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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

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June 30, 2018

Parent



Michaela Clancy,
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Lakewood, WA 98499-1341

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PO Box 1315
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In re: **Clover Park School District**
Cause No. 2017-SE-0101
Docket No. 10-2017-OSPI-00419

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

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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Superintendent of Public Instruction
Administrative Resource Services

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

CAH - SEATTLE

IN THE MATTER OF:

OSPI CAUSE NO. 2017-SE-0101

OAH DOCKET NO. 10-2017-OSPI-00419

CLOVER PARK SCHOOL DISTRICT

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

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Lakewood, Washington over five days on April 23-26 and 30, 2018.¹ The Parent of the Student whose education is at issue² appeared and represented herself (*pro se*). The Parent was accompanied and advised by Helen Caldart. The Clover Park School District ("the District") was represented by William Coats and Erin Sullivan-Byorick, attorneys at law. Also present for the District was Dr. Holly Galbreath, special education supervisor. The following is hereby entered:

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request ("the Complaint") on October 18, 2017. A Scheduling Notice was entered on October 19, 2017. The Scheduling Notice, in part, assigned ALJ Michelle Mentzer as the presiding ALJ, set a prehearing conference for November 16, 2017, and a due process hearing for December 11, 2017. The District filed its Response to the Complaint on October 26, 2017. An Order Resetting Prehearing Conference was entered on November 7, 2017, which reset the prehearing conference for November 15, 2017. A First Prehearing Order was entered on November 17, 2017, which by agreement of the parties reset the due process hearing for January 30-31 and February 1, 5-7, 2018.

On November 20, 2017, the Parent filed a request to amend the Complaint. On November 27, 2017, a Second Prehearing Order was entered. The Second Prehearing Order granted the Parent's request to amend the Complaint effective November 27, 2017. On January 3, 2018, the Parent filed her second request to amend the Complaint. On January 10, 2018, a Third Prehearing Order was entered, granting the Parent's second amendment effective the same day.

On January 16, 2018, Parent moved to continue the due process hearing that was set to begin on January 30, 2018, because she had not received most of the records she had requested from the District until January 11, 2018. A readiness prehearing conference was held on January 17, 2018, but not completed. By agreement of the parties, the readiness prehearing conference

¹ The due process hearing had been set to include a sixth day: May 1, 2018. The due process hearing was completed on April 30, 2018. No hearing was held on May 1, 2018.

² In the interest of preserving the family's privacy, this decision does not use the actual names of the parent or the student. Instead, they are each identified as the "Parent," and the "Student."

was continued and completed on January 18, 2018. After hearing from the parties at the readiness prehearing conference, the Parent's motion to continue the due process hearing was granted. By agreement of the parties, the due process hearing was reset for April 23-26, 30, and May 1, 2018. On January 19, 2018, a Fourth Prehearing Order was entered, memorializing the continuance of, and the new dates for, the due process hearing. On January 22, 2018, the District filed its Response to the now second-amended Complaint.

On March 20, 2018, the Parent file a Motion for Joint Exhibit Completion. The Parent's motion was heard at a prehearing conference on March 26, 2018. On March 27, 2018, a Fifth Prehearing Order was entered, denying the Parent's Motion for Joint Exhibit Completion.

On April 6, 2018, a Notice of Reassignment of Administrative Law Judge was entered, reassigning the above matter to ALJ Matthew D. Wacker.

Due Date for Written Decision

The due date for a written decision in the above matter was extended to thirty (30) calendar days after the close of record. See First Prehearing Order entered November 17, 2017. The record in the above matter closed by agreement of the parties with the filing of written closing arguments postmarked by June 1, 2018. Therefore, the due date for a written decision in the above matter is **July 1, 2018**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: P2-P5, P7, P8 (except page 1), P9-P17, P18 (except pages 1-2), P19-P32;

District Exhibits: D1-D91;

Joint Exhibits: J1-J22, J24-J33.

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

Ronald Banner, District assistant superintendent for elementary schools;
Sheila Steward, District paraeducator;
Gretchen Mertes, Educational consultant;
Audra Walters, District special education supervisor;
Alison Jayne, District special education teacher;
Allison Brooks, PhD., psychologist;
Melissa Kaasa, District general education teacher;
Jane Al-Tamimi, District principal;
Melanie Mueller, District special education teacher;
Holly Smelt, District occupational therapist;
Jesika Miller, District behavior intervention specialist;
Shayna Raphael, Educational consultant;
Megan Qualls, District principal;
Darcy Moore, District special education teacher;
Thomas Betterbed, District special education supervisor;

Allen Spadafore, District school psychologist;
Michaela Clancy, District director of special education;
Holly Galbreath, District special education supervisor;
The Parent of the Student;
Denise Eddington, District special education teacher; and
Paula Swan, District special education teacher.

ISSUES AND REMEDIES

The statement of the issues and remedies for the due process hearing is:

1. Whether the District violated the IDEA and denied the Student a free appropriate public education (FAPE) by:
 - a. Conducting an evaluation in fall 2016 that was not comprehensive and did not evaluate the Student in all areas of suspected disability;
 - b. Delaying an excessive amount of time in contracting with the approved independent educational evaluation (IEE) provider, and in considering the IEE's recommendations once the IEE was completed;
 - c. Holding an individualized education program (IEP) meeting on December 13, 2016, when the Parent was unable to attend;
 - d. Adopting an IEP in December 2016 that was inappropriate in the following areas: Present Levels of Performance; Annual Goals; Accommodations and Modifications; Assistive Technology; Special Education and Related Services minutes; and Related Services and Supplementary Aids and Services;
 - e. Failing to comply with the requirements of the IDEA, and Washington State regulations implementing the IDEA, concerning discipline, isolation and restraint of the Student during the 2016-2017 and 2017-2018 school years;
 - f. Adopting an IEP in August 2017 that was inappropriate in the following areas: Present Levels of Performance; Annual Goals; Accommodations and Modifications; Assistive Technology; and Special Education and Related Services minutes;
 - g. Failing to consider the Parent's input in developing the December 2016 and August 2017 IEPs;
 - h. Failing to comply with the Parent's requests for educational records, including a request made on November 20, 2017;
 - i. Failing to adequately address the Student's behaviors that interfered with his ability, and the ability of others, to learn;
 - j. Failing to conduct a functional behavioral assessment (FBA) during summer 2016, as agreed, and as a result of this, failing to have a behavior intervention plan (BIP) in place at the beginning of the 2016-2017 school year;

- k. Once an FBA and BIP were adopted, failing to update them after the Student was repeatedly suspended;
- l. Failing to convene an IEP meeting to revise the Student's IEP after lack of sufficient progress on his measurable annual goals during the 2016 – 2017 school year;
- m. Failing to have the mandatory school team members present for the full duration of IEP meetings during the 2016-2017 and 2017-2018 school years;
- n. Failing to address repeated bullying and physical assaults on the Student by another student, both in class and on the bus, during the 2017-2018 school year;
- o. Failing to comply with IDEA procedures in developing the Student's December 12, 2017 IEP by:
 - (1) Not completing discussion of the entire IEP with the Parent present, and omitting any discussion of the BIP and student safety plan;
 - (2) Not notifying the Parent about a person who attended the IEP meeting who was not a District employee;
 - (3) Not having a District representative at the IEP meeting who met the requirements of WAC 392-172A-03095(1)(d) and/or (1)(e);³
 - (4) Not allowing any discussion of the Student's educational placement, thereby predetermining that placement;
 - (5) Making educational recommendations based on the services available in the District rather than on the Student's individual needs;
 - (6) Not providing a prior written notice (PWN) stating whether the Parent's requests were accepted or denied, and the reasons for acceptance or denial;
 - (7) Not asking the Parent for input prior to the IEP meeting;
 - (8) Not allowing sufficient time for the IEP meeting, which impeded parental participation and resulted in failing to complete an appropriate IEP;
- p. Failing to comply with IDEA requirements concerning PWNs during the 2016-2017 and 2017-2018 school years by: not sending PWNs in a timely manner; not stating whether the Parent's requests were accepted or denied; and not explaining why they were accepted or denied;

³ This reference to a regulation is substituted for the language in Claim number 2(c) of the Second Amended Complaint, which states: "failing to have a District Representative who could make decisions and answer questions." This language does not track any provision of the IDEA or applicable regulations, but seems to be a reference to the cited requirements.

2. Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate. An order that the District:

- a. Accept all recommendations from the IEE of August 2017, including its recommendations on specific curriculum, and amend the IEP accordingly;
- b. Provide weekly communication to the Parent from the IEP case manager that includes: responses to emails; biweekly progress reports on IEP goals and the BIP; any changes to the Student's weekly schedule, including time spent with typically developing peers;
- c. Include in the Student's IEP:
 - (1) Monthly minutes for consultation between school staff and the Parent to problem-solve on the effectiveness of the IEP's social goals;
 - (2) Daily data collection, to be evaluated by the IEP team every two weeks to determine whether the current BIP is effective;
- d. Contract with the Brooks Powers Group to do the following:
 - (1) Perform an FBA and develop a BIP for the Student;
 - (2) Have Dr. Allison Brooks participate in the development of the Student's IEP;
 - (3) Have Shanna Alvarez develop Structured Teaching for the Student, train District staff on its implementation, and train the Parent on developing structures at home to support the learning environment;
 - (4) Reevaluate the Student at the end of the 2017-2018 school year;
- e. Contract with Gretchen Mertes to train District staff and the Parent in the areas of social communication and social skills groups;
- f. Contract with an outside organization, approved by the District and the Parent, to develop training for staff on school discipline, to include at a minimum: isolation and restraint; manifestation determinations; short-term suspensions; bus suspensions; in-school suspensions, emergency expulsions, Counting to 10, and changes of placement; and
- g. Change the Student's educational placement to a social program in a small, structured school environment that emphasizes functional communication and social behavior.

See January 19, 2018 Fourth Prehearing Order.

FINDINGS OF FACT

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

General Background

1. The Student was first determined eligible to receive special education and related services under the Developmental Delay eligibility category based upon a District evaluation in November 2014. The Student was four years old. J3p5.⁴
2. The Student's initial IEP was developed at an IEP team meeting on December 5, 2014. The Student's IEP placed him in an early childhood special education program at the District's Custer Elementary School. J4p3
3. The Student's IEP team held another IEP meeting on May 13, 2015. The team amended the Student's IEP to reflect his transition into a general education kindergarten classroom for the 2015-16 school year. J5p4, p18.

2015-16 School Year

4. The Student attended kindergarten at the District's Dower Elementary School during the 2015-16 school year. Swann T796.⁵ Paula Swann, a District special education teacher, worked with the Student on his academic skills in her resource-room classroom at Dower.⁶ Swann T796. The level of academic work in kindergarten was "challenging" for the Student. Swann T803.
5. During a routine parent/teacher conference in October or November 2015, Ms. Swann discussed with the Parent how challenging the academic work was for the Student. The Parent remarked that she could pull the Student out of kindergarten and have him repeat preschool. It was ultimately agreed that they would give the Student "the gift of time," and have the Student repeat kindergarten the following (2016-17) school year. Swann T803-804. The Student finished the 2015-16 school year at Dower.
6. The Student's IEP team held another IEP meeting on November 30, 2015, and developed a new annual IEP for the Student. J6p3.
7. The Student received four "Behavior Reports" involving three separate incidents over the course of the 2015-16 school year at Dower. Three of the four Behavior Reports involved incidents during late May and early June 2016. P20pp1-4.
8. Concerned about the Student's behavior at school, the Student's Parent and the Student's Father had a meeting on June 7, 2016 with the school principal, a school counselor and Ms. Swann. P3p2.

⁴ Citation to the exhibits of record is by exhibit and page number, e.g. J3p5 is a citation to Joint Exhibit J3 at page 5.

⁵ Citation to the testimony of a witness is by the witness's last name and hearing transcript page number, e.g. Swann T796 is a citation to the Testimony of Paula Swann at page 796 of the transcript.

⁶ The Student's placement during the 2015-16 school year was in a general education kindergarten class. Ms. Swann would "pull out" the Student from his kindergarten class to work on his academic skills in her resource room classroom.

9. At the meeting, the Parents requested that the District evaluate the Student "at the beginning of the school year to add social skills/behavior."⁷ The Parents wanted a behavior intervention plan for the Student in place at the start of the next school year. P3p2.

10. Later on June 7, 2016, the school counselor, Jessica Jorgenson, sent an email to Allen Spadafore, a District school psychologist. Ms. Jorgenson informed Mr. Spadafore that the Parents "want [the Student] to be re-evaluated and assessed for behavior/social skills" prior to his IEP being reviewed in November. P3p1.

2016-17 School Year

11. The Student returned to Custer Elementary School and repeated kindergarten during the 2016-17 school year. Melanie Muller was the Student's special education teacher and case manager, and Melissa Kassa was the Student's general education teacher at Custer. J7p8.

12. By October 2016, the Student's aggressive behaviors were increasing in frequency and severity at Custer. See J8p11 (Conclusions from observations). The District utilized its Behavioral Assistance Team (BAT) to observe and collect behavioral data on the Student, evaluate interventions and initiate a functional behavior assessment of the Student. Miller T400-401.

13. On October 5, 2016, the Parent signed a consent form to allow the District to conduct a reevaluation of the Student. J8p2.

14. On November 3, 2016, the Parent sent an email to Ronald Banner, the District's assistant superintendent for elementary schools. In her email, the Parent stated, "[w]e spoke back in May 2016 regarding my son needing a Functional Behavior Assessment and my request to have... it completed during the summer. ...Jane Al-Tamimi⁸ said they would not do it until the fall." The Parent requested Mr. Banner's assistance. P12pp1-2.

15. On November 4, 2016, Mr. Spadafore sent an email to the Parent. The email included a consent form to conduct an FBA of the Student. P12p3. At the due process hearing, Mr. Spadafore could not recall why it took from June to November 2016 to send the Parent a form to provide her consent for the District to conduct the FBA. Spadafore T578.

16. On November 7, 2016, the Parent signed the consent form for the FBA. J9p2.

The District's November 2016 reevaluation of the Student

17. On November 11, 2016, a reevaluation team meeting was held to review the results of the District's reevaluation of the Student. J8p1. Mr. Spadafore was the reevaluation case manager.

⁷ The meeting took place on June 7th. The last day of the 2015-16 school year was June 14, 2016, only one week later. J1p1.

⁸ Ms. Al-Tamimi was the principal at Custer Elementary School.

He carried out multiple assessments of the Student as components of the reevaluation. J8pp11-14. The Parent attended the meeting along with her advocate, Helen Caldart. J8p3.

18. Mr. Spadafore assessed the Student's academic skills using the Kaufman Tests of Academic Achievement, Third Edition (KTEA-3). J8p14.

19. The Student earned a standard or "age-based" score of 58, a grade-based score of 69 and a percentile score of 0.3% for reading comprehension. J8p14. Mr. Spadafore considers this assessment result to be an accurate representation of the Student's performance on the reading comprehension subtest "that day, at that time." Spadafore T603.

20. A percentile score of 0.3% means that 997 out of 1000 children the same age as the Student would be expected to earn a higher score on the reading comprehension subtest than the Student's score. A percentile score of 0.3% is greater than three standard deviations below the mean score on the reading comprehension subtest. Based on his percentile score of 0.3%, Mr. Spadafore opined that the Student "likely will require some sort of intervention or support to be more successful." Spadafore T594.

21. The reevaluation determined the Student remained eligible to receive special education and related services under the Developmental Delay eligibility category. J8p8. The reevaluation team recommended that the Student's IEP team consider providing the Student with specially designed instruction (SDI) for social skills, behavior and fine motor skills. J8p10.

22. The reevaluation report concluded that:

Specially designed instruction is not recommended for [the Student] at this time in academics. The IEP team may decide that the resource room may be a more appropriate place for him to work on academics *as it is a motivational and behavioral issue*, but he does not seem to require specially designed instruction in academics.

J8p14 (Emphasis added).

23. Under the "Consideration of Test Bias" section of the reevaluation summary it states:

This evaluation was administered with the understanding of test limitations which may result in bias because of cultural, economic, environmental *or behavioral factors*. However, such limitations have been considered and determined not to be a significant factor in current eligibility determination.

J8p10 (Emphasis added).

24. It was at the time of the Student's reevaluation and remains to date, Mr. Spadafore's understanding that students who qualify for special education under the Developmental Delay eligibility category cannot be eligible for SDI in academics.⁹ Spadafore T584. Academics includes reading comprehension, written expression and math. *Id.* at T584-585

⁹ Paula Swann, a District special education teacher, gave testimony after Mr. Spadafore. See Transcript T795-837. Ms. Swann gave testimony about the District's computer software for writing IEPs: IEP Online. It is Ms. Swann's understanding that once an eligibility category is entered into IEP Online, the software will

25. It was at the time of the Student's reevaluation and remains to date, Mr. Spadafore's understanding that under the eligibility category of Developmental Delay, students can only be provided SDI in the following five areas: motor development, cognitive development, communication development, social or emotional development, and adaptive development. *Id.* at T588.

26. Mr. Spadafore was asked and answered the following hypothetical question at the due process hearing:

Q. [I]f I were to tell you that once a student meets the definition of a student with a disability, they are entitled to receive any services they require in order to receive a free appropriate public education, would that change your statement that the [S]tudent¹⁰ did not qualify for specially designed instruction in academics, as that is not an area of eligibility under the category of developmentally delayed?

A. Yeah. It would have been a team decision, but I think academics would have been an area of need for [the Student].

T597.

27. The Parent believes the Student's reevaluation was not comprehensive and did not assess him in all areas related to a suspected disability. The Parent believes the reevaluation should have evaluated "signs of dyslexia," ADHD, and other recommendations from Dr. Hood.¹¹ Parent T779. The Parent also believes the reevaluation should have included an FBA. *Id.*

28. On November 17, 2017, the District issued a Prior Written Notice (PWN) regarding the reevaluation meeting. J8p22. Under the section entitled "Any other factors relevant to the action," it states "Parent has also requested that it be noted that all behavioral data was not present in the draft copy of the evaluation."

29. On November 22, 2016, the Parent sent an email to Sean Whalen, then the District's director of special education. In the email the Parent stated, "I am writing to request an Independent

restrict or limit what services can be selected to include in a student's IEP. The services that are restricted or limited by IEP Online for a given eligibility category include what types of specially designed instruction can be included in a student's IEP. Swann T806-809. It is unclear whether Mr. Spadafore's belief that a student determined eligible under the Developmental Delay category, but without any delay in cognitive development, cannot receive any specially designed instruction in academics is somehow an artifact of limitations of IEP Online.

¹⁰ There is a typographical error in the hearing transcript. This reference was to the Student whose education is at issue in this matter, not a reference to any generic "student."

¹¹ The Parent's reference to "Dr. Hood" appears to be a reference to a clinic note or report prepared by Bradley S. Hood, MD, on March 6, 2017, after seeing the Student on January 5, 2017. Dr. Hood saw the Student well after the reevaluation meeting on November 17, 2016. The Parent did not offer any explanation how the reevaluation team would have been aware of Dr. Hood's diagnoses or recommendations at the time of the reevaluation meeting in November. Nor did the Parent provide any more explanation regarding her reference to "signs of dyslexia."

Educational Evaluation (IEE) at public expense...The evaluation is incomplete and additional tests are needed." P4p2.

30. The Parent sent a second email to Mr. Whalen the same day. In it, the Parent states that, "I would like to review any and all educational records held in any form and in any location by the Clover Park School District for my son, [the Student]. P10p1.

31. On November 29, 2016, the Parent sent an email to Mr. Spadafore. In her email, the Parent thanks Mr. Spadafore for sending her the "evaluation document," apparently a reference to the reevaluation report. She goes on to state that she needs draft copies of anything that will be given to her at the FBA meeting on December 6, 2016, and then says, "Having things in writing is easier for me to comprehend what is being said verbally than just listening to the information at meetings." P12p4.

32. On December 1, 2016, a Notice of Meeting was sent to the Parent. The notice referenced an "FBA meeting" set for December 6, 2016 at 11:00 a.m. J9p3.

33. On December 4, 2016, the Parent sent an email to Melanie Muller, the Student's special education teacher and case manager for the 2016-17 school year. In it, the Parent asks Ms. Mueller to schedule an IEP meeting in January because she was not available on dates Ms. Mueller was proposing. J7p6.

34. On December 5, 2016, Audra Walters, a District special education supervisor, sent an email to multiple District staff, stating in part:

We need to hold the IEP meeting before winter break...Melanie [Mueller]...[w]hen you email the draft IEP, please have it clearly noted it's a draft...You can go ahead and schedule a follow up IEP meeting on 1/10 at 11:00 as [P]arent requested. The team can either write a new IEP or amend the current one.

P5p1.

35. Shortly after her first email, Ms. Walters send a second email to multiple District staff, stating in part, "The annual review expired on 11/29/16 – the IEP is out of compliance now." P5p1.

36. Later on December 5, 2016, Ms. Walters sent an email to the Parent, which stated in part:

I'm emailing to confirm Clover Park has received your request for an Independent Education Evaluation (IEE). The district is not disputing your right to an IEE...Please schedule a meeting with Sean Whalen to discuss specific areas of evaluation, at your earliest convenience. We can send the Independent Education Evaluator's list or give it to you when you meet with Mr. Whalen.

P4p2. Ms. Walters' email included a copy of the District's Procedure 2161-P1 Independent Educational Evaluations (IEE), which identified the District's criteria for IEEs. P4p3 (underline in original).

37. On December 5, 2017, the Parent sent an email to Ms. Walters and copied Mr. Whalen. The Parent's email stated, "Thank you for getting back to me. You aren't saying if my IEE request

was approved or not. Is it? I will call and schedule a meeting with Sean Whalen, but I need it stated that the school district is saying yes." P4p3.

38. On December 5, 2016, Ms. Mueller sent an email to the Parent. In it, Ms. Mueller acknowledged she understood the Parent could not attend an IEP meeting the week, but that with the addition of services for the Student from the reevaluation, the IEP team would go ahead and with the meeting on December 13, 2016. Ms. Mueller stated that the team would hold another meeting on January 10, 2017 with the Parent, and the team would either write a new IEP or amend the Student's current IEP. J7p7.

39. On December 6, 2016, Ms. Walters replied to the Parent via mail, stating, "Yes, it (the IEE) is accepted/approved." P4p4.

40. On December 6, 2016, a meeting was held to review the FBA of the Student. The Parent attended the meeting. J9p1. The meeting included a Behavior Support Planning document. J10p1.

41. On December 6, 2016, Mr. Whalen sent an email to the Parent. The email stated:

The district is agreeing to your IEE request. We would just like to meet with you so we can agree on how things are going to move forward and address any questions that you might have about the process. It's not required, but I do find that it is helpful to have a conversation about the IEE process.

P4p4.

42. The Parent believed that parents do not set up or schedule IEEs, that parents and school districts must agree on who will conduct the IEE, and that she could not set up or schedule the IEE until a contract was signed.¹² Parent T733-734.

The December 2016 IEP

43. On December 13, 2016, the District members of the Student's IEP team held an IEP meeting without the Parent in attendance. J11p2. The District members of the team developed a new IEP for the Student. On the IEP Cover Page underneath where the District members of the team signed as participating in the development of the IEP was handwritten, "IEP will be sent home. Another meeting has been scheduled for January 10, 2017. *Id.*

44. The new IEP identifies a present level of performance (PLOP) for the Student in the area of Social/Emotional/Behavior. *Id.* at pp7-8. The PLOP identifies the Student's current behaviors in his classroom, the frequency of those behaviors, breaks down the Student's behaviors into categories of mild, escalated, and crisis behaviors, summarizes the frequency with which each category was occurring, and the duration of those categories of behavior. *Id.* The Parent characterizes the PLOP in the IEP as just a "laundry list" of data. Parent T661-662.

¹² In the Parent's case, the contract with the IEE provider was not signed by the provider and the District until June 29, 2017, well after the IEE was started. P4pp19-21.

45. The new IEP identifies a present level of performance (PLOP) for the Student in the area of Behavior. J11 at pp8-9. The PLOP identifies the activities the Student enjoys at school, identifies specific "sensory breaks using sensory tools," references a report from an FBA meeting, and identifies adverse or negative behaviors for the Student, and the frequency of those behaviors. *Id.* The Parent characterizes this PLOP as not including anything from the Student's general education teacher about his day, such as the Student's daily schedule and not including information about how the Student receives his daily data sheet, or how his data sheet is "communicated" to her. Parent T662.

46. The new IEP identifies goals for the Student over the next 12 months. J11pp12-15. The Parent characterizes these goals as "too wordy" and "confusing," and questions whether they are related to the Student's behavior data sheets. Parent T662.

47. Gretchen Mertes appeared at hearing as a witness for the Parent. Ms. Mertes is an educational consultant in the field of Autism and social communication. P27pp10-12. With respect to the goals in the Student's December 13, 2016 IEP, Ms. Mertes opined that the two social skills goals are similar to behavioral goals and that the second goal should be divided into two goals. However, she confirmed that, "sometimes we have to get behaviors under control before we can address anything further, including social." Mertes T111-112, T120.

48. Ms. Mertes has never met and does not know the Student. The basis for all of her testimony specifically about the Student and his goals is based upon her review of the December 13, 2016 IEP, the August 24, 2017 IEP Amendment, and the Parent's IEE of the Student. Ms. Mertes "skimmed" the IEE, but did not read it. *Id.* at T112-113, T117. Ms. Mertes does not know if the Student had made any progress on the goals in the December 2016 IEP because she does not have any progress reports for the Student. *Id.* at T122.

49. Ms. Mertes compared the social goals in the Student's December 2016 IEP with the goals in his August 24, 2017 IEP. J11pp7-8; J24pp13-14. Ms. Mertes opined these the same goals across the two IEPs. Mertes T115. However, because she had no data or information to determine whether the Student made progress between December 2016 and August 2017, Ms. Mertes could not say if repeating those goals across two IEPs nine months apart is cause for any concern.

50. The December 2016 also contained accommodations and modifications for the Student at school. J11pp1617. The Parent could not articulate any compelling reason(s) why these accommodations and modifications are not appropriate for the Student. Parent at T662-663.

51. The December 2016 also contained a breakdown of the location, duration and frequency of the Student's special education and related services. J11p19. Again, the Parent offered no compelling reason why this service matrix is not appropriate for the Student. Parent T663-664.

52. On December 16, 2016, Ms. Mueller sent an email to the Parent. Ms. Mueller attached a draft IEP, BIP, and a PWN from the last meeting on December 6, 2016. She also confirmed a meeting with the Parent set for January 10, 2017. J11p1.

53. After improving for a period of time, during January 2017 the Student's aggressive behaviors at school began to escalate. See D15p6; Al-Tamimi T332-333; Mueller T350; Miller T409.

54. On January 5, 2017, the Student was seen by Bradley Hood, MD.¹³ Dr. Hood diagnoses for the Student were ADHD, Oppositional defiant behavior, and learning disabilities. He noted that, "No psychotropic medications for reported neurobehavioral symptoms are desired at this time. P4p11. The Parent was not willing to consider medication for the Student at that time. Parent T720.

55. An IEP meeting was held to consider amending the Student's IEP on January 10, 2017. The Parent attended this meeting along with her advocate, Ms. Caldart. Ms. Walters arrived 30 minutes after the meeting began. Parent T704; P2p18.

56. On January 17, 2017, the Parent filed a Citizen Complaint with the Office of Superintendent of Public Instruction (OSPI). The Parent asserted the District denied her parental rights by holding the December 13, 2016 IEP meeting without her in attendance. J7p1.

57. On January 18, 2017, the Parent sent an email to Mr. Whalen. The Parent for the first time specifically identified Psychologist Allison Brooks, PhD. as the individual she wanted to conduct the Student's IEE. P4p5. At the time she made this request for Dr. Brooks, the Parent was aware that it would be three months until Dr. Brooks could begin her IEE of the Student. Parent T649.

58. On January 23, 2017, a meeting was held to review and revise the Student's BIP from December 13, 2016. The Parent attended the meeting along with Ms. Walters. J14; Walters T151, 158.

59. On January 24, 2017, Mr. Whalen sent an email to the Parent. Mr. Whalen informed the Parent that the District was denying her request to have Dr. Brooks conduct the IEE because the rates charged by the Brooks Powers Group (BPG), Dr. Brooks' company, specifically their travel rates, exceeded the District's "obligations." P4p6.

60. After requesting the District's list of approved outside providers on January 24, 2017, the Parent finally received the list on February 2, 2017. P4p6; P4p7.

61. In an email to District staff on March 1, 2017, Ms. Mueller recounted speaking with the Parent that day and that the Parent agreed to excuse Holly Smelt, a District occupational therapist, from a meeting scheduled for March 22nd. Ms. Mueller stated the purpose of that meeting was to review data regarding the Student's behavior, talk about what interventions were working with the Student, and what interventions District staff could try to use to decrease the most serious behaviors (Level 3 events). Ms. Mueller remarked that the Student's BIP might be amended, and stated, "This is not a new IEP meeting." P11p9.

62. On March 10, 2017, Ms. Al-Tamimi suspended the Student for a series of "escalated behaviors." P11p11.

63. In an email to District staff on March 14, 2017, Ms. Al-Tamimi stated that "[The Student's] aggressive behaviors are increasing...I am struggling to find consequences that work." P11p12.

¹³ As noted above, Dr. Hood saw the Student on January 5, 2017, but the only documentation in the record of that visit is dated March 6, 2017. P4p10.

Ms. Mueller responded the same day, stating in an email "I see the same increase in assaultive behaviors. It looks like behavior we were seeing in the fall again, but even more." P11p13.

64. On March 16, 2017, OSPI issued its report on the Parent's Citizen Complaint. OSPI concluded the District failed to follow procedures for scheduling IEP team meetings during the 2016-17 school year. OSPI ordered the District to develop written guidance for all special education staff that addressed when IEPs must be reviewed, and procedures for ensuring parent participation during IEP meetings. J7pp28-29.

65. On March 20, 2017, Ms. Mueller sent an email to Mr. Spadafore. In the email, Ms. Mueller asked Mr. Spadafore about the status of the Student's IEE and remarked, "We are struggling here to provide what he needs at this level, and are starting to wonder about a change in placement." P11p14.

66. On March 20, 2017, Jesika Miller, District behavioral specialist, sent an email to Ms. Walters stating in part, "I looked at [the Student's] behavior plan and pointed out that it's not written for this problem behavior...I told [Melanie Muller] that given the change in behavior, it would be appropriate to observe to see if new interventions would be helpful." P13p1.

67. On March 21, 2017, the Parent sent Mr. Whalen an email. She told Mr. Whalen she still wanted Dr. Brooks to conduct the Student's IEE, and that the family was considering whether to pay the difference between what the District would pay and what Brooks would charge for the IEE. The Parent reported to Mr. Whalen that the Student's behaviors had continued to escalate. P4p9.

68. Mr. Whalen replied on March 22, 2017. He told the Parent that if she was willing to absorb all of the additional costs for travel time, the District was willing to consider an IEE with Dr. Brooks. P4p12.

69. A meeting was held on March 22, 2017, at Custer Elementary School. The Parent attended with her advocate, Ms. Caldart, and multiple District staff. D15p23. There is a PWN dated March 16, 2017, but it appears to be associate with this meeting. P30p18.

70. There is conflicting evidence of record regarding the nature and purpose of this meeting. Although documentation of the meeting identified it as a meeting to amend the Student's IEP (See generally P30; D15, P13p2 (3/23/17 Al-Tamimi email - "The IEP team meeting met yesterday)), other evidence identified it as a meeting to review, discuss and possibly amend the Student's BIP. P11p9 (3/1/17 Mueller email - "this is not a new IEP meeting...We may end up amending the Behavior Intervention Plan."); D15p23 (Signatures from meeting participants under heading "BIP review/discussion"). Further contributing to the confusion is District's Exhibit D15, which includes progress reporting on the Student's goals dated as late as March 27, 2017, five days after the meeting took place. D15p12.

71. The Parent asserted there was no discussion of Dr. Hood's diagnoses for the Student at the March 22, 2017 meeting, and identified as evidence supporting her assertion notes from the meeting. P2p32. However, there is reference in the meeting notes to "ADHD exercise". *Id.* at p32. Dr. Hood had diagnosed the Student with ADHD. P4p10. It is found that, more likely than not, Dr. Hood's diagnoses for the Student were discussed to some extent at the meeting.

72. On March 23, 2017, Ms. Al-Tamimi sent an email to Mr. Whalen and District staff. Ms. Al-Tamimi stated in part that, "The IEP team met yesterday to discuss [the Student's] program...it has become clear that the current level of support is not working for [the Student]." She went on to request temporary paraeducator support for the Student's classroom "while we work to determine the level of support (and possibly placement) that [the Student] needs. This request comes on the recommendation of the IEP team." P13p2.

73. On March 27, 2017, the Parent agreed to pay for the travel expenses associated with Dr. Brooks' IEE of the Student. P4p12.

74. That same day, the Parent informed Dr. Brooks of the agreement between her and the District to pay for the IEE, and asked Dr. Brooks to contact the District in order to start the IEE. P4p13.

75. Dr. Brooks replied to the Parent on March 28, 2018, telling the Parent she would be in touch as soon as she was able regarding when the IEE could be completed. P4p13.

76. On March 29, 2017, Dr. Brooks informed Mr. Whalen that, "Our availability timeline is pushing into the summer". P4p13. The Parent was unaware of this timeline until she received documents from the District on January 11, 2018, as part of discovery for the due process hearing. Parent T652.

77. On April 10, 2017, the Parent contacted Mr. Whalen, stating she had not heard back from him about the IEE, and asking whether the District had scheduled the IEE with Dr. Brooks. P4p14.

78. That same day, Mr. Whalen informed the Parent that he had a phone appointment with a representative at the BrooksPowers Group set for later that week. P4p14.

79. On April 19, 2017, Mr. Whalen spoke with Tom Powers, the other principal at the BrooksPowers Group. Mr. Powers believed there already was a contract in place for the IEE. Mr. Whalen and Mr. Powers agreed they needed a signed consent from the Parent so the District could send the Student's educational records to BrooksPowers Group. Those records were needed in order to develop a proposal for the IEE, followed by development of a contract. P4p14.

80. On April 20, 2017, the Parent signed an authorization for release of the Student's educational records to the BrooksPowers Group. J21p1.

81. On April 24, 2017, a meeting was held to develop an extended school year (ESY) IEP for the Student. J16pp6-16. The Parent attended the meeting. *Id.* at p7.

82. On May 1, 2017, the BrooksPowers Group informed Mr. Whalen and the Parent that it had received the Student's records the prior Friday, April 28th. BrooksPowers Group's schedule to move forward with the IEE began with an intake interview with the Parent on June 12th, and testing of the Student to begin on June 13th. P4p15.

Use of Physical Restraint/Isolation with the Student

83. On May 9, 2017, District staff employed physical restraint and isolation due to the Student's physical aggression towards other students. P22p23.

84. That same day, Ms. Al-Tamimi sent an email to District staff. D26. Ms. Tamimi stated the Student had been placed on emergency expulsion ("EE"), and that "In the past 46 days, [the Student] has shown aggression towards others (either hurting or trying to hurt) on 36 days." She went on to state that the Student's teacher "feels that [the Student's] behavior has had a significant impact on the learning of her other students as well as his own." Ms. Al-Tamimi believed "we need to meet as an IEP team as soon as possible to look at [the Student's] needs and address whether his is in the appropriate placement." She noted that the Student had been suspended a little less than 3 days during the school year. *Id.* at pp13-14; see also D3pp1-5.

85. District staff employed physical restraint and isolation with the Student on three more occasions: May 11, May 19, and July 27, 2017. P22pp26, 28, 32. The last occasion occurred while the Student was attending ESY services. On all four occasions, the Parent was verbally notified of the use of restraint and/or isolation. P22pp24, 26, 29, 33.

86. Denise Eddington was the District special education teacher who employed physical restraint with the Student on July 27, 2017. P22p33; Eddington T684. Ms. Eddington indicated on a Physical Restraint/Isolation Incident Report form that she employed isolation with the Student. That isolated involved clearing *other* students from the Student's ESY classroom, leaving the Student behind with Ms. Eddington and a paraeducator in the classroom. Eddington T687.

87. Ms. Eddington indicated on the Physical Restraint/Isolation Incident Report form that she was not restraint certified. P22p33. She had previously received training to employ the "Right Response" de-escalation model with students, but as of the incident with the Student on July 27, 2017, her Right-Response training had "lapsed," and she was due to be recertified. Eddington T689.

88. In an email to Ms. Al-Tamimi on May 10, 2017, the Parent states, "I have often stated that I need to read things and have time before any meetings in order to fully participate in decisions for [the Student]." P13p9.

89. At her request, on May 15, 2017, the District sent the Parent a Behavior Support Planning & Implementation Information document. The document presented in graphic form the incidence of "replacement behaviors" and "target behaviors" by the Student at school from January 2017 into May 2017. J18.

90. On May 17, 2017, an IEP team meeting was held and the Student's IEP was amended.¹⁴ J17.

91. On May 19, 2017, Ms. Walters sent an email to the BrooksPowers Group. P4p15. In it, Ms. Walters wanted to schedule time to discuss the scope of the IEE and the cost of the contract. She also stated that the Parent had requested an FBA as part of the IEE. P4p15.

¹⁴ No signatures from any participants at the meeting appear on the IEP amendment. However, as the IEP amendment was jointly offered by the parties, it will be presumed this meeting took place.

92. Another meeting was held on May 22, 2017 to amend the Student's IEP. J19. The Parent attended the meeting along with the other members of the team from the District. The IEP team met to review the Student's IEP goals and progress, and to discuss possible changes to his services in the areas of social/emotional and behavior in light of a significant increase in "Level 2 and 3 behaviors that the team needed to address. *Id.* at p20. The team added daily service minutes to address the Student's behaviors and assigned a 1:1 paraeducator to support the Student during parts of the school day. The team also determined it necessary to update the Student's "crisis response plan." *Id.* The PWN associated with this meeting is dated May 23, 2017. J19p20.

93. On May 22, 2017, the Parent sent an email to Ms. Walters, asking if the District had a contract yet for the IEE with the BrooksPowers Group. P4p16.

94. Ms. Walters replied to the Parent the next day, informing her that she would be speaking with Dr. Brooks later the same week about the IEE contract. P4p16.

95. On May 25, 2017, Dr. Brooks sent the District a proposal for the IEE. The Parent was not included in this communication. P4p17. The Parent was unaware of this proposal until she received documents from the District on January 11, 2018, as part of discovery for the due process hearing. Parent T654.

96. On or about May 26, 2017, the Student's Crisis Intervention Response Plan was updated. J2p6.

97. On June 5, 2017, Dr. Brooks inquired with the District about the status of the IEE contract. P4p18.

98. On June 9, 2017, Mr. Whalen provided Dr. Brooks with a schedule to observe the Student at school as part of the IEE. P4p18.

99. On June 29, 2017, the District sent the IEE contract to BrooksPowers Group for signature. Mr. Powers signed the contract the same day.¹⁵ P4pp19-22.

100. During July 2017, the Parent started the Student on medication. The Student continues receiving his medication through the present time. The medication has helped the Student to be "a little less moody, a little less irritable." Parent T720.

BrooksPowers Group IEE Report

101. On August 9, 2017, the Parent met with the BrooksPowers Group to review the IEE report. Parent T654.

¹⁵ Although the IEE contract was not finalized until June 29, 2017, the IEE had already started according to the schedule proposed by BrooksPowers Group on May 1, 2017. P5p15; see also J21p2 (Examination of Student began on June 12, 2017).

102. The purpose of the IEE was to assess the Student's current neurobehavioral functioning and assist with treatment and educational planning. J21p2. The IEE report concluded that, "[the Student's] symptom presentation suggests the presence of an Autism Spectrum Disorder; however due to the significant "barrier behaviors [the Student] displayed during the assessment, a full comprehensive evaluation of these symptoms...could not be completed." *Id.* at p18. The report recommended the Student receive a re-evaluation within twelve months. *Id.* The report concluded a provisional diagnosis of Autism Spectrum Disorder (ASD), mild in severity, was appropriate. *Id.* at p20. The report confirmed additional diagnoses of Attention-Deficit/Hyperactivity Disorder (ADHD) and Oppositional Defiant Disorder (ODD). *Id.*

103. The report went on to recommend that the Student needed a very high level of structure, predictability, and routine throughout his day, both at home and at school, as well as a schedule that allowed him to know what to expect. *Id.* at p19. The report concluded that the Student would benefit from Applied Behavioral Analysis (ABA) services to target reduction of his "barrier behaviors," recommended participation in a social skills group, and provision of occupational therapy services. *Id.* at p21. It recommended a more structured school environment with individualized education and services, use of a personalized daily visual schedule, and consistent reinforcement for appropriate behaviors, and specific teaching around social and communicative behavior. *Id.* at pp22-24.

104. The report concluded that the Student's needs would best be served in an educational setting that was small, with a low student-to-teacher ratio, and where instruction can be individualized. It recommended the Student have an FBA and a BIP, individual therapies, developmentally appropriate small group instruction, and direct one-to-one contact with staff. *Id.* at p27.

105. The Student's "very low scores in academics relative to his intellectual functioning supported the need for individual specially designed instruction in reading, handwriting, and potentially in math." Brooks T238. The Student was not receiving any medication to address his behaviors during his assessment. *Id.* at T250. Such medications could have a significant impact on the Student's behaviors, as medication is well established as an effective intervention for ADHD. *Id.* at T251-252.

106. In response to a hypothetical question from District's counsel at the due process hearing, Dr. Brooks opined that self-contained classroom with nine students, a teacher, two aides, a behavior specialist assigned to the classroom for 15 hours per week, a mental health specialist available on an intermittent basis, with support from an occupational therapist, physical therapist, and a speech-language pathologist would be a good match for the Student. Brooks T252. Dr. Books opined that the District's self-contained Success classroom cannot be ruled out as an appropriate educational placement for the Student. *Id.* at T260.

107. On August 15, 2017, the Parent sent an email to Michaela Clancy, the District's director of special education. In part, the Parent asked when the IEP team would meet to discuss the IEE report. P4p26.

108. Ms. Clancy responded to the Parent's email with a telephone message to the Parent on August 18, 2017. Parent T655. The Parent responded to Ms. Clancy's message in an email the same day. P8p11. The Parent informed Ms. Clancy that it would be important to have Dr. Brooks at the meeting to review the IEE report. *Id.*

109. In her same email, the Parent stated, "Just so you know, I process information much better when I have been able to read something instead of verbally hearing it in the moment." *Id.*

110. On August 21, 2017, the Parent and her advocate, Ms. Caldart, met with Ms. Clancy, Ms. Qualls and Thomas Betterbed, a District special education supervisor. This was not the IEE review meeting the Parent had expected. Parent T655.

111. It appears as though the Parent brought a copy of the IEE report with her to the meeting, as the Parent's notes from the meeting include a remark by Ms. Clancy about the IEE recommending a "more structured placement for the Student," and then Ms. Clancy's reference to the District's Success program. P2p46. The Parent sent Ms. Clancy a copy of the IEE report after the meeting. *Id.* at p45.

The Student's August 2017 IEP

112. Paula Swann is a District special education teacher at Dower Elementary School. Ms. Swann was responsible for developing the Student's IEP for the 2017-18 school year at Dower¹⁶ because the Student was coming from a resource room at Custer Elementary School, and Ms. Swan is a resource room teacher at Dower. Swann T831, 838. Ms. Swann received a copy of the BrooksPowers Group IEE on August 23, 2017. *Id.* at T806.

113. On August 24, 2017, the Student's IEP team met to consider amending his IEP. The Parent and Ms. Caldart both attended. J24p4. The Student's IEP was amended at this meeting, and the changes made to the Student's IEP were based upon consideration of the BrooksPowers Group IEE report. Swann T805-806. The PWN associated with this meeting is dated the same day. J24p22.

114. The IEP team "reviewed and looked" at the IEE report, but may not have gone over it "page by page," or "word for word." *Id.* at 824.

115. Holly Smelt, the Student's occupational therapist, was not present at the IEP meeting. P8pp 12-13; Parent T704. Dr. Holly Galbreath, District director of special education, arrived approximately 30 minutes late. *Id.*; P8p14. However, another school psychologist, Penny Holmes was present at the meeting. J24p4.

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¹⁶ The Student returned to Dower Elementary School after the Parent's request to keep him at Custer Elementary School for first grade was denied by the District. Custer is the Student's neighborhood school.

116. The IEP team changed the Student's eligibility category from Developmental Delay to Autism.¹⁷ Compare J19p1; J24p1.¹⁸ The team also added Academic goals in math, writing and reading to the IEP. *Id.* at p15.

117. The IEP team determined that the Student's educational placement for the 2017-18 school year should be changed to a self-contained setting with a smaller teacher/student ratio.¹⁹

118. The Parent believes the August 2017 IEP is not appropriate because she did not agree to excuse Ms. Smelt, the IEP was developed from the November 2016 reevaluation, the IEP did not take into consideration the BrooksPowers Group IEE report (J24p3; Parent T667, 704), and Dr. Holmes arrived late. Parent T704; P8p14.

119. On the same day as the IEP team meeting, August 24, 2017, the Parent signed a consent for a reevaluation of the Student, which would include academic assessment in math and an assessment in "Medical-Physical." The consent form also stated, "[The Student] needs a new re-evaluation to review the last evaluation and to incorporate the information from the Independent Evaluation from Dr. Brooks and Dr. Davis (Brooks Powers Group, 6/17)," and a hand-written notation that states, "We met to incorporate I.E.E. and write a temporary I.E.P. We will address assisted technology needs in next meeting." J26p1. It is uncertain who wrote this notation, although what appear to be initials corresponding to the Parent's name are to the right of the notation on the form.

120. At the Parent's request, Ms. Swann added a notation to the PWN that, "Mother gave the IEP team parent IEP + eval input forms."²⁰ J24p22.

2017-18 School Year

121. The Student returned to Dower Elementary School for the 2017-18 school year. He was placed in the Success Program. Darcy Moore was the Student's special education self-contained classroom teacher for the Success program. Ms. Moore had two paraeducators assigned to her Success classroom. She was also supported by a mental health counselor, an occupational therapist, a physical therapist, and a speech language pathologist as needed. Ms. Shayna Raphael was the District's lead teacher for the Success Program. Ms. Raphael was in Ms.

¹⁷ Ms. Swann confirmed there was some question whether the team should change the Student's eligibility category from Developmental Delay to Autism. During the meeting, Mr. Betterbed, who was one of the team members, had to leave the meeting and make one or more phone calls to some unidentified individual(s) to ask for "clarification" of the disability category. Swann T826-827. In addition, and for reasons unknown, later in the IEP the Student is identified as eligible under the Other Health Impairment Eligibility Category based on "his evaluation dated 11/17/16." J24p7.

¹⁸ Other than the signatures on J24p4, the handwritten notations on the rest of J24 are Ms. Swann's handwriting. Swann T806.

¹⁹ This educational placement was subsequently identified as the Success Program at Dower, a self-contained special education classroom. P8p2.

²⁰ The Parent's input forms appear to be those documents at P2pp63-68 and P2pp69-70.

Moore's classroom three days a week, and was available for consultations outside of those three days. This was Ms. Moore's first year as a classroom teacher, and Ms. Raphael also served as her mentor through the District's BEST Program. Moore T545-546.

122. The Student had Positive Behavior Intervention Support (PBIS) plan at Dower. The Student's PBIS included daily data recording of his behavior at school. J29; P24pp1-94.

123. The Parent believes the Student made a lot of progress with his behavior during the 2017-18 school year. Parent T722, 751. He is not as aggressive or as physical as he was the prior school year. *Id.* at T727. And he has not been suspended this school year. *Id.* at T757. But the Parent does not believe the Student has made progress with his social skills. *Id.* at T723. The Parent believes the Student should be in a self-contained classroom focused on social and emotional goals, rather than a self-contained classroom focused on behavioral goals. *Id.* at T727.

Bullying and physical assaults of Student by another student

124. Beginning on or about October 10, 2017, and continuing intermittently until at least November 16, 2017, the Student was involved in at least five documented encounters with another student who bullied or assaulted the Student at school or on a school bus. See, P16, pp1, 2, 8, 17, 33.

125. On October 17, 2017, the Parent sent an email to Ms. Moore, telling Ms. Moore that the Student was being repeatedly bullied and physical assaulted by another student both in the classroom and on the bus. The Parent requested alternative transportation. P16p3.

126. On October 18, 2017, Megan Qualls, the Dower Elementary School principal, replied to the Parent. Ms. Qualls was aware of two instances where the Student had an incident with another student. Ms. Qualls offered to review video from the bus with the Parent. P16p4.

127. After a third incident with the same other student later on October 18, 2017, the Parent emailed District staff stating, "[The Student was assaulted, again, today, by the same student. Totally unacceptable." P16p10.

128. The Parent asked that the Student be separated from the other student by having them assigned to different buses, but was told that was not an option. Instead, the District placed a paraeducator on the bus. Parent T761. The District later relented and placed the Student on a different bus. However, this was difficult for the Student because he does not deal well with transitions to new circumstances, and it was hard for him to get on the new bus. *Id.* at T762. And the Parent felt as though the Student was being punished by having to take a new bus. *Id.*

129. On October 23, 2017, Mr. Betterbed sent a draft safety plan to the Parent. P16p13, J25p1.

130. On October 30, 2017, the Student was pushed out of his chair in his classroom and was hit. P16p17. On November 13, 2017, the Parent filed a police report regarding the incidents with the other student. The Parent did not believe the District was following the Student's safety plan. P16pp23-28; Parent T707.

131. On November 16, 2017, another student flicked hand-sanitizer in the Student's eyes. After staff washed out his eyes, the Student said he was fine. P16p33.

132. The District subsequently revised the Student's safety plan on December 12, 2017, and January 25, 2018. J28; J31.

133. The last alleged incident of bullying or assault occurred on February 5, 2018, when according to a report from the Student, he was "deliberately" elbowed by the same other student while standing in a line at school. P16p35. When Ms. Moore spoke to the Student the next day, the Student reported that he was unsure if the elbowing was intentional. Ms. Moore sent the other student to a different classroom. P16p36.

134. On October 18, 2017, the Parent filed her Due Process Hearing Request (the "Complaint").

October 26, 2017 IEE results meeting

135. On October 26, 2017, a group of District staff, the Parent, and Ms. Caldart held a meeting to review the results of the BrooksPowers IEE. Dr. Brooks was present and provided feedback for the group regarding the Student's IEE. Holly Smelt, the Student's District occupational therapist, was not present. Darcy Moore, the Student's special education teacher left before the meeting finished. P2p52; P15p5; Parent T705.

136. A PWN dated October 30, 2017 reflects the District was proposing extend the Student's reevaluation to initiate an FBA and speech-language pathology (SLP) evaluation of the Student. It noted the Parent and her advocate requested time to consider the FBA before a BIP was written. P31p4.

137. In an email on November 21, 2017 to Ms. Clancy and others, the Parent stated, "I have repeatedly stated...that I [need documents in advance] before meetings...This is in order for me to fully participate due to my own difficulties with processing information." P15p2.

138. Ms. Clancy responded in an email the same day stating, "We appreciate your concerns..., and want to ensure that we are providing you the ability to meaningfully participate in the student's evaluation." P15p2.

139. In a memorandum to Ms. Clancy dated November 26, 2017, the Parent stated, "I am disappointed because at every meeting I have attended with you, I have stated, due to my own disabilities, I need to be able to read content that is to be discussed, and/or presented to me, in advance, as I am not able to process information at a 'typical' pace." D66p3.

140. On November 27, 2017, the Parent was granted the first amendment to her Complaint.

141. A reevaluation team meeting was held on November 27, 2017. J26. The Parent attended with Ms. Caldart. *Id.* at p10. District OT Holly Smelt did not attend. Parent T705. The PWN associated with this meeting is dated the same day. J26p42.

142. The PWN from the reevaluation meeting stated the Student's eligibility category was changed to Autism, and that the District would provide SDI in reading, written expression, math, social/emotional skills and behavior. The Student would receive related services for occupational therapy and speech/language therapy, and the District would provide a BIP based on the findings of the Student's FBA. The PWN also described the Parent's input at the reevaluation meeting, and set out the reasons why the Parent's input was rejected. J26p42.

The December 2017 IEP

143. An IEP team meeting was held on December 12, 2017. J27. The meeting lasted approximately 2½ hours. The Parent attended along with Ms. Caldart. Id. at p1. At one point during the meeting Megan Qualls, the school principal, left for approximately one hour, and then returned. District OT Holly Smelt left the meeting before it was finished.

144. The Parent has raised eight alleged procedural violations which occurred during or as a result of the December 12, 2017 IEP meeting. See Statement of Issues and Remedies. However, the Parent offered only very cursory and summary testimony (See Parent T710-712) and the notes taken at the meeting by Ms. Caldart (P2pp85-104) as evidence to support her alleged procedural violations.

145. During the meeting, the Parent stated that she had learning disabilities, it was difficult for her to process information, and it was hard for her to think on the spot. P2p102.

146. After approximately 2½ hours, some of the team members had to leave. The remaining team members offered to continue the meeting. The Parent was concerned that mandatory team members needed to leave. She asked to end the meeting and schedule another IEP meeting to continue discussion of the IEP and review the Student's BIP and safety plan. Galbreath T631; Parent T711-712; J27p9.

147. On December 15, 2017, Holly Galbreath, the District's director of special education, sent the Parent a copy of the Student's IEP, and told the Parent that another meeting would be scheduled for January after the school break. P17p2.

148. The Parent replied to Ms. Galbreath in an email on December 17, 2017. The Parent argued the team had not finished the IEP. P17p4.

149. Ms. Galbreath replied in an email on December 20, 2017 stating the District, "recognizes that you have additional input to the IEP and as stated at the end of his IEP meeting, we will schedule a meeting after Winter Break to continue the discussion and make any changes to the IEP through amendments." P17p4.

150. On January 10, 2018, the Parent was granted the second amendment to her Complaint.

151. Another IEP meeting was scheduled for January 24, 2018 to review the Student's current IEP and review his safety plan, BIP, and transition to general education. J30p1.

152. The IEP team held another IEP meeting on January 24, 2018. The team reviewed the Student's safety plan and BIP, and the team discussed a plan to transition the Student from his Success program to a less restrictive setting. J32p1.

153. On February 21, 2018, the team held another IEP meeting and amended the Student's IEP. J33p3. The team amended the Student's IEP to include the Student in a social skills group in a resource room setting, place the Student in a general education technology class, and added accommodations for the Student. J33p31. The February 21, 2018 IEP is the Student's current educational placement.

154. A District consultant, Vanessa Tucker, left the IEP meeting before it was finished. J33p3.

Parent's request for Student's educational records

155. On November 22, 2016, the Parent made a request with Mr. Whalen to review any and all educational records for the Student. P10p1. After receiving no response from Mr. Whalen, the Parent made another request with Mr. Whalen on January 17, 2017. P10pp1-2. Mr. Whalen replied to the Parent that same day. P10p3. At her request, the Parent reviewed the Student's records on February 28, 2017. P10pp3-5.

156. On November 20, 2017, the Parent made another request for the Student's records. The District did not respond until December 14, 2017. On December 18, 2017, a small number of records were provided to the Parent. The vast majority of records were not provided until January 11, 2018. Because of the District's delay in providing the vast majority of the Student's records until January 11, 2018, the Parent requested and was granted a continuance of this due process hearing by ALJ Michelle Mentzer, then the presiding ALJ in this matter. P10p67.

CONCLUSIONS OF LAW

The IDEA and Jurisdiction

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 Parent. *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.
4. *Rowley, supra*, 458 U.S. at 206-207 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201.
5. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

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

Endrew F. v. Douglas County Sch. Dist. RE-1, ___ U.S. ___, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Endrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential.

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, ___ U.S. ___, 138 S. Ct. 556 (2017).

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

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

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

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); 34 CFR §300.513.

8. Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

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

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

Failing to conduct an FBA during summer 2016

9. The Parent asserts there was an agreement with the District to conduct an FBA of the Student during the summer vacation in 2016. The evidence of record regarding any such agreement is very sparse. See Findings of Fact 9-10. While there was contact between the Parent and the District about conducting an FBA during this timeframe, the record does not support a finding the District ever *agreed* to conduct an FBA over the summer. The email from Jessica Jorgenson to Mr. Spadafore reflects her understanding to be the Parents wanted the Student assessed for behavior and social skills prior to his IEP review in November 2016. Given the evidence of record, it cannot be concluded the District had agreed to conduct an FBA over the summer of 2016. The Parent has not proven any violation of the IDEA.

The District's November 2016 reevaluation of the Student

10. The Parent asserts that the November 2016 reevaluation of the Student was not comprehensive and did not evaluate the Student in all areas of suspected disability, and therefore was not appropriate. Like IEPs, the appropriateness of an evaluation must be determined in light of what was known, or should have been known, at the time the evaluation was conducted. Like IEPs, whether an evaluation is appropriate should not be judged in hindsight. This is the so-called snapshot rule. See *Adams v. Oregon*, 195 F.3d 1141, 31 IDELR 130 (9th Cir. 2001).

11. The Parent asserts the District should have evaluated the Student for autism given the "signs of autism," and Dr. Hood's diagnoses of the Student. However, the Parent has not identified with any greater specificity what signs of autism the Student displayed as of November 2016 that should have placed the District on notice the reevaluation should include an assessment for possible autism. While the Student was demonstrating behavior problems at school, no professional with the requisite education, training or experience to explain why or how the District should have suspected the Student might have autism testified at the due process hearing. With respect to Dr. Hood's diagnoses of the Student, Dr. Hood saw the Student in January 2017, and Dr. Hood did not write his clinic note until March 2017. The District could not have known about Dr. Hood's diagnoses of the Student when it conducted the reevaluation in November 2016. Therefore, it is concluded that the Parent has not presented sufficient evidence to find the District knew or should have known to assess the Student for autism in November 2016. The Parent has not offered any more specific argument or evidence regarding whether the reevaluation was not comprehensive, and therefore has not carried her burden of proof on that point. It is concluded the Parent has failed to establish the November 2016 reevaluation of the Student was not appropriate.

12. It is important to recognize that the undersigned ALJ has only the authority to hear and decide issues that are raised in a due process hearing request. The Parent's due process hearing request, the Complaint, was amended twice, and a long and detailed statement of the issues and remedies for the due process hearing was developed without objection by any party.

13. While it is clear the Parent has not offered sufficient evidence to conclude the November reevaluation of the Student was not appropriate because it was not comprehensive or did not evaluate the Student in all areas of suspected disability, the undersigned ALJ is troubled by other aspects of the reevaluation. The reevaluation determined the Student remained eligible under the Developmental Delay category. It also determined the Student's level of reading comprehension was lower than what would be expected from 997 out of 1000 other students of

the Student's same age. Despite this, the reevaluation did not recommend the Student receive SDI in reading comprehension. This was because, according to Mr. Spadafore, students eligible under the Developmental Delay category are not eligible to receive SDI in academics. This is a categorically incorrect statement of the law. Once a student is determined eligible to receive special education and related services under any eligibility category, that student is entitled to receive any services, including SDI in academics, which the student requires in order to receive FAPE. *San Rafael City Schs*, 112 LRP 12088 (SEA CA 2012). Based upon the hypothetical question posed to Mr. Spadafore at the due process hearing, had he correctly understood the IDEA, he would have recommended the Student receive SDI in reading comprehension based on his assessment results from the November 2016 reevaluation. However, as noted above, the failure of the reevaluation to recommend SDI in reading comprehension was not raised as an issue by the Parent, and therefore cannot be adjudicated or decided in this matter. It is also troubling that District witnesses would offer testimony attributing the Student's very low reading comprehension score to his behavioral problems when the reevaluation report manifestly rejects any bias due to behavioral factors. See Finding of Fact 23.

The Student's December 2016 IEP

14. The Parent raised multiple reasons why she believes the December 2016 IEP was not appropriate for the Student. With respect to the present levels of performance (PLOPs), the Parent characterized them as just a "laundry list" of data, or not containing anything from the Student's general education teacher about his day. No other witness offered any testimony go establish the PLOPs were not appropriate. With all due respect to the Parent, there is no evidence to find she has the requisite education, training or experience to offer an opinion about whether a PLOP in an IEP is or is not appropriate for the Student. Given this and the lack of any more objective evidence the PLOPs in the December 2016 IEP were not appropriate for the Student, it must be concluded that the Parent has not carried her burden of proof to establish the PLOPs in the IEP were not appropriate for the Student.

15. The Parent also asserts the goals in the IEP were not appropriate, arguing they were "too wordy" and "confusing." Again, the Parent does not have the expertise to opine on the whether these goals were appropriate or not. The Parent offered the testimony of Gretchen Mertes on this issue. Ms. Mertes is qualified by her education, training and experience to offer such an opinion on the goals. While she would have rewritten some of the goals, Ms. Mertes did not testify the goals were not appropriate for the Student. It is concluded that the Parent has failed to establish the goals were not appropriate for the Student.

16. The Parent similarly asserted the accommodations and modifications in the December IEP were not appropriate. The Parent, however, could not articulate any compelling reason why she believes the accommodations and modifications were not appropriate, and there is no other evidence of record upon which to conclude they were not appropriate. This same conclusion holds for the Parent's concern for the location, duration and frequency of the Student's special education and related services in the IEP.

The December 2016 IEP Meeting

17. The District held an IEP meeting without the Parent in attendance on December 13, 2016. The District subsequently scheduled and held another IEP meeting with the Parent present on

January 10, 2017. This was a procedural violation of the IDEA, and was the subject of the Parent's Citizen Complaint with OSPI.

18. 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).

19. The IDEA requires that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." WAC 392-172A-03100; 34 CFR §300.322. To comply with this requirement, parents must not only be invited to attend IEP meetings, but must also have the opportunity for "meaningful participation in the formulation of IEPs." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

20. As noted above, a procedural violation of the IDEA only warrants a remedy when the procedural violation impedes the student's right to a free appropriate public education, significantly impedes the parent's opportunity to participate in the decision-making process, or causes a deprivation of educational benefits.

21. After review and consideration of the evidence of record in this matter, it is concluded that the District's violation does not warrant any remedy. It was only a brief period between the December and January meetings, especially in light of the typical intervening holiday break from school. The District did promptly hold a second meeting. Moreover, there no evidence from the Parent how this violation denied the Student FAPE, impeded her participating in the decision-making process in January, or denied the Student an educational benefit.

Adopting an IEP in August 2017 that was inappropriate in the following areas: Present Levels of Performance; Annual Goals; Accommodations and Modifications; Assistive Technology; and Special Education and Related Services minutes

22. The Student' IEP team, including the Parent, met on August 24, 2017 and amended the Student's IEP. The Parent provided extraordinarily little testimony to explain or support her belief that the IEP amendment was not appropriate. See Finding of Fact 118. Further, some of the reasons why she believes the IEP amendment was not appropriate were reasons that she did not raise in her Complaint and reasons that do not appear in the statement of issues and remedies. The undersigned ALJ is limited to considering only those issues raised in the statement of issues and remedies. Even broadly reading the above reasons from the statement of issues and remedies does not convince the undersigned ALJ that the Parent has carried her burden of proof to establish the August IEP was not appropriate for the Student at the time it as created.

23. Broadly reading or construing the Parent's argument and testimony, it could be seen to include the assertion that the August 2017 IEP was not appropriate because the November 2016 reevaluation was not appropriate, and therefore any IEP based on that reevaluation could not be

appropriate. However, it has already been concluded that the Parent has failed to carry her burden of proof to establish the November 2016 reevaluation was not appropriate. The Parent also argued that the team did not consider the results of the BrooksPowers IEE. However, any reasonable reading of the August 2017 IEP makes it abundantly clear that the team did in fact consider the IEE, starting with the decision to change the Student's eligibility category from Developmental Delay to Autism. The other reasons identified by the Parent, including PLOPs, goals, accommodations and modifications, assistive technology, and special education and related services, were simply left undeveloped in the record. Even Ms. Mertes, comparing the goals in the Student's 2016 IEP and August 2017 IEP, could not conclude that the goals in the later IEP were not appropriate for the Student. Finding of Fact 49.

24. After careful review and consideration of the scant evidence of record, it must be concluded that the Parent has not carried her burden of proof to establish the August 2017 IEP was not appropriate for the Student.

Failing to comply with IDEA procedures in developing the Student's December 12, 2017 IEP

25. The Parent identified eight separate alleged procedural violations of the IDEA with respect to this IEP. However, as with other parts of the record in this case, the Parent has offered very little evidence in support of her alleged procedural violations. The entirety of her testimony on these alleged procedural violations is found in the record at T710 through 712. Some additional evidence on these alleged procedural violations is found in Ms. Caldart's meeting notes. See P2pp85-104.

26. The Parent is correct that the IEP meeting on December 12, 2017 did not complete discussion and consideration of the Student's safety plan, BIP and transition into general education despite running 2½ hours. However, another IEP team meeting was held and those matters were addressed at a second meeting on January 24, 2018. It was understandable that some team members may not have anticipated the need to schedule more than 2½ hours for the first meeting on December 12th. While failing to complete discussion and consideration of all of the IEP at the first meeting could be construed as a procedural violation, the Parent has not explained how such a procedural violation warrants a remedy, or why the second meeting on January 24th did not cure the violation.

27. A parent is entitled to notice of who will attend an IEP meeting. WAC 392-172A-03100(3)(a). The Parent argues she was not notified about a person who attended the IEP meeting on December 12th. As best can be determined, this person is like Vanessa Tucker, a District consultant. Again, this would be a procedural violation and the Parent simply has not explained or offered evidence why such a procedural violation warrants any remedy. The Parent did not explain how this denied the Student FAPE or denied her a meaningful opportunity to participate in the decision-making process. Moreover, it would wildly speculative for the undersigned ALJ to attempt to fathom such.

28. With respect to the allegation there was no one at the meeting who met the requirements of WAC 392-172A-03095(1)(d) or (1)(e), all the Parent has offered is P2p103; an oblique reference to "Need to check with the director." This is simply insufficient evidence to make any finding of fact or reach any conclusion the Parent has established a procedural violation. The same is true for the Parent's allegations that the team predetermined the Student's educational placement (citing only to what is apparently her own statement at P2p78) or made educational

recommendations based not on the Student's needs but on what services were available in the District.

29. The Parent has identified not legal requirement and the undersigned is unaware of any requirement that an IEP team is required to ask a parent for input *before* an IEP meeting. Indeed, one of the crucial purposes of convening an IEP team meeting is to gather input from all members of the team, including parents.

30. The Parent asserts the team did not allow sufficient time for the meeting, and this impeded her participation. At some point, a rule of reason must come into play. It cannot be expected that one IEP meeting can go on indefinitely. This IEP meeting lasted 2½ hours, but did not finish. Accordingly, a second meeting was scheduled and held on January 24, 2018. It is concluded that the Parent has not established she did not have sufficient time and opportunity across both those meeting to meaningfully participate in the development of the Student's IEP.

Requirements and regulations regarding discipline, isolation and restraint

31. The Parent raised as an issue whether the District failed to comply with requirements and regulations regarding the District's use of discipline, isolation and restraint with the Student during the 2016-17 and 2017-18 school years. The Parent did not identify specifically what requirements or regulations with which she believes the District did not comply. As a preliminary matter, it is concluded that the record does not reflect any use of discipline, isolation and restraint with the Student during the 2016-17. RCW 28A.600.485 sets out the law that applies to all students, including students eligible for special education, regarding use of restraint or isolation at school. WAC 392-172A-02076 [Prohibited Practices] applies specifically to students eligible for special education.

32. As can best be determined, the only specific argument raised by the Parent and supported by evidence of record is that Ms. Eddington was not currently restraint certified when she was compelled to use physical restraint with the Student on July 27, 2017. Ms. Eddington had received training through the District in the Right Response de-escalation model. She had been Right Response certified, but by July 27, 2017, her certification has lapsed. The Parent has not explained how Ms. Eddington's lapse of certification violated any requirements or regulations. Moreover, review of RCW 28A.600.485 does not include any requirements for training in the use of physical restraint. The statute does require school districts to adopt a policy providing for the least amount of restraint or isolation, but neither the Parent nor the District offered into evidence any policy adopted by the District pursuant to this statute. Similarly, WAC 392-172A-02076 does not, on its face, set any training requirements. It must be concluded the Parent has not carried her burden on this issue. It cannot be concluded the District violated any requirements or regulations when Ms. Eddington physically restrained or isolated the Student.

Contracting for the BrooksPowers IEE

33. The Parent first requested an IEE of the Student at District expense November 22, 2016. Finding of Fact 29. The IEE report was not completed until sometime in August 2017. The District received a copy of the IEE report from the Parent on August 21, 2017. Finding of Fact 110.

34. While a period of nine months between a request for an IEE and production of a final report might raise concern, the record in this particular case is replete with evidence of the parties' efforts

to facilitate the IEE. And no small amount of the nine months is attributable to the Parent's request that the BrooksPowers Group conduct the IEE. It is concluded that the record does not support any undue delay or bad faith on the part of the District in contracting for the IEE. It is concluded the Parent has not carried her burden to prove any violation of the IDEA or denial of FAPE based upon the length of time it took to obtain the BrooksPowers' IEE.

Failing to convene an IEP meeting to revise the Student's IEP after a lack of sufficient progress on his measureable annual goals during the 2016-2017 school year

35. There was virtually no testimony or evidence offered on this issue at the due process hearing. A few of the IEPs of record include some progress reporting on the Student's annual goals. The Parent, however, has not explained why she believes any of that evidence supports a conclusion the Student was not making "sufficient" progress on his goals, or why the District should have revised any of the Student's goals. It must be concluded that the Parent has not proven any violation of the IDEA or denial of FAPE to the Student.

Once an FBA and BIP were adopted, failing to update them after the Student was repeatedly suspended

36. It is important to clarify the timeframe for this issue. The Student's first BIP was created on December 6, 2016, and the Parent confirmed the Student has not been suspended during the 2017-18 school year. Therefore, the period at issue is from December 6, 2016 to the end of the 2016-17 school year.

37. The Student's FBA and BIP were in fact updated during the period at issue. The Student's BIP was updated or amended on January 23, 2017. Finding of Fact 58. And on May 15, 2017, additional behavioral data was provided to the Parent. Finding of Fact 89. Nor has the Parent's evidence established a clear need for the FBA or BIP to have been amended. Some of the Parent's argument the Student's FBA and BIP should have been amended may stem from her belief that if the Student is removed from his educational placement for some even small portion of the school day, the Student is considered to have been suspended for an *entire* school day. The Parent has cited not legal authority for this proposition, and the undersigned is aware of none. While an in-school suspension (ISS) can be considered a removal of a student from his or her educational placement, the evidence of record does not support a conclusion the Student was suspended during the period at issue to such a degree or duration it would have triggered any additional protections for the Student. It is concluded the Parent has failed to carry her burden of proof on this issue.

Failing to consider the Parent's input in developing the December 2016 and August 2017 IEPs

38. While the December 13, 2016 IEP meeting was held without the Parent in attendance, a second meeting was held on January 10, 2017 with the Parent in attendance along with her advocate. Findings of Fact 43, 55. The Parent has not explained clearly in what manner the District failed to consider her input into the resulting IEP. The fact that an IEP team may not ultimately choose to include suggestions or input from a parent on an IEP is not equivalent to failing to consider input from a parent. Parents do not have veto power over the decisions of an IEP team. Moreover, the law recognizes that a team's proper consideration of parental input is a relatively low bar or standard. Listening with an open mind is all that is necessary. The Parent's

evidence of record does not prove the District failed to at least consider her input with respect to either IEP.

Failing to have mandatory school team members present for the full duration of IEP meetings during the 2016-17 and 2017-18 school years

39. There were 10 IEP meetings held during these two school years. Findings of Fact 43, 55, 69, 81, 90, 92, 113, 143, 151, 153.

40. Ms. Walters arrived at the January 10, 2017 meeting 30 minutes late. An occupational therapist was invited to the August 24, 2017 meeting, but did not attend. Finding of Fact 115. In addition, at the same meeting, Dr. Galbreath arrived 30 minutes late. *Id.* These are the only two IEP meetings where the Parent has identified mandatory participants as not present for the full IEP meeting. See Parent Testimony at T705-706. While the Parent identifies other meetings where she believes mandatory members were not present or were not present for the entire meeting, those other meetings were not IEP meetings.

41. As a matter of law, the evidence does not establish the occupational therapist was a mandatory team member on August 24, 2017. See WAC 392-172A-03095 and *Compare* J24p4. Ms. Walters arrived late on January 10, 2017 and signed in as the District representative, a mandatory team member. However, apart from the bare fact that this would constitute a procedural violation, the Parent has not explained how Ms. Walters' absence of 30 minutes denied her right to participate as a parent, or denied the Student FAPE or an educational benefit. In addition, at the August 24, 2017 IEP meeting, another school psychologist was present: Penny Holmes.

42. It is concluded that while the District may have committed a procedural violation at the January 10, 2017 IEP meeting when Ms. Walters arrived late, it is also concluded that this would not warrant any remedy.

Failing to comply with IDEA requirements concerning PWNs during the 2016-2017 and 2017-2018 school years by: not sending PWNs in a timely manner; not stating whether the Parent's requests were accepted or denied; and not explaining why they were accepted or denied

43. With respect to this issue, Parent has identified six specific PWNs in her testimony, all in 2017. See Parent T667-670 and Findings of Fact 69, 92, 113, 136, 141 142.

44. PWNs must comply with WAC 392-172A-05010. Review of these PWNs leads to the conclusion that the Parent's belief they do not comply with the regulation is rather a belief they are not as perfect as the Parent would like, not that the PWNs are legally deficient. For example, given a 2½-hour long IEP meeting, it may not be able to capture every nuance of a team's discussion and consideration of every piece of input, conversation, or deliberation. Moreover, the undersigned ALJ's reading of the regulation does not lead to a conclusion that that is the intent of the regulation. PWNs are intended to provide notice to a parent of what a team has considered, and what decisions the team made. A fair reading of the PWNs identified by the Parent leads to a conclusion the PWNs meet that standard. Further, and has already been noted, a legally defective PWN is a procedural violation. The Parent has not presented sufficient evidence or explained how any lack of detail or precision in these PWNs impeded her ability to participate in

the decision-making process or denied the Student FAPE or an educational benefit. It is concluded these PWNs do not constitute a procedural violation of the IDEA.

Failing to address repeated bullying and physical assaults on the Student by another student, both in class and on the bus, during the 2017-18 school year

45. The evidence of record is clear that during the 2017-18 school year the Student was bullied and physically assaulted by another student both in class and on the bus. See Findings of Fact 124-133. However, the record is clear that the District took action to address the problem. At first, the District placed an aide on the bus. Later, the District placed the Student on a different bus. The District revised the Student's safety plan multiple times.

46. Bullying of a student with a disability with a disability that results in the student's failure to receive a meaningful educational benefit constitutes a denial of FAPE under the IDEA. *Dear Colleague Letter*, 113 LRP 33753 (OSERS/OSEP 2013); *M.L. v. Federal Way Sch. Dist.*, 105 LRP 13966, 394 F.3d 634 (9th Cir. 2005).

47. While the undersigned ALJ in no way minimizes the seriousness of bullying or assault of any student, the evidence in this case does not support a conclusion that the bullying and assaults on the Student were so pervasive or severe that the Student did not receive a meaningful educational benefit during the 2017-18 school year. In fact, the consensus of the witnesses, including the Parent, is that the Student's own aggressive and assaultive behaviors diminished during the school year. The Parent has not presented evidence that the Student was denied a meaningful educational benefit. That is the legal standard to establish a school district violated the IDEA with respect to bullying of a student eligible for special education. Again, this conclusion should not be interpreted as any endorsement of the District's response. It is simply an application of the controlling law to the facts in this case.

Failing to Comply with the Parent's requests for educational records, including a request made on November 20, 2017

48. Pursuant to WAC 392-172A-05190, a parent has the right to inspect and review, during school business hours, any educational records related to the student. School districts must respond within 45 calendar days after the request is made. Parents have the right to request copies of the records if failure to provide copies would effectively prevent a parent from exercising the right to inspect and review the records.

49. With respect to the Parent's request for records made on November 20, 2017, ALJ Mentzer has already heard and decided that issue. ALJ Mentzer determined the District violated the 45-day time limit to respond, and as a remedy for the District's violation granted the Parent a continuance of this due process hearing. It is concluded no further remedy is warranted for the District's violation.

50. With respect to the Parent's request for records made on November 22, 2016, it is similarly concluded that the District failed to respond within the 45-calendar-day time limit. However, the Parent has identified nothing in the way of a remedy for this procedural violation of the IDEA. The likely appropriate remedy would be an order for the District to have Mr. Whalen review the applicable regulation to ensure he would not commit the same violation in the future. However, it

is the undersigned ALJ's understanding that the District no longer employs Mr. Whalen. Given this, it is concluded that no remedy is warranted for this procedural violation.

Whether the Student's current educational placement is an issue in this case

51. There were conflicting statements made and testimony given regarding whether the Student's current educational placement is an issue in the case. First, it is necessary to determine what the Student's current educational placement is. A student's educational is typically a student's last implemented IEP. In this case, the last IEP implemented for the Student is his February 21, 2018 IEP. The Parent's Complaint was last amended on January 10, 2018. It is not possible for the Parent to raise an issue about the Student's placement under his February 21, 2018 IEP when that IEP was implemented *after* the Parent's Complaint was last amended. It is concluded that the appropriateness of the Student's current educational place is not an issue in this case.

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

53. The Parent is clearly a loving, concerned and empathic mother of a disabled young student. She is also a forceful advocate for the Student. It is difficult enough for experienced attorneys to participate in a days-long due process hearing and develop a comprehensive and complex evidentiary record that addresses many, many issues. Is it obvious that the Parent must have spent very considerable time and effort preparing to present her evidence at the due process hearing. The fact that some parts of her evidentiary record were not as complete as they could have been is no fault of the Parent.

ORDER

After careful review and consideration of all the evidence presented by the parties, it is concluded that the District has committed several procedural violations of the IDEA as identified in the above Conclusions of Law. Those procedural violations, however, do not warrant any remedy. Accordingly, the Parent's requested remedies are DENNID.

Signed at Seattle, Washington on June 30, 2018.



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 this final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

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. *now*

Parent


Michaela Clancy, Director, Special Education
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