater than the ROIs of 65 percent of students in a national sample who started at a similar level. Currently, [the Student's] score is **Below Average**

⁵ The AIMSweb is a one-minute test used as a "screening tool." It is not an assessment or diagnostic tool. Testimony of Plummer.

compared to other students in the Sultan Middle School Spring Percentiles. This was a score **at the 24** percentile compared to other students in the Sultan Middle School Spring Percentiles.

Exhibit D16p3, emphasis in original.

34. By June 12, 2014, evaluation of the Student's progress toward his IEP goals reflected that, while he was making progress, the Student might not achieve mastery of his reading comprehension or vocabulary goals by January 2015. The Student was making progress and might achieve mastery of his reading speed and paragraph-writing goals. Exhibit D10pp1-2.

Eighth Grade at Sultan Middle School

35. The Student was an eighth grader at Sultan Middle School during the 2014-2015 school year.

36. Dale Pittman, District special education teacher, was the Student's teacher for Reading and Written Language during eighth grade. Mr. Pittman was also the Student's IEP case manager. It is undisputed that the Student and Mr. Pittman thought highly of each other and enjoyed their student-teacher relationship during eighth grade. The Parents were also very pleased with Mr. Pittman as the Student's teacher and IEP case manager. Testimony of Pittman, Student, and Parents. The Father characterized Mr. Pittman as "outstanding" and believes he "deserves an award" for his efforts on behalf of the Student's education, and this is despite the Student earning lower grades over the course of eighth grade in Mr. Pittman's Reading and Written Language class. Exhibit D21pp1; Testimony of Father.

37. For the grading period ending October 8, 2014, the Student earned the following grades in his eighth-grade general education classes: Read/Writ Lang B-; Math 8 D; Band A; American Studies D; Science 8 C+; Physical Ed A. Exhibit D21p1.

38. For the grading period ending November 20, 2014, the Student earned the following grades in his eighth-grade general education classes: Read/Writ Lang B+; Math 8 C-; Band A; American Studies F; Science 8 D; Physical Ed A-. Exhibit D21p2.

The Student's December 2014 IEP

39. An IEP meeting was held on December 18, 2014, to develop an annual IEP for the Student. The Mother and the Student attended the meeting and signed the IEP. Exhibit D19p11.

40. Regarding the Student's present levels of academic and functional performance, the IEP noted:

According to [the Student's] most recent assessment, He (sic) is reading at the fourth grade level. He is [a] difficult student to assess due to his great communication skills and his habit of rushing through assessments. Based on classroom assessments he is scoring 80% accuracy in vocabulary and has achieved that particular goal. He has also achieved the goal of reading at 120 cwpm. He can be inconsistent when testing occurs and tests better or worse

depending on his attitude. Comprehension still remains an issue with [the Student] and he has not achieved the goal regarding comprehension.

[The Student] is capable of writing complete sentences yet struggles creating full paragraphs and sentences with varied punctuation...He can often edit sentences on the board but does not correct his own work before turning it in.

[The Student] has a tendency to not focus in class, which impacts his grades. He is capable, but does not always work to his full potential. His is often distracted by social interactions and his personal electronic devices.

Exhibit D19p1.

41. The December 2014 IEP developed two reading and two writing goals for the Student. Exhibit D8pp3-5.

42. The IEP states that the Student's progress toward his annual goals would be evaluated using class-based assessments and student writing samples. Exhibit D8pp3.

43. The Student's December 2014 IEP does not identify, mention, or reference the Barton Reading program.

44. The Student's December 2014 IEP identifies the following items as accommodations, modifications, or assistive technology for the Student:

- Shortened Assignments
- Simplify test wording
- Read class materials orally
- Reader for tests
- Extra time to complete assignments
- Extra time on tests/quizzes
- Provide study outlines/guides/graphic organizers
- Take test in separate location (all subjects)
- Preferential seating
- Spelling and grammar devices
- Speech-to-text software
- Modified grading (for English, Spelling, and math)
- iPod during quiet time.

Exhibit D19p7.

The Student's IEP Goal Progress and General Education Grades Under the December 2014 IEP

45. The Student earned the following grades in his general education classes for the *first semester* of eighth grade ending January 2, 2015: Read/Writ Lang C; Math 7 D+; Band A; American Studies P; Science 8 D+; Physical Ed B. Exhibit D21p3.

46. For the grading period ending February 25, 2015, the Student earned the following grades in his eighth-grade general education classes: Read/Writ Lang C; Math 8 C; Band C; American Studies F; Science 8 F; Health B+. It was noted by the Student's American Studies, Science, and Band teachers that the Student was not consistently turning in assignments, and this was affecting his grades. Exhibit D21p4.

47. By March 15, 2015, the District's evaluation of the Student's IEP goal progress reflected the Student was making progress on all four of his annual goals. Exhibit D20pp1-2.

48. The District administered the AIMSweb Reading – Curriculum Based Measurement to the Student on two occasions during eighth grade. The results reflected:

"[The Student] declined from 110 Words Read Correct (WRC) from Grade 8 passages at the Fall Benchmark to 96 Words Read Correct (WRC) at the Winter Benchmark. The rate of improvement (ROI) from the Fall Benchmark is -0.8 WRC per week, which is greater than the ROIs of 5 percent of students in a national sample who started at a similar level. Currently [the Student's] score is **Well Below Average** compared to Sultan Middle School Winter Percentiles. This was a score at the 6 percentile compared to other students in the Sultan Middle School Winter Percentiles.

Exhibit D23p1, emphasis in original.

49. The District administered the AIMSweb MAZE – Comprehension to the Student on two occasions during eighth grade. The results reflected:

[The Student] declined from 18 Responses Correct (RC) from Grade 8 Probes at the Fall Benchmark to 16 Responses Correct (RC) at the Winter Break. The rate of improvement (ROI) from the Fall Benchmark is -0.1 RC per week, which is greater than the ROIs of 25 percent of students in a national sample who started at a similar level. Currently, [the Student's] score is **Average** compared to Sultan Middle School Winter Percentiles. This was a score at the 34 percentile compared to other students in the Sultan Middle School Winter Percentiles.

Exhibit D23p3, emphasis in original.

The Parents' Request for an IEP Meeting

50. Concerned about the Student's grades, on November 26, 2013, the Father sent an email to Ms. Manduchi. In the email, the Father asked Ms. Manduchi, "Should we have an IEP meeting before the scheduled one in January?" Exhibit D6p5.

51. Ms. Manduchi replied to the Father's email later the same day, stating in part:

I am more than happy to schedule an IEP in December if you feel that would be beneficial, but I can also check in with his teachers and remind them of [the Student's] testing accommodations.

Let me know what you decide. It would be nice to have a meeting with you to discuss the Barton program and have [the Student] included in that meeting. I don't think that needs to be an official IEP meeting, i.e. include his Gen Ed teachers, but I think it would be beneficial to have your input on how he is progressing and how we are able to provide that program to him this year.

Exhibit D6p4.

52. Ms. Manduchi had no intention of refusing to schedule an IEP meeting before January 2014 with her reply to the Father's email inquiry. Testimony of Manduchi.

53. The Father replied to Ms. Manduchi's email later the same day stating:

Thank you very much for taking the time to speak with his teachers. With that being done, *I do not think an IEP meeting is necessary before January.*

[The Mother] and I are more than willing to speak with you and his teachers about the Barton program, but [the Student] does not need to be there. And if we are going to talk about the Barton program, why not at an IEP meeting?

Exhibit D6p4, emphasis added.

54. The Father asserted at hearing that he interpreted the last paragraph of Ms. Manduchi's email, cited above, as Ms. Manduchi's "refusal" to meet with the Parents. Testimony of Father. In light of the Father's response to Ms. Manduchi the same day, also cited above, the undersigned finds the Father's assertion unpersuasive, and does not give it any substantial weight. The express language of the Father's email response is more logically persuasive and compelling.

55. On December 4, 2013, the Father emailed Ms. Manduchi, stating:

Hello Rebecca, I hope your day is going well. I have not received any response from you since before Thanksgiving and I want to be sure I haven't missed anything. Are we going to get together and talk about Barton or are we waiting until January?

Exhibit D6p3.

56. Ms. Manduchi responded to the Father's email on December 5, 2013, stating in part:

I apologize for not responding earlier, based on your prior email I had thought you wanted to wait until the IEP in January to meet. Speaking of the IEP because we will need to meet pretty much right after break would it be possible to schedule the meeting now? [The Student's] IEP is due by January 8th, but I was hoping to hold it after school on Monday the 6th if possible.

Exhibit D6p3.

57. On December 6, 2013, the Mother emailed Ms. Manduchi, stating in part that, "Unfortunately [the Father] starts his new classes on the 6th, so that won't work. Is there any way to meet before break?" Exhibit D6p2.

58. Ms. Manduchi replied to the Mother's email later the same day stating in part that, "I don't have any meeting time available before the break unfortunately. Would you be willing to meet right after we come back on January 2nd at 2:30?" Exhibit D6p2.

59. The Mother asserted that the Parents agreed to wait until January 2014 to meet with District staff about the Student's grades because they knew their request to meet earlier would not be acted on. Testimony of Mother. In light of the documentary evidence referenced above and the Parents' demonstrated willingness and ability to intercede on behalf of the Student with the District regarding the Student's education, the undersigned finds the Mother's testimony on this point is not credible.

60. The Father asserted that the Parents made "numerous" requests for an IEP meeting beginning with commencement of the 2013-2014 school year before finally having the IEP meeting on January 2, 2014. Testimony of Father. But apart from this general assertion, the Father did not provide any detailed testimony regarding how the alleged requests were made (telephone calls, emails, in-person contacts), who the requests were made to, or how the Parents were informed of the District's refusal to meet with them. Given the lack of specifics, such general testimony is of little probative value, and is not given significant weight.

District Asking the Parents to Administer the Barton Reading Program to the Student

61. Concerned that the Student was still experiencing difficulty with his reading, the Parents approached Mr. Pittman about looking at the Barton program. Mr. Pittman finally located what he believed was the District's copy of the Barton program in the middle-school computer lab. Eventually the Parents asked to "check out" the Barton program in early spring of 2015, and they suggested to Mr. Pittman that they take the Barton program home. Mr. Pittman gave the Parents what he believed was the Barton Level or Lesson One. He later received an email from the Parents, telling him that what they received was not Level or Lesson One, but rather the instructions on how to use the Barton program. At some point, Nathan Plummer, principal at Sultan Middle School, took the Barton program from Mr. Pittman and had it photocopied and barcoded. Testimony of Pittman, Plummer.

62. On March 4, 2015, Principal Plummer sent an email to the Father. In the email, Principal Plummer stated:

I am unsure of what communication you have made with Mr. Pittman regarding Barton. Unfortunately he is out of the building for the rest of this week, and I am unable to find the appropriate materials. We will have items ready for you on Monday.

Exhibit P49.

63. The Father replied to Principal Plummer's email the same day, stating "Thank you, sir. See you on Monday." Exhibit P49.

64. The Father asserted at hearing that he was surprised when the District sent the Barton Reading Program home with the Student, and that this was one of the final factors which led to the Parents moving out of the District. Testimony of Father. In light of the March 4, 2015 email exchange between the Father and Principal Plummer and both Mr. Pittman's and Mr. Plummer's credible testimony, the undersigned finds the Father's assertion is not credible.

65. No one from the District ever asked the Mother to use the Barton Reading Program at home to instruct the Student. Testimony of Mother.

66. The Mother asserted that, without any request or prompting from the Parents, the District simply sent the Barton Reading Program home with the Student. Testimony of Mother. The Student was given the Barton Reading Program, or some part of it, by someone at his middle school's office and told to take it home. Testimony of Student. But in light of the March 4, 2015 email exchange between the Father and Principal Plummer and both Mr. Pittman's and Mr. Plummer's credible testimony, the undersigned finds the Mother's assertion is not credible. The undersigned finds the Mother's assertion that the Parents did not request or prompt the District to send the Barton program home is not credible.

Evaluating the Student Without the Parents' Consent and Failing to Discuss the Evaluation Results With the Parents

67. Rebecca Kmitta is a former District school psychologist. She last worked for the District during the 2013-2014 school year, when the Student was in seventh grade. Ms. Kmitta is currently employed as a school psychologist for a school district in Indiana. She appeared by telephone for the due process hearing.

68. The Student had been reevaluated in March 2011 by the District. Exhibit D1. He was due for another triennial evaluation in 2014.

69. Apart from her review of records provided to her for the due process hearing by the District's counsel, Ms. Kmitta has no independent recollection of the events or circumstances involving the Student's triennial reevaluation in 2013. Testimony of Kmitta.

70. On March 20, 2014, Ms. Kmitta completed Prior Written Notice (PWN), Parent Consent, and Invitation To Attend A Meeting forms. It was Ms. Kmitta's standard practice at that time to mail documents the same day she prepared them. Ms. Kmitta obtained addresses for parents from their address of record with the District. Exhibit D11, Testimony of Kmitta.

71. The PWN stated the purpose was to inform the Parents that the District was proposing to initiate a reevaluation of the Student. The Parent Consent form requested the Parents sign and return the form, providing their consent for the reevaluation. The Invitation To Attend A Meeting form informed the Parents that a meeting to discuss the reevaluation results would be held on April 17, 2014, at 7:15 a.m. at Sultan Middle School. Exhibit D11.

72. Ms. Kmitta cannot recall receiving any response from the Parents to any of the forms she mailed to them. Testimony of Kmitta.

73. The Parents do not recall receiving any of the documents from Ms. Kmitta. They had no knowledge or notice that the District was proposing to conduct a reevaluation until after the

reevaluation report was completed, and the reevaluation meeting had been held. Testimony of Parents.

74. The District never obtained any written consent from the Parents to conduct the Student's triennial evaluation in 2014.

75. Ms. Kmitta proceeded to conduct the reevaluation by reviewing records, obtaining input from Ms. Manduchi and the Student, and administering the Woodcock Johnson Psycho-educational Battery III – Tests of Achievement (WJ-III) to the Student. Exhibit D14pp1-2. Ms. Kmitta then prepared an Evaluation Report. Exhibit D14.

76. A Reevaluation Results meeting was held on April 17, 2014. The Parents were not in attendance. Ms. Kmitta attended the meeting along with Ms. Manduchi, Mr. Lynch, the Student's seventh-grade math teacher, and two other individuals. All five attendees signed the Evaluation Report. Exhibit D14p5.

77. As a result of his triennial reevaluation, the Student was determined eligible to continue receiving special education and related services based on a specific learning disability (SLD) involving reading. Exhibit D14p4.

78. It was not until sometime after the Reevaluation Results meeting that the Parents finally learned the Student had been reevaluated. They apparently learned of the reevaluation during a meeting with Principal Plummer sometime before the end of the school year. Testimony of Parents.

79. The Parents requested a copy of the triennial reevaluation report after learning of its existence, but never received a copy until after the Complaint was filed in 2015. No one from the District ever discussed the results of the triennial reevaluation with the Parents. Testimony of Parents.

80. Had the Parents been made aware of the Student's impending triennial reevaluation, they would have obtained another Group Health Language and Learning Evaluation for the Student and provided it to the District for consideration, as they had done for his 2011 reevaluation. The Parents believe that the District's triennial reevaluation is not as comprehensive as the evaluation they obtained at Group Health. Exhibit P56pp19-26, Testimony of Parents.

81. Apart from obtaining another Group Health Language and Learning Evaluation, the Parents are unsure of specifically what they would have contributed to, or what they would have raised questions about, regarding the Student's triennial reevaluation had they received notice of the reevaluation. This uncertainty is caused by their exclusion from the reevaluation process. Testimony of Parents.

Failing to Make Speech-to-Text Software Available to the Student

82. It was not until the Student's January 2014 IEP that speech-to-text software (hereafter STTS) was added as an accommodation/assistive technology by Ms. Manduchi. Exhibit D8p7, Testimony of Manduchi.

83. In seventh grade, Ms. Manduchi had the capability of providing STTS to the Student using software on a computer in her classroom. Testimony of Manduchi.

84. The record is not well-developed and there is conflicting testimony regarding whether the Student and/or the Parents ever requested or made known to District staff that the Student wanted to use STTS at school, or that STTS was not made available to him. Ms. Manduchi asserted that neither the Student nor the Parents made it known to her that the Student needed or wanted to use STTS at school. On the contrary, the Student did not want to use STTS on the computer in Ms. Manduchi's classroom. Testimony of Manduchi. The Mother asserted she could not recall how many times the Parents requested STTS, but that it was "many" times and at every single IEP meeting. Testimony of Mother. The Student asserted he asked Ms. Manduchi to use STTS, but she said "no." Later, in eighth grade, the Student asked Mr. Pittman if he could use STTS. Mr. Pittman told the Student to use his phone, and then email the text to him.⁶ But the Student also confirmed that he didn't want to use STTS most of the time because he felt it was unfair to the other students in his classes. Testimony of Student.

85. The Student's assertion that Ms. Manduchi told him he could not use STTS is inconsistent with Ms. Manduchi adding it to the Student's January 2014 IEP for the first time. The Mother's assertion that the Parents on many occasions requested the Student be allowed to use STTS is compromised by her testimony regarding how the Barton Reading program came to be sent home in eighth grade, which was found to be not credible. And when requested by the Student, Mr. Pittman permitted him to use his phone to convert his speech to text and email the text to Mr. Pittman. And finally, the Student himself confirmed he didn't want to use STTS most of the time.

86. After careful review and consideration of all the available evidence, it is found as fact that the Student more likely than not had STTS available to him in one form or another should he have elected to use it from the time of his January 2014 IEP, until he was withdrawn from the District by the Parents.

Failing to Provide the Student's IEP Accommodations and/or Services in his Math and History/American Studies Classes During the 2014-2015 School Year (Eighth Grade)

87. The Student's eighth-grade math teacher was Kenneth Lynch. Exhibit D21p.1. Mr. Lynch was also the Student's seventh-grade math teacher the year before. Exhibit D15pp1-8. Mr. Lynch is now retired. Testimony of Plummer.

88. The Student had two American Studies teachers during eighth grade.⁷ Exhibit D21pp1-4. The Student began eighth grade with Terence McIver as this teacher. The Student was later removed from Mr. McIver's class by Principal Plummer and placed in an American Studies class with Peter Riehle. The exact date when the Student was removed from Mr. McIver's class is unclear from the record, but it occurred no later than February 25, 2015. See, Exhibit D21p4

⁶ Apparently the Student's cell phone had the voice recognition software necessary to convert his spoken words into text.

⁷ Although identified in the statement of issues as History/American Studies, the exhibits identify the class as simply "American Studies." Exhibit D21pp1-4.

(Progress Report for period ending February 25, 2015, identifying American Studies teacher as Peter Riehle). Mr. McIver is no longer employed with the District due to his "poor instructional practices." Testimony of Plummer.

89. Once he was transferred out of Mr. McIver's class, the Student reported that he "learned a lot" in Mr. Riehle's class. Testimony of Student. Mr. Riehle accommodated the Student sufficiently to "make things work," and the Mother does not recall problems in Mr. Riehle's class during the remainder of the time the Student attended Sultan Middle School. Testimony of Mother. This is despite the Student receiving an "F" in Mr. Riehle's class for the grade period ending February 25, 2015. Exhibit D21p4.⁸ Mr. Riehle accommodated the Student just like the Student's eighth-grade science teacher, Angela Nelson (who followed the Student's IEP to a "T"). Testimony of Mother.

90. The reliable evidence of record regarding the provision, or failure to provide, accommodations and/or services in math and American Studies during eighth grade is generally limited to the testimony of the Student and Mr. Pittman. Neither Mr. McIver nor Mr. Lynch appeared at the due process hearing to give testimony. Neither of the Parents ever observed the Student in school during eighth grade, and the significant majority of their testimony on this issue is based on what the Student reported to them. Further, much of the testimony on the issue of provision of accommodations and/or services was not well-developed. Testimony was often unclear as to whether it concerned seventh or eighth grade, and/or involved classes other than math and American Studies. At times the same witnesses gave conflicting testimony.⁹ And clear determination of the facts is further complicated by evidence that the Student either did not or may not have made it known he wished to utilize the accommodations and/or services provided for in his IEP. See, e.g. D6p5.¹⁰

91. Mr. McIver would not allow the Student to use his headphones and iPod in class. The Student asked Mr. McIver for copies of notes, but Mr. McIver refused. Testimony of Student. However, the Student's accommodations only addressed study outlines, guides, and graphic organizers, not class notes. Exhibits D8p7, D19p7, Testimony of Manduchi.

92. The Student was allowed to read class materials orally, as this was a common practice in his eighth-grade classes. Testimony of Student.

⁸ D21p4 is the last progress report or report card for the Student in eighth grade that appears in the record. While the record is unclear, this appears likely due to the Parents removing the Student from the District on April 3, 2015, prior to the end of the school year.

⁹ With respect to the January 2014 IEP (Exhibit P7), the Mother testified the Student did not receive shortened assignments except in Mr. Lynch's math class, but then later testified one of the more important accommodations the District did not provide was shortened math assignments.

¹⁰ D6p5 is an email from the Mother to Ms. Manduchi, in which the Mother states, "[the Student] told me that he was not allowed to take any of his tests to any one for assistance with reading them. Now, I think this is part[ly] because he is too embarrassed to take a test out of a room for assistance; so I don't think that he is asking." The Mother's email was written during seventh grade, not eighth grade, but it is still illustrative of the Student's use of accommodations and/or services. See also Finding of Fact 84: the Student reported he didn't want to use STTS most of the time.

93. The Student was sometimes provided a reader for tests in seventh grade math, and he could have used them in other classes. But whether this was true in eighth grade as well is unclear from the record. Testimony of Student.
94. The Student was not provided extra time to complete assignments, but again it is unclear if this was in seventh or eighth grade. And the Student never requested extra time to complete assignments. Testimony of Student.
95. The Student was provided with extra time for quizzes and tests. Testimony of Student.
96. The Student was permitted to take tests in a separate location. Testimony of Student.
97. The Student was allowed to use his phone for assistance with spelling and grammar. Testimony of Student.
98. The Student did receive modified grading during eighth grade in Ms. McIver's class. Prior to Mr. McIver's separation from the District, Mr. Pittman interceded on the Student's behalf and this resulted in the Student receiving a "P"- a modified grade – for the first semester of eighth grade. Exhibit D21p3.
99. Mr. Pittman provided the Student's accommodations in his Reading and Written Language class, but the Student's grades gradually declined over the course of eighth grade. See, D21pp1-4 (B-, B+, C, C). Based upon his observations and interaction with the Student in this class, Mr. Pittman believed the Student was reading almost at grade level with the provision of his accommodations, modifications, and assistive technology. Testimony of Pittman.
100. Angela Nelson was the Student's eighth grade science teacher. Ms. Nelson followed the Student's IEP to a "T." Testimony of Mother. Despite Ms. Nelson's faithful implementation of the Student's IEP, the Student's grades in Ms. Nelson's class were poor and declined during eighth grade. See, D21pp1-4 (C+, D, D+, F).

The Student's Home and Family Circumstances During Eighth Grade

101. Sometime during December 2014, the Student and his family lost their residence and moved in with another family. This continued through at least February 12, 2015. The Mother believed this was "really getting to" the Student. Exhibit P47. The Father believes the family's living situation during this period impacted the Student. Testimony of Father.
102. During eighth grade, the Father told Principal Plummer the family was homeless but that they were trying to stay in the District. The Father also told Principal Plummer that he had a new job, and that the Student was having "girlfriend issues." Testimony of Plummer.
103. Mr. Pittman opined that as the school year went on, the Student was not as "engaged" as he had been at the start of year, and that by the spring semester the Student had "checked out," as though he didn't want to be at school any longer. The Student was not turning in his homework assignments as he had earlier in the school year. The Student told Mr. Pittman that he was moving and switching schools. In Mr. Pittman's opinion, the Student had been making progress in Mr. Pittman's class until he "checked out" during the spring semester. Testimony of Pittman.

104. The Parents withdrew the Student from the District effective April 3, 2015. Exhibit D22. The Parents and their family moved to Lake Stevens, Washington, where the Student began attending school right after spring break. Testimony of Mother. The Parents assert that the only reason they moved outside the District was the problems the Student was experiencing with his education. The Parents were tired of fighting over two years to get the Barton Reading program back. Testimony of Mother.

CONCLUSIONS OF LAW

The IDEA

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, in this case the Parents: *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).
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, supra, 458 U.S. at 206-207 (footnotes omitted).

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.

5. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.*, 458 U.S. at 207. "[A] school must provide a student with a 'meaningful benefit' in order to satisfy the substantive [FAPE] requirement." *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9th Cir. 2014) (internal citation and quotation marks omitted).

Procedural Compliance with the IDEA

6. Procedural safeguards are essential under the IDEA:

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

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

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

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

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

Removing The Barton Reading Program From The Student's Individualized Education Program (IEP) Without The Parents' Consent

8. Parents are mandatory participants in the development of a student's IEP. They are as equally important as school district members of an IEP team. However, parents do not have veto power over the development of a student's IEP. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). In other words, the IDEA does not grant parents the right or authority to withhold their consent, effectively stopping development of a student's IEP. If a school district and a parent or parents cannot agree on the contents of a student's IEP, including the choice of instructional methodology, the IDEA recognizes the need to move forward with the development and implementation of the student's IEP. In such a situation, the remedy for parents who disagree with the contents of an IEP is to file a due process hearing request and attempt to convince an ALJ or hearing officer they are correct. WAC 392-172A-05080.

9. It is clear the Parents were aware of, disagreed with, and did not consent to what they perceived as the removal of the Barton Reading program from the Student's January 2014 IEP by Ms. Manduchi. But the District did not violate the IDEA by moving forward with development and implementation of that IEP; the District did not require the Parents' consent to remove any mention of the Barton Reading program from the IEP. Given the Parents' disagreement, their remedy was to file a due process hearing request and try to convince an ALJ or hearing officer that the Student requires the Barton Reading program in order to receive FAPE.

10. It is concluded that the District did not violate the IDEA by removing the Barton Reading program from the Student's January 2014 IEP without the Parents' consent.¹¹

Declining The Parents' Request for an IEP Meeting in The Earlier Part of The 2013-2014 School Year on The Grounds That The Student's Annual IEP Review Was Not Due Until Early 2014

11. The evidence on this issue is clear. Ms. Manduchi did not decline or refuse the Parents' request for an IEP meeting until the January 2, 2014, IEP meeting. The evidence produced and relied upon by the Parents is not persuasive. Rather, an objective reading of the emails between the Parents and Ms. Manduchi reflect a conversation or exchange during which Ms. Manduchi offered to schedule an IEP meeting before January, and at the same time offered to speak with the Student's teachers about the Parents' concerns. The Father responded that, given Ms. Manduchi would speak with the Student's teachers, an earlier IEP meeting was not necessary. The Father's assertion he interpreted Ms. Manduchi's response as a *refusal* to meet with the Parents is simply unpersuasive. And even if that was the Father's true belief, it was an unreasonable belief, and unsupported by objective facts. It is concluded that the District did not refuse to meet with the Parents before the Student's annual IEP meeting in January 2014, and did not violate the IDEA.

Asking The Parents to Administer The Barton Reading Program to The Student Themselves Instead of Having His Teachers Administer it

12. As above, the evidence and the facts simply do not support the Parents' assertion the District asked them to administer the Barton Reading program at home. The Parents' testimony on this issue is troubling at best. The facts frankly reflect that, at a minimum, the Parents were as active participants in having the Barton Reading program sent home as the District was, and likely more so. There is simply insufficient evidence to conclude that anyone from the District ever asked the Parents to administer the Barton Reading program at home, and or that the District simply sent the Barton Reading program home completely on its own initiative without any direction or request from the Parents. Furthermore, having concluded the District was not required to use the Barton program to provide the Student's SDI in reading, it is unclear how asking the Parents to use it at home would be any violation of the IDEA while the District continued to implement the Student's IEP at school using the Rewards program. It is concluded the Parents have not established any violation of the IDEA with respect to this issue.

¹¹ It is important to note that the issue in this matter is whether the District violated the IDEA by removing the Barton Reading program from the Student's IEP *without the Parents' consent*. The issue is not whether the Student required the use of the Barton Reading program in *order to receive FAPE*.

Evaluating The Student Without The Parents' Consent and Failing to Discuss The Evaluation Results With The Parents

13. The District is correct that under certain circumstances a school district may evaluate, or more properly in the Student's case reevaluate, a student without obtaining consent from the student's parents. But those circumstances are limited, and not present in this case. WAC 392-172A-03000 is applicable and provides in relevant part:

...
(3)(a) A school district must obtain informed parental consent, prior to conducting any reevaluation of a student eligible for special education services, subject to the exceptions in (d) of this subsection and subsection (4) of this section.

...
(d) A school district may proceed with a reevaluation and does not need to obtain informed parental consent if the school district can demonstrate that:

- (i) It made reasonable efforts to obtain such consent; and
- (ii) The child's parent has failed to respond.

...
(4)(d) To meet the reasonable efforts requirements to obtain consent for an evaluation or reevaluation the school district must document its attempts to obtain parental consent using the procedures in WAC 392-172A-03100(6).

WAC 392-172A-03100(6) provides that:

(6) A meeting may be conducted without a parent in attendance if the school district is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as:

- (a) Detailed records of telephone calls made or attempted and the results of those calls;
- (b) Copies of correspondence sent to the parents and any responses received; and
- (c) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

See also 34 CFR §300.300(c)(1)-(2), and 34 CFR §300.322(d), respectively.

14. On March 20, 2014, Ms. Kmitta sent the Parents PWN, Parent Consent, and Invitation to Attend A Meeting forms she had completed. The purpose of these forms was to notify the Parents of Ms. Kmitta's intent to reevaluate the Student, obtain their consent, and invite them to the meeting to discuss the results of the Student's reevaluation. Ms. Kmitta does not recall receiving any response from the Parents, and the Parents do not recall receiving any of these forms from her. This one attempt on March 20th to obtain the Parents' consent for the Student's reevaluation is the only attempt the District can document.

15. The applicable regulations clearly refer to a school district making reasonable "efforts" to obtain parental consent for a reevaluation. The regulation uses the plural "efforts" not the singular "effort," and the intent of the regulations is manifest. A school district must make more than a single effort to obtain parental consent for a reevaluation. In the Parents' case, Ms. Kmitta made a single effort on March 20th to obtain the Parents' consent. Ms. Kmitta has no independent recollection of the circumstances surrounding any additional efforts to obtain the Parents' consent, and so her testimony regarding any standard practice of following up with a phone call is unconvincing. And even were Ms. Kmitta able to independently recall additional efforts to obtain the Parents' consent, the District is unable to produce any documentation or

"detailed records" of any such efforts, as the regulation requires.

16. It is concluded that the District failed to obtain the Parents' consent to reevaluate the Student, and has failed to establish it made reasonable efforts to do so. It is concluded that by proceeding with the Student's reevaluation without the Parents' consent, the District committed a procedural violation of the IDEA. But before the Parents may be awarded any remedy for a procedural violation, the evidence must establish the procedural violation denied the Student FAPE based upon any of three circumstances. See, WAC 392-172A-05105(2), above.

17. It is easily concluded that the District's failure to obtain the Parents' consent to reevaluate the Student significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE for the Student. The record is replete with abundant evidence of the Parent's past history and continuing desire to participate in the decision-making process to ensure the Student receives FAPE. The District's failure to obtain consent for the reevaluation and effective, though unintentional, exclusion of the Parents' from the reevaluation meeting significantly impeded their opportunity to participate. The Parents presented compelling evidence of how they would have participated had they given consent and participated in the reevaluation process and meeting. At a minimum, they would have obtained another outside evaluation of the Student. It is concluded that this procedural violation warrants a remedy.

Substantive Compliance with the IDEA

18. Material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007).

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

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

Van Duyn, supra, 502 F.3d at 821 and 822 (italics in original).

Failing to Provide Reading Instruction to The Student Using The Barton Reading Program During Nearly All of The 2013-2014 and 2014-2015 School Years

19. The Parents argue that the Student's January 2013 IEP *required* the District to use *only* the Barton Reading program as the instructional methodology to deliver the Student's specially designed instruction (SDI) for reading. They base their argument on the identification of the Barton in the Student's IEP as one of the means by which to evaluate the Student's progress toward his reading goals. The Parent's reliance on this interpretation of the Student's IEP is misplaced. Applying the logic of the Parents' argument, it could just as reasonably be argued that the Student's January 2013 IEP required the District to use the Lexia reading methodology to deliver the Student's SDI because the IEP also identifies Lexia as one of the means by which

to evaluate or assess the Student's progress toward his reading goals.

20. The choice of instructional methodology to deliver a student's SDI is clearly left to school districts. The only way parents can prevail in a dispute with a school district over the choice of instructional methodology used to deliver SDI is to present sufficient evidence establishing that a student can only obtain FAPE using one specific methodology. This is a very heavy evidentiary burden, and the evidence presented by the Parents in this matter falls far short of that. It is concluded that the Student's January 2013 IEP did not mandate or require the District to use only the Barton Reading program to deliver the Student's SDI for reading.

21. With respect to the Student's January 2014 and December 2014 IEPs, there is no identification of the Barton Reading program in *any* manner. The IEPs are entirely silent with respect to any use of the Barton program as either the required methodology, or as an evaluation or assessment tool. There is simply no legal basis for the Parents to argue the IEPs require the District to use only the Barton Reading program to deliver the Student's SDI for reading.

22. It is concluded that the District did not violate the IDEA or deny the Student FAPE by failing to use the Barton Reading program as the instructional methodology to deliver the Student's SDI for reading during seventh or eighth grades.

Failing to Make Speech-to-Text Software Available to The Student

23. After having considered all the evidence of record and having found the Student more likely than not had speech-to-text software available to him in one form or another should he have elected to use it during the period at issue, it is concluded that the District did not violate the IDEA or deny the Student FAPE.

Failing to Provide The Student's IEP Accommodations and/or Services in His Math And American Studies Classes During The 2014-2015 School Year

24. Of all the issues raised by the Parents, this issue is the most difficult to adjudicate. As noted at length in the Findings of Fact, the reliable evidence of record is limited, not well-developed, unclear as to the time period(s) and class(es) involved, and much of the evidence presented was hearsay. But after carefully parsing through the evidence, it is concluded that more likely than not the Student's accommodations and modifications provided for in his two 2014 IEPs were not fully implemented during eighth grade for the period of time the Student was in Mr. McIver's American Studies class. This period runs from the commencement of the 2014-2015 school year, until no later than February 25, 2015. This failure constitutes a material violation of the IDEA by the District, as the failure to implement the accommodations and modifications in Mr. McIver's class was more than a minor discrepancy between what the IEP called for and what the District provided. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007).

25. Based largely on the Parents' testimony that the Student was accommodated sufficiently to "make things work" once he was transferred into Mr. Riehle's American Studies class, and the Student's testimony that he "learned a lot" in Mr. Riehle's class, it is also concluded that the Student's accommodations and modifications were either implemented in Mr. Riehle's class, or were sufficiently implemented such that any failure to implement was no more than a minor

discrepancy between what was provided in Mr. Riehle's class and what was required under the Student's IEP. It is concluded this does not constitute a violation of the IDEA. *Id.*

26. It is concluded that the Parents' have not presented clearly sufficient evidence to find any more than a minor discrepancy in implementing the Student's accommodations and modifications in Mr. Lynch's eighth-grade math class. It is concluded this does not constitute a violation of the IDEA. *Id.*

Remedies

Compensatory Education

27. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra*, 401 F.3d at 523-524.

28. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra*, 401 F.3d at 524.

29. The District committed two violations of the IDEA. The District committed a procedural violation by failing obtain the Parents' consent for the reevaluation. That procedural violation warrants a remedy because it significantly impeded their opportunity to participate in the decision-making process regarding the provision of FAPE to the Student. The District committed a substantive violation when it materially failed to implement the Student's accommodations and modifications in Mr. McIver's class. This also warrants a remedy.

30. For failing to obtain the Parent's consent for reevaluation, it is concluded that the most appropriate remedy is to require the District to train its staff responsible for conducting evaluations and reevaluations in the proper procedures regarding obtaining parental consent. Accordingly, the District is ordered to conduct training for all staff that may be called upon to conduct evaluations or reevaluations at Sultan Middle School. The training shall be no less than one hour in duration, and provided by an individual qualified by education, training and experience to provide such training. The training shall include instruction on regulations in the Washington Administrative Code at WAC 392-172A-03000 and WAC 392-172A-03100. The District shall document the attendance of all staff at said training and maintain that documentation at the District. The training shall be provided no later than 60 calendar days from entry of this order, and thereafter as frequently as needed for new staff assigned to conduct evaluations or reevaluations at Sultan Middle School. The training may be video-recorded for future use so as not to require continuing live instruction. This mandatory training requirement shall remain in place for three calendar years from entry of this order.

31. In addition to the mandatory training, the District shall make a diligent and good-faith effort to locate the Student's notebook containing his Barton progress work. If the notebook is located, it shall be returned to the Parents. If the District, after making a diligent

and good-faith effort to locate the notebook, is unsuccessful, no further remedy is ordered regarding the notebook.

32. Designing an appropriate remedy for failing to provide the accommodations and modifications in Mr. McIver's classroom in conformity with the Student's IEP is more difficult. Ordering mandatory training in providing accommodations and modifications and the use of assistive technology for Mr. McIver is pointless, as he no longer works for the District. And the record is not sufficiently well-developed by the Parents to reasonably determine what adverse effect, if any, the implementation failure had on the Student. The Parents argue that the failure to provide those accommodations and modifications resulted in the Student's grades declining, but the District has offered equally plausible reasons apart from Mr. McIver's class to account for any such decline during eighth grade.

33. It is clear the Student's primary need is to increase his ability and capability to read and comprehend at grade level. Accordingly, the District shall be ordered to provide a sum of \$2,000.00 to be used by the Parents to purchase appropriate tutoring to address the Student's reading disability as compensatory education. The Parents shall select the tutor. This a reasonable sum given the District's violation occurred over a substantial period of time; from the beginning of the school year in September 2014, until sometime on or about February 25, 2015. The Parents may pay for the tutoring and then submit appropriate documentation for reimbursement to the District, or they may elect to have the tutor bill the District directly. The funds shall be available for a period of one calendar year from entry of this order. Any funds remaining after that time shall be forfeited back to the district.

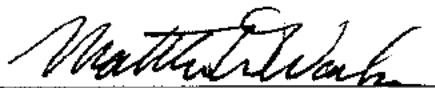
34. All arguments made and remedies requested by the parties have been considered. Arguments and/or remedies not specifically addressed herein have been considered, but are found not to be persuasive, not to substantially affect a party's rights, or are unwarranted.

ORDER

The Sultan School District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education. The violations are set forth in detail in the Conclusions of Law, above.

The Sultan School District shall provide the remedies ordered in Conclusions of Law #30 through #33, above:

Signed at Seattle, Washington on December 16, 2015.



MATTHEW D. WACKER
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. *MOW*

Parents
[REDACTED]
[REDACTED]

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