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July 30, 2015

Parent

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Redmond, WA 98073

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In re: Lake Washington School District
OSPI Cause No. 2014-SE-0015
OAH Docket No. 12-2014-OSPI-00003

Dear Parties:

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

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

Sincerely,

A handwritten signature in blue ink that reads "Anne Senter".

Anne Senter
Administrative Law Judge

cc: Administrative Resource Services, OSPI
Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator

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

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SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NO. 2014-SE-0015

OAH DOCKET NO. 12-2014-OSPI-00003

LAKE WASHINGTON SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter in Redmond, Washington, on March 10 - 13, and 16 - 19, 2015. The Parent of the Student whose education is at issue¹ appeared and was represented by Jeannette Cohen attorney at law. The Lake Washington School District (the District) was represented by Carlos Chavez, attorney at law. Paul Vine, District director of special services, and Rick Burden, District associate director of special services, also appeared.

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on March 31, 2014. The Complaint was assigned Cause No. 2014-SE-0015 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered March 31, 2014, which assigned the matter to ALJ Matt Wacker. The District filed its Response to the Complaint on April 10, 2014.

The Parent's first request to amend her Complaint was granted effective October 15, 2014. The Mother later filed a "request for the extension of limitations," which ALJ Wacker treated as a second request to amend the Complaint and denied.

On December 15, 2014, the matter was reassigned to ALJ Senter. The Parent submitted two additional requests to amend her Complaint on January 13, 2015, which were granted effective January 21, 2015.

On February 20, 2015, an order was entered denying the Parent's motion for exception to the statute of limitations and granting the District's cross-motion.

¹In the interests of preserving the family's privacy, this decision does not name the Student or his family members. Instead, they are each identified by title. The Student's mother, the parent who filed the Complaint, is referred to as the "Parent." The Parent's partner, who lives in the home with the Parent and the Student and who was present for the hearing, is referred to as "Parent 2." Referring to Parent 2 in this manner is not a determination that she meets the definition of "parent" set forth in WAC 392-172A-01125 or 34 CFR §300.30.

Prehearing conferences were held on April 7,² May 9 and 16, October 10, November 7, and December 23, 2014, and January 16 and February 6 and 17, 2015. Prehearing orders were entered April 7, May 9 and 16, October 15, and December 12, 2014, and January 7, 21, and 26, and February 9 and 17, 2015.

Due Date for Written Decision

As set forth in the Order Continuing Prehearing Conference and Decision Due Date entered September 10, 2014, the due date for a written decision in matter was continued, at the District's request, to the close of record plus 30 calendar days. The hearing record closed with the filing of supplemental post-hearing briefs on June 30, 2015. The due date for the written decision is therefore **July 30, 2015**.

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: D1 – D101; and

Parent's Exhibits: P1 – P74, P77 – P95, P101 – P104.

Witnesses Heard (in order of appearance):

The Student's Parent;
Guy Oram, Ph.D., clinical psychologist;
Ann Uherek, Psy.D., clinical psychologist;
Janet Dolan, Dolan Academy and Learning Center director and teacher;
Patricia Brown, former District special education teacher;
Valerie Martin, District school nurse;
Patti Bruneau, District general education teacher;
The Student's Parent 2;
Wynn Spaulding, District associate director of special education;
Paul Vine, District director of special services;
Jason Ewert, District general education teacher;
Rick Burden, District associate director of special services;
Victoria Findley, District health services specialist; and
Stephen Dewitt, District substitute teacher/tutor.

² The case was consolidated for purposes of the early prehearing conferences with Cause No. 2014-SE-0011, another case between the Parent and the District, which was later withdrawn by the District prior to hearing.

ISSUES

As set forth in the Seventh Prehearing Order, the issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
 - i. Providing the Student with Individualized Education Programs (IEPs) that did not include appropriate specially designed instruction (SDI), related services and/or educational placements from commencement of the 2012-2013 school year through January 21, 2015;
 - ii. Failing to implement the Student's IEPs by failing to provide the SDI and related services identified in the IEPs from commencement of the 2012-2013 school year through October 15, 2014;
 - iii. Denying the Parent full participation in developing and/or revising the Student's IEPs when the District, from commencement of the 2012-2013 school year through October 15, 2014;
 - A. Did not consider input and/or information provided by the Parent;
 - B. Made changes to the Student's IEPs without providing the Parent prior written notice;
 - C. And/or made changes to the Student's IEPs without notice to the Parent;
 - iv. Making changes to the Student's Individualized Health Plan (IHP) without the Parent's knowledge from commencement of the 2012-2013 school year through October 15, 2014;
 - v. Failing to provide appropriate autism training, including but not limited to social and adaptive skills, from commencement of the 2012-2013 school year through October 15, 2014;
 - vi. Failing to timely complete the reevaluation it requested in April 2014 and a reevaluation initiated in or around October 2014;
- b. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2012-2013 school year when District employees verbally, mentally, and physically abused the Student and falsified school assignments;
- c. And, whether the Parent is entitled to her requested remedies:
 - i. An order finding the District denied the Student FAPE from commencement of the 2012-2013 school year through January 21, 2015;

- ii. An order finding the Student's June 19, 2012, November 9, 2012, February 26, 2013, May 21, 2013, and November 20, 2013 IEPs were not designed to provide the Student FAPE and were developed in violation of the IDEA;
- iii. An order finding that placement at the Dolan Academy for the 2013-2014 and 2014-2015 school years at District expense is an appropriate placement for the Student;
- iv. One-to-one therapy for the Student with Dr. Ann Uherek for Posttraumatic Stress Disorder and trauma;
- v. Autism instruction for the Student in a one-to-one and small group setting with Dr. Uherek;
- vi. An award of compensatory education for all SDI and related services identified in the Student's IEPs which the District failed to provide;
- vii. Or other equitable remedies, as appropriate.

FINDINGS OF FACT

Background

1. The Student was 15 years old at the time of the hearing. Exhibit D99, p.1. He has resided in the District since the 2008-2009 school year. Parent, Tr. 46.
2. The Student has an intractable seizure disorder, which means that his seizures cannot be completely controlled, even with medication.
3. During the 2011-2012 school year, when the Student was in the seventh grade, he attended Rose Hill Junior High. He received most of his education in general education classes. Exhibits D1, p.12; P1, p.14. He received "push-in" special education services in reading and writing from a special education teacher in his general education language arts class, and attended special education classes for math and organization. Exhibits D1, p. 11; P1, p. 13; Brown testimony, Tr. 688. The District created a number of individual health plans (IHPs) during this year to address the Student's safety at school. Exhibit P2.
4. On December 6, 2011, the Parent notified the District that the Student would remain at home because of safety concerns due to his epilepsy and the Parent's belief that school staff was not following the IHP. Exhibit D2. She stated that he would not return until a full-time nurse was assigned to the school and a new safety plan was in place that would be followed by every staff member. *Id.*
5. The Parent also provided a letter from Dr. Ednea Simon, the Student's doctor, dated December 6, 2011. Exhibits D3; P72. The letter stated that the Student's epilepsy puts him at high risk for injury, particularly due to falling, because his seizures can happen suddenly and without warning. *Id.* The letter also stated that the Student requires pharmacological intervention to stop the seizures and prevent permanent damage. *Id.* Dr. Simon recommended

that the Student have constant adult supervision at school until it is determined that his seizures no longer put him at risk. *Id.*

6. On December 8, 2011, the District prepared another IHP, addressing, among other things, the need for adult supervision at all times. Exhibits D4, P3. Nonetheless, the Student did not return to school.

7. The Parent submitted to the District an application for long-term illness tutoring dated January 11, 2012, stating that the Student would be unable to attend school for 10 weeks. Exhibits D5, P4. The request stated that the Student would be admitted to the hospital for a prolonged video EEG study and then a plan for school would be made based on the results. *Id.*

8. The District requested information from the Student's doctor about the reasons the Student could not attend school because the doctor had recently communicated that the Student *could* attend school with adult supervision. Exhibit D6.

9. The Student was hospitalized in January 2012 for an extended video EEG to better characterize his seizures. Exhibit P74. As part of this evaluation, Alan Haltiner, Ph.D. conducted neuropsychological testing. Exhibit P5.

10. Dr. Simon drafted a letter to the District regarding the Student, which was received by the District in February 2012.³ Exhibits D8, P73. The letter was three pages long and stated that the Student has intractable epilepsy and "frequent seizures." *Id.* It described that, during his diagnostic video EEG study in January, he had simple partial seizures, complex partial seizures, and secondarily generalized seizures, as well as one grand mal seizure. *Id.* The letter described that the Student's seizures typically consist of a tingling sensation in his extremities or whole body and that he gets very agitated during the seizures and complains of a shock sensation in his face or body, and cries. *Id.*

11. Dr. Simon stated that the Student may return to school once a seizure plan is in place. *Id.* She described that the Student needs school staff trained to identify his seizures and trained in CPR to both help him with school work and attend to his medical needs. *Id.* She noted that it is important that he always has the same staff person who is able to promptly recognize that he is having a seizure. *Id.* Dr. Simon further stated that the Student should never be left alone, and recommended that the school receive training provided by the Northwest Epilepsy Foundation about seizure types and how to proceed during a seizure. *Id.*

12. Dr. Simon provided instructions about what should take place if the Student has a grand mal seizure: he should be placed on a flat surface, away from sharp objects, and turned on his side. If the seizure lasts more than three minutes, he should receive the medication diastat, and 911 should be called if there are any signs of respiratory difficulties or if a seizure persists after the administration of diastat. *Id.* She also provided instructions about what should take place if

³ The letter is dated January 8, 2012. Exhibits D8, P73. However, in the body of the letter, Dr. Simon states that the Student was admitted for the video EEG study on January 23, 2012, a date after January 8, 2012. *Id.* The District's copy of the letter has a facsimile transmittal line across the top dated February 9, 2012. Exhibit D8, p.1.

the Student has a partial seizure: It is important to calm him down, place him in a safe and quiet place, and time the seizure. If it lasts more than five minutes, give him Ativan by mouth if he is conscious and able to swallow, and midazolam if not. *Id.* Dr. Simon stated that the Student may not practice high impact sports or be involved in activities involving heights. *Id.* She stated that it is important to avoid stressful situations, especially bullying, which may trigger seizures. *Id.* She stated that other triggering factors were lack of sleep, being very tired, and being sick. *Id.* She stated that the Student's new medication requires that he be well hydrated and he should be allowed to have a water bottle with him at school. *Id.* She stated that the school must keep ativan, midazolam, and diastat for the Student. *Id.*

13. On February 8, 2012, the District made arrangements for a paraeducator to work with the Student if he returned to school. Exhibit D9.

14. On February 10, 2012, Valerie Martin, the school nurse, wrote to Dr. Simon, stating that she had been told by Dr. Simon's nurse that she could not speak with Dr. Simon directly. Exhibit D11. Ms. Martin asked Dr. Simon whether, since 911 responders are available to the school in five minutes or less, it is necessary that a nurse be available on campus at all times. *Id.* She also asked how far the Student could safely walk to reach the "quiet area" and how long he should remain in the quiet room before calling the Parent to pick him up if there was no improvement in symptoms after administering ativan. *Id.*

15. Rather than responding directly to Ms. Martin's questions, Dr. Simon sent the District a letter dated February 10, 2012. Exhibits D10, P77. The letter is almost identical to the prior three-page letter. *Compare* Exhibits D10 and P77 *and* Exhibits D8 and P73. The only substantive changes are the addition of a statement that a nurse must be present at school every day to assist the Student with his medical needs, that the Student be taken to the nurse's office (rather than a safe and quiet place) if he has a partial seizure, and that the nurse will call his mother and he will go home if he receives medication for seizures. *Id.*

16. Dr. Simon sent the District another letter dated February 13, 2012. Exhibit P79. Again, this letter was mostly the same as the earlier three-page letter. *Compare* Exhibit P79 *with* Exhibits D10, P77. The only substantive changes to the letter dated February 10, 2012, are the deletion, without explanation, of the recently inserted requirement that a nurse must be present at school every day, the addition of a statement that the person assigned to the Student will carry a radio and cell phone to communicate with 911 and the nurse if the Student has a seizure, and the inclusion of information about who may administer the Student's medication: the paraeducator may give ativan under the school nurse's supervision, and the school nurse, paramedics, or the mother may administer midazolam and diastat. *Id.*

17. On February 14, 2012, a new IHP was created and signed by the Parent. Exhibits D12, P8. Under the plan, the Student would be with a paraeducator at all times. *Id.*

18. The District also agreed at this meeting to pay for a neuropsychological evaluation by Dr. David Breiger at Children's Hospital. Exhibits D13, P10. The Parent sought to obtain her own outside neuropsychological evaluation by Dr. Ann Uherek, Psy. D., and the District declined to pay for it. *Id.*

19. The Student returned to school soon after February 14, 2012, when the new IHP was in place. On or about February 24, 2012 the Parent was at the school to pick up the Student.

Exhibit D15; Parent, Tr. 824. The Parent observed that the Student was exhibiting symptoms of a seizure and the paraeducator disagreed. Parent, Tr. 824-25; Exhibit P63, p. 5. The Parent again removed the Student from school because she believed that the paraeducator had not been properly trained to recognize the Student's unique seizure symptoms. Parent, Tr. 829.

20. At a meeting on or about February 29, 2012, the District agreed to provide home tutoring services for the Student until its evaluation, including the outside evaluation with Dr. Breiger, was complete. Exhibit P12. The District assigned Steve Dewitt as the tutor to work with the Student for 7.5 hours per week. Exhibit P11. The Student was not attending school at this time because the Parent reported he was having uncontrollable breakthrough seizures, which means that he continued to have seizures even though he was being medicated. Parent, Tr. 85; Oram, Tr. 251.

21. In April 2012, the District hosted a seizure training for staff conducted by the Northwest Epilepsy Foundation as recommended by Dr. Simon. Exhibit D18.

22. Dr. Uherek conducted a psychological evaluation of the Student at the Parent's request and expense, which concluded in April 2012. Exhibits D23.

23. Dr. Uherek determined that the Student's medical history suggests he has an organic mental disorder, manifested by obsessive compulsive behavior, symptoms of mood disturbance, multiple somatic complaints, and social withdrawal. Exhibit D23, p. 9. She noted that he continues to have epileptiform discharges on his EEG, although the severity of his seizures seemed to have abated. She noted that seizures can produce disruptive effects on memory and behavior for as long as 24 hours after the event. *Id.* She stated that the Student has episodes of intermittent memory loss, inattention, and spells of being "spacy" and disoriented, and slowed processing speed that are likely associated with his abnormal brain activity. *Id.* She also stated that he presented behaviors and characteristics that "are consistent with Asperger's Syndrome." *Id.* Dr. Uherek's report did not recommend any instruction or services related to Asperger's. *Id.*

24. Dr. Uherek determined that the Student had inherently average to above average intelligence, although she noted that he had poorly developed oral and written expression skills. *Id.* at 8. She also determined that he had delays in executive functioning and working memory deficits. *Id.*

25. Dr. Uherek recommended that the Student receive direct instruction in integrative writing and composition skills as well as ongoing coaching in the organization skills needed to produce written language commensurate with his language processing abilities. *Id.*

26. Dr. Uherek stated that, "[i]f he falls behind in a large class setting, providing him instruction in a smaller class setting needs to be considered." She noted that he "clearly can learn, but [his] fluctuating mental status related to his underlying seizure disorder and medications can affect his ability to attend and learn in a busy or distracting environment and to keep up with work expectations." *Id.* The report did not otherwise address the appropriate size of classroom or school for the Student or state that he required one-on-one instruction. *Id.*

27. She recommended that the Student may need access to a study skills class or tutoring before or after school to provide reteaching if he is having more seizure activity as well as time

to catch up with assignments if he falls behind. *Id.* at 11. She also recommended the use of assistive technology because of his difficulty organizing his thoughts and putting them into written or spoken responses. *Id.*

28. Dr. Uherek recommended a number of accommodations, including that the Student be provided extra time on any test or assignment that involves reading or writing because of his slower than expected processing speed and intermittent working memory deficits as well as accommodations to address his difficulties with attention, short term memory, and organization. *Id.* She recommended that he have flexibility in grading, such as the ability to turn in assignments late and to work at his own pace to complete complex assignments. *Id.* She also recommended accommodations for notetaking and recording lectures due to his working memory deficits and poor handwriting fluency. *Id.*

29. After Dr. Uherek's evaluation was complete, the Parent and Student met with Dr. Breiger, who was selected by the District to evaluate the Student. Parent, Tr. 83. After reviewing Dr. Uherek's report, Dr. Breiger determined that no further testing was necessary and he did not conduct any assessments or prepare a report of his own. Parent, Tr. 83; Spaulding, Tr. 1307-08.

30. An evaluation team meeting was held on June 12, 2012. Exhibits D24, P13, p.5. The team reviewed reports of Dr. Simon and Dr. Haltiner, as well as the report of Dr. Uherek, who was present at the meeting. Exhibits D24, pp.4, 9; P13, pp. 8, 15. Dr. Haltiner's evaluation was for purposes of profiling the Student's cognitive function and did not provide educational recommendations. Exhibit P5, p. 8. The team determined that the Student remained eligible for special education and related services under the health impaired eligibility category, and recommended that he receive SDI in reading comprehension, math reasoning, written expression, and organization. Exhibits D24, pp.2, 9; P13, pp.6, 15. The team noted that Dr. Uherek diagnosed the Student with Asperger's Syndrome (although her report had not used the word diagnosis), but also stated that the school team did not observe any social concerns related to the Student's functioning. Exhibits D24, p. 6; P13, p.9. Teachers described him as prosocial and appropriate in the classroom. *Id.*; Brown, Tr. 778-79. The evaluation team did not recommend any social skills or other services related to Asperger's for the Student. Exhibits D24, p.2; P13, p.6.

31. An IEP meeting was held on June 19, 2012. Exhibits D27, P15. Under the IEP adopted that day, the Student would continue to attend Rose Hill with SDI in written expression, organization/executive functioning, math reasoning, and reading comprehension in a resource room with the remainder of his classes in general education. Exhibits D27, pp. 11,12; P15, pp. 13, 14. The team also offered three hours of tutoring for the Student for six weeks over the summer to assist with his transition back to school in the fall, not as an ESY service, as well as five hours of per week of tutoring for the first semester of the 2012-2013 school year. Exhibit D27, p.13.

32. The Student had not attended school since the Parent removed him in February 2012. Parent, Tr. 86. The Parent accepted the summer tutoring, and Mr. Dewitt continued to be the Student's tutor. Parent, Tr. 103.

33. Dr. Simon drafted another letter "to whom it may concern" dated June 27, 2012. Exhibits P71, p.11; P80. The letter stated that the Student had a history of intractable epilepsy and

Asperger's syndrome and outlined his current medications and the types of seizures he has. The letter contained the following recommendations:

It is very important that he be placed on [sic] a smaller classroom at school for better assessment and management of his seizures since he has frequent seizures and requires immediate attention if partial seizures lasting more than 15 minutes with use of midazolam or if grand mal seizure lasting more than 3 minutes with use of midazolam or diastat. Stress triggers seizures for [the Student] and a quiet and controlled environment helps minimize his symptoms. He is also sensitive to light and touch. He cannot be involved in activities involving heights at school and he is also not allowed to participate in high impact sports.

Id.

On July 30, 2012, the Parent notified Wynn Spaulding, District associate director of special education, that the Student's medical providers did not believe the proposed IEP would work. Exhibit D31, p1. She stated that he needed a school with a smaller class size that could customize a schedule to allow the Student the time off he needs and to keep his stress levels low. *Id.*

34. Dr. Simon wrote another letter to the District dated August 10, 2012, which was received by the District on August 14, 2012. Exhibits P71, pp.12-13; P82. In the letter, Dr. Simon recommended the following:

[The Student's] seizures may be challenging to recognize because [he] does not have complete change in his level of awareness. His seizures are characterized by tingling sensation (sic) in his body and [he] feels very uncomfortable and anxious about this feeling and confused and unable to interact appropriately. This behavior may be misunderstood by a person that is not used to [the Student]. His seizures may be prolonged and require attention with administration of benzodiazepine. It is very important to have close monitoring of [the Student's] behavior and be able to identify his seizures. I believe that a placement at school (sic) with small number to (sic) students per classroom will be ideal for better management of his seizures. The school will also need to have RN (sic) in order to give [the Student] adequate treatment for his seizures. Delay in stopping his seizures may increase the risk for the seizure to evolve to a grand mal type of seizure that may have more serious consequences. It is also important to avoid social stressors that [the Student] was experiencing last year with frequent bullying at school. [The Student] also needs to have enough hours of sleep and some changes in his school schedule may be necessary to accommodate his needs and improve his quality of life and subsequently better school performance. We have been working on management of his antiepileptic medications for better control of his seizures but triggering factors such as stress and sleep deprivation will exacerbate his seizures.

Id. She stated that a "placement in a smaller school would allow closer contact of the school staff with [the Student] and opportunity to better recognize and understand his learning and

medical needs. In addition, small classroom [sic] will increase the opportunity for more attention to [the Student's] learning needs and better monitoring of his seizures." *Id.*

2012-2013 school year

35. Another IEP meeting was held on August 30, 2012, to address the Parent's concerns. Exhibits D34, P19. The Parent alternately requested that the District place the Student at Dartmoor Learning Center, which provides tutoring, or that the District hire the Parent as a one-on-one safety support for the Student to monitor him for seizures. Exhibits D34, p.13; P20. The District declined each of these requests. *Id.*

36. The August 2012 IEP provided for SDI in the same subject areas and in the same settings as the June 2012 IEP. Compare Exhibits D27, pp. 11, 12 and P15, pp.13, 14 with Exhibits D34, pp.11, 12 and P19, pp.12, 13. To address the Parent's concerns about monitoring the Student's seizures and receiving appropriate medical care, the District provided that a school nurse would be assigned to the Student as a one-on-one daily support to monitor the Student for seizure activity and respond according to the steps outlined in the safety plan. Exhibits D34, p.13; P20. The District also provided that the Student would receive one to two hours per day of home tutoring, depending on what the Student could manage, to assist him with his classwork. *Id.*

37. However, the Parent reported that the Student was not able to return to school at this time because of adjustments to his medications. Exhibits D34, p.13; P20; Parent, Tr. 840. Accordingly, the Parent requested that home tutoring continue. Exhibits D34, p.13; P20. The District requested medical documentation to support the need for home tutoring and agreed to provide two hours per day of tutoring dependent on receiving medical documentation supporting the service and verifying why he was not able to attend school. *Id.*; Exhibits D34, p. 13; P20; P40, p.5.

38. The Student was in the eighth grade this year and assigned to Rose Hill, although he was receiving home tutoring, rather than attending school, at the beginning of the year. Exhibits D34, p.13, P20, Parent, Tr. 840, 843, 997-98.

39. It was agreed that Dr. Uherek would coordinate communications between Dr. Simon and Dr. Novotny, another of the Student's doctors, and the District. The District asked Dr. Uherek to determine whether the Student was currently stable on his medication regimen and whether he was still likely to have breakthrough episodes of seizure activity; whether placement in a classroom with 25 or more students in a regular school would be overstimulating and stressful for him and would contribute to triggering more seizure activity. Exhibit P71, pp. 19-20. Additionally, given the recommendation for a small school setting, the District wanted to understand the problems associated with assessing whether he was having seizures and providing appropriate medical intervention in a large class or school setting.

40. An IEP meeting was held on November 9, 2012. Exhibits D42, P24. At this meeting, Dr. Uherek reported that Dr. Simon had very positive news – as of October 16, 2012, the Student was stable and there had been no epileptiform discharges in his EEG. Exhibit P101, p.5. Dr. Uherek further reported that Dr. Simon thought the Student should try a bit more challenging school setting, continuing with tutoring and slowly increasing the time in a more challenging setting. *Id.* Additionally, Dr. Uherek reported that Dr. Simon no longer believed that it was necessary to have an RN in the building and that calling 911 for a seizure event would be

sufficient given his stability. *Id.* She also reported that he did not need a one-on-one aide. *Id.* at 21. Dr. Uherek reported that Dr. Simon did not want the Student in big classes, but that they had not talked about smaller classes with six to 12 students. *Id.* at 16. Mr. Spaulding suggested that a resource classroom might be a better starting point, and Dr. Uherek agreed that starting with a smaller class and slowly integrating him back to see if it would cause seizures was Dr. Simon's experimental approach. *Id.*

41. The November 2012 IEP provided that the Student would receive the following SDI: 50 minutes in written expression three times per week, 50 minutes of math reasoning five times per week, 25 minutes of organization/executive functioning two times per week, and 25 minutes of reading comprehension two times per week. Exhibit D52, p. 155. He would attend two resource room classes per day to receive this instruction and would also receive tutoring support in an unspecified amount to assist with organizational skills and managing his assigned work as he transitioned back to school. Exhibits D42, pp. 12, 14; P101, p. 29; Spaulding, Tr.1394. These classes would be offered third and fourth period to address Dr. Simon's recommendation, communicated through Dr. Uherek, that the Student have a late start because of his medication and fatigue issues. Exhibit 101, pp. 28-29. The District agreed that Mr. Dewitt would monitor the Student at school for the first five days after his return. Exhibit D42, p. 14. The District would reevaluate the need for home tutoring services as the Student transitioned to a full-time schedule at the end of the semester. Exhibit D42, p. 14.

42. The record contains two IHPs dated November 9, 2012, and there is no record evidence as to which of these, if either of them, the District believed would be in effect when the Student returned to school. Exhibits D43, 44, P23. The Parent believed that the Student would be returning to school with a one-on-one paraeducator pursuant to the February 2012 IHP. Parent, Tr. 131. However, this belief is inconsistent with the PWN dated November 9, 2012, which stated that the District rejected providing one-on-one support for the Student because Dr. Uherek reported that Dr. Simon believed a one-on-one staff member was not necessary. Exhibit D42, p.14. Moreover, Mr. Spaulding and Ms. Bowser had informed the Parent in an email before the Student returned to school that there was a plan to have persons identified to keep the Student in their line of sight during his transitions from the office to class, between classes, and back to the office, rather than a one-on-one escort. Exhibit D47.

43. The Student returned to school on or about November 15, 2012. Parent, Tr. 1085.

44. On December 3, 2012, the Student sustained a bump approximately the size of a golf ball on his head but did not know how he got it. Exhibit D50; Parent, Tr. 142. The Parents believe that the injury must have occurred at school because he did not have the lump on his head before he left for school and they do not believe it could have happened between the time the Parent picked him up at school and their discovery of it. Parent; Parent 2, Tr. 1258. The District's investigation did not reveal anyone who saw the Student injure himself there. Spaulding, Tr. 1346. The Parent had not established it is more likely than not that the injury occurred at school. No finding can be made on the present record as to where the injury took place.

45. The Parent did not return the Student to school after discovering the head injury. Parent, Tr. 864.

46. A meeting was held on December 6, 2012, to address the Parent's concerns about the Student's safety at school. Exhibit D102. The District agreed to assign someone to be with the Student at all times when he was at school. *Id.* at 35. The Student returned to school the following week, once the Parent was informed there was someone in place to be with the Student at all times. Parent, Tr. 148.

47. After the Student's head injury, he was readmitted to the hospital in January for another video EEG. Parent, Tr. 150.

48. Dr. Simon drafted another letter to the District, this one dated February 8, 2013. Exhibit P83. The letter stated that Dr. Simon was providing medical care for the Student and requesting assistance in providing him reasonable accommodations to return to school. *Id.* She stated that he has "simple partial" and "complex partial" seizures and also secondarily generalized seizures. *Id.* She then stated the following:

We have been working on management of his antiepileptic medications for better control of his seizures but triggering factors such as stress and sleep deprivation will exacerbate his seizures. Please allow him to continue tutoring services and a late school start so that he may be able to receive enough sleep to prevent seizures and alleviate the worry and stress of him falling behind in school. Some changes in his school schedule and continued tutoring may be necessary to accommodate his medical needs and improve his quality of life and school performance.

Id. Although the Parent testified that she obtained this letter from Dr. Simon because she believed someone other than the classroom teacher should be responsible for identifying the Student's seizures, the letter did not make recommendations or requests other than for the late start and continued tutoring. *Id.*; Parent, Tr. 1013.

49. Another IEP meeting was held on February 22, 2013. Exhibits D57, P29. Under the resulting IEP, the Student would receive 50 minutes of SDI in math five days per week in a general education setting. Exhibit P29, p. 11. This was a push-in class in which a special education teacher worked with the Student in a general education class. *Id.* He would also receive 25 minutes per week of SDI in written expression, 25 minutes per week in organization/executive functioning, and 25 minutes per week in reading comprehension. Exhibit P29, p. 11. This SDI was provided by a special education teacher during "Pride time," a 25-minute class offered three times per week at 9:30 a.m. in which students could work individually with teachers. Brown, Tr. 729-30, 739; Burden, Tr. 1631. This was less SDI than the Student had been receiving before. The minutes were decreased to accommodate the Student's need for a late start. Brown, Tr. 733. The Student was also taking three additional general education classes, including language arts. The school provided a language arts class with push-in special education services but it was scheduled in the morning before 9:30 a.m. when the Student could arrive. Bowser. The IEF stated that the Student would receive these services until May 14, 2013, at which time he would receive additional SDI. Exhibit P29, p.11. This was to increase his time in school as he transitioned back to a longer school day. Spaulding, Tr. 1398. The District also provided two hours of tutoring three days per week to support the Student in organization skill and managing his assigned work during that transition. Exhibit P31. The tutoring would be reevaluated in May 2015 as well. *Id.*

50. The record does not contain an explanation as to how the team determined what mix of special and general education classes was appropriate for the Student at this point in his transition back to school. There is no evidence as to whether Dr. Uherek, who was present at the IEP meeting, made recommendations about class size or specific supports for the Student at this time. Exhibit D57, p. 1.

51. Dr. Simon wrote another letter to the district dated April 11, 2013. Exhibits D61; P71, p.23; P85. The letter stated that the Student "needs to continue starting school at 9:30 a.m." *Id.* It further stated that Dr. Simon requested the District's "understanding and cooperation to continue [the Student's] current plan at school with starting classes at 9:30 a.m. in addition to tutoring at home to help him keep up with his learning difficulties secondary to his neurologic problems." *Id.* The Parent testified that she obtained this letter because the District was refusing to do what the doctor said, to place the Student elsewhere, and to adjust the schedule if the Student needed to come in later than 9:30 a.m. However, the letter contained no requests or recommendations other than a 9:30 start time and home tutoring, which Dr. Simon acknowledged in her letter the District was already providing. *Id.*; Parent, Tr. 171-72, 872, 1015, 1020.

52. Dr. Simon wrote another letter to the District dated May 15, 2013. Exhibits D78, p.16; P71, p.24. This letter was identical to the one dated April 11, 2013, except that that it said the Student needed to continue starting school "no earlier than" 9:30 a.m. rather than "at" 9:30 a.m. Compare Exhibits D61; P71, p.23; P85 with Exhibits D78, p.16; P71, p.24.

53. Another IEP meeting was held on May 21, 2013. Exhibits D68, P33, P34. The purpose of the meeting was to review the Student's progress and talk about his next steps for the rest of the school year and the following year, when he would start high school. Exhibit P103, p.3. Dr. Uherek and Mr. Dewitt each attended. Uherek testimony, Tr. 402.

54. Teachers reported that the Student had previously been doing well, but that his work completion had declined in the weeks leading up to the IEP meeting. Exhibit P103, p. 5. It was reported that he participated well in his language arts class, raising his hand and answering questions, and that he interacted well with other students in the class. Exhibit P103, pp. 13, 102.

55. The team discussed that, although the Student had initially been able to arrive at school at 9:30, he was coming in later, sometimes at 10:00 or 10:10. Exhibit P103, p. 10. Ms. Brown noted that was not giving her enough time to work with the Student on his SDI in the morning Pride class before he needed to get to his language arts class. Exhibit P103, p. 11.

56. Because of the Student's need for additional support and his unavailability to continue to receive SDI during Pride time at 9:30 a.m., the team moved the Student from his general education language arts class to a special education class where he could both get additional SDI minutes and work on his reading and writing goals. Exhibit P103, pp. 54-55, 147; Burden, Tr. 1661. This was a special education writing and organization class with approximately ten students in it. Exhibit P103, p. 55.

57. The Parents and tutor reported at the meeting that the Student was fatigued at the end of the day when the tutor came to the home. Exhibit P103, p. 46. The team determined that Mr. Dewitt would come to school at the end of the day, rather than meet the Student at his home, so

the Student would not lose momentum during the trip home and so that Mr. Dewitt could communicate with the special ed teacher about the Student's assignments and subjects that may need reteaching. Exhibit P103, p. 81, 88; Burden. Tutoring would take place in this manner four days per week for 90 minutes each, an increase in the amount tutoring from that provided in the February 2013 IEP. Exhibit P103, p. 101.

58. The IEP thus provided 50 minutes of SDI in math, which continued to take place in the push-in general education math class, 50 minutes of written expression three times per week, 50 minutes of organization/executive functioning one time per week, and 50 minutes of reading comprehension one time per week, all to be delivered in the special education classroom with Ms. Brown. Exhibit D68, p. 11. Additionally, it was determined that Mr. Dewitt would work with Ms. Brown so that the tutoring time would be considered SDI as well. Exhibit P103. Thus, the IEP provided for 30 minutes each, four times per week, of reading comprehension, organization/executive functioning, and written expression with the tutor. Exhibit D68, p. 11. During this time, one of the tutor's duties was to help the Student get his assignments turned in for his general education classes. Exhibit P103, p. 142. The Student continued to take general education classes in addition to the push-in math class. Exhibit P103, p. 87.

59. The Parent reported at the meeting on May 21, 2013, that the Student's District-assigned netbook had not been working for over a month and that the loaner the District provided in its place lacked the programs to assist the Student with writing. Exhibit P103, p. 20 - 22. Mr. Dewitt agreed that the netbook had intermittent problems over the school year. 24. At the Parent's request, the District agreed to load the programs onto the Parent's computer. Exhibit D68, p. 13. Up to that point in the quarter, the Student had not been given the type of writing assignment for which he would have needed these writing programs. Exhibit P103, p. 32.

60. The District offered summer tutoring services, but the Parents declined them, saying that it would be too hard for them that year because of travel plans and family medical issues. Brown, Tr. 797; Parent, Tr. 889-90.

61. For the following school year, 2013-2014, the Parent reported to the IEP team that she had obtained a variance so the Student could attend Lake Washington High School in the District. Exhibit P103, p. 105. The Student's May 2013 IEP contained a separate matrix for the new school year providing for 50 minutes of SDI in math in a general education setting five times per week. Exhibit D68, p. 11. It also provided for 50 minutes of organization/executive functioning five times per week, 50 minutes of reading comprehension two times per week, and 50 minutes of written expression three times per week, all in a special education setting. *Id.* The team agreed that the Parent would meet with the high school team before school started. Exhibit P103, p. 130. Tutoring was not included on this part of the matrix and there is no other provision regarding tutoring for the high school. Exhibit D68, p. 13.

62. On May 23, 2013, Mr. Dewitt delivered the Student's netbook and the Parent's computer, both with the Student's programs loaded, to the Parent. Exhibit D69.

63. Ms. Brown did not give Mr. Dewitt instruction on delivering SDI to the Student under the May 2013 IEP, although the tutoring typically took place in her class while she was there. Brown, Tr. 764, 813.

64. During the time that Mr. Dewitt was tutoring in the family home, the Parent testified that he only stayed the whole scheduled time once or twice and that otherwise he left early, expressing that he was frustrated that they were not accomplishing anything. Parent, Tr. 638. Mr. Dewitt acknowledged that he was sometimes frustrated that he could not get all the assignments he needed for the Student. Dewitt, Tr. 1787. He did not testify as to whether he left before the scheduled tutoring sessions were over. The Parent had complained to Mr. Spaulding in December 2012 that the Student was not receiving the correct amount of tutoring. Exhibit P40, p. 32.

65. Once the Student began tutoring with Mr. Dewitt at the school, the Parent testified that Mr. Dewitt would release the Student early because the Student was tired or he was not able to pay attention or to leave with his friends. Parent, Tr. 183. The Student would arrive at home and say that Mr. Dewitt said he could go home. *Id.* at 184. Ms. Brown recalled that Mr. Dewitt was "pretty consistent" about coming in when he was supposed to but did not testify about how long the sessions lasted. Brown, Tr. 805.

66. Mr. Dewitt submitted a log of his tutoring time to the District for payment. Exhibit D73. He testified that he believed he was recording his time accurately and that he never intentionally falsified anything. Dewitt, Tr. 1758-59. However, the Parent identified a number of situations in which the Parent had informed Mr. Dewitt that the Student was unavailable for tutoring but Mr. Dewitt's log showed he tutored the Student on those days. Dewitt, Tr. 1797-98. Mr. Dewitt explained that he kept his schedule in a calendar and then transferred the information from his calendar to the log he submitted to the District for payment at the end of each week. He stated that there might have been errors when he moved the information from his calendar to the log or that he inadvertently neglected to remove the sessions from his calendar when they were cancelled. Dewitt, Tr. 1760-61. Regardless of the reasons, Mr. Dewitt's tutoring logs are found to be unreliable as to the hours he provided tutoring because of the demonstrated inaccuracies. It is found, based on the Parent's credible testimony that most of the tutoring sessions did not last as long as they were scheduled, that the Student did not receive all the tutoring to which he was entitled under his IEPs during the 2012-2013 school year.

67. June 13, 2013, was the last day that Mr. Dewitt ever worked with the Student. Exhibit D70; Dewitt, Tr. 1755.

68. At some point during 2012-2013 school year, the Parent had problems with her internet at home and could only access it on her cell phone. Parent, Tr. 202; Brown, Tr. 735. The parent testified that the Student could not access materials necessary to complete his assignments. Parent. Ms. Brown recalled that the Student was accessing materials at school and that he might also have worked in the library or had her print things off for him. Brown, Tr. 735. And Mr. Dewitt downloaded most of the Student's assignments and went to school to pick them up for the Student. Dewitt, Tr. 1789. The Parent has not proven that it is more likely than not that the District's response to her internet problems significantly impacted the Student's ability to complete his assignments.

69. In July 2013, the Parent told the police that the Student disclosed to her that Mr. Dewitt had regularly assaulted him by striking him in the head during their tutoring sessions. Exhibit D87. Mr. Dewitt was charged with assault but the charges were eventually dropped when the Student was unable to testify because he was in the hospital. Dewitt, Tr. 1770; Parent. The only evidence in the record of Mr. Dewitt striking the Student is the Parents' testimony about the

Student's disclosures to them, the Parent's testimony about what the Student's brother disclosed about observing Mr. Dewitt strike the Student, the police reports about the disclosures, and Dr. Uherek's testimony about the Student's disclosures to her. Parent, Tr. 205, Parent 2; Uherek; Exhibit D87. Mr. Dewitt vehemently denied that he ever struck the Student or behaved appropriately in any way. Dewitt, Tr. 1775-76. As all of the evidence of Mr. Dewitt assaulting the Student is uncorroborated hearsay, no finding may be made that Mr. Dewitt struck the Student. See RCW 34.05.461.

70. The Parent observed interactions between the Student and Mr. Dewitt that she determined were inappropriate only in hindsight after the Student's disclosure. Parent, Tr. 1027. She observed Mr. Dewitt grabbing the Student's arm and wrist, but had accepted Mr. Dewitt's explanation that he had observed the Student "jerking" or "spacing off" and wanted to check on him. *Id.* at 206, 1027-28. Parent 2 once observed Mr. Dewitt having the Student's arm "pinned" to the table with the Student in what she described as a defensive posture. Parent 2, Tr. 1266. Another time Parent 2 observed Mr. Dewitt and the Student standing with the Student backing away looking angry. Parent 2, Tr. 1266. There is no evidence that these observations were ever reported to the District prior to the Student's disclosures that Mr. Dewitt struck him. At the May 2013 IEP meeting when the team was discussing Mr. Dewitt tutoring the Student at the school, Mr. Dewitt specifically asked if anyone would be worried about him tutoring the Student alone, and the Parent said she had no concerns given their working relationship. Exhibit P103, p. 90.

71. The District never assigned Mr. Dewitt to tutor the Student after the Parent reported the Student's allegations in July 2013. Vine, Tr. 1487.

2013-2014 school year

72. On August 23, 2013, the Parent notified the District in writing that she intended to unilaterally place the Student at Dartmoor and seek reimbursement for his tuition and fees there. Exhibits D75; P54.

73. Rick Burden, who was now the District associate director of special education working with the family, responded on August 29, 2013. Exhibits D76; P55, p. 2. He informed the Parent that the District was denying her request for a change in placement and was proposing to initiate a reevaluation. He also proposed that the IEP team reconvene to discuss the service changes and interventions proposed by the team in May 2013 to address her concerns. *Id.*

74. Although the Parent informed the District the Student would be attending Dartmoor, he did not enroll because the Parent was not able to obtain financial aid. Parent, Tr. 224. The Parents taught him at home, although they did not formally enroll him as a home school student. Uherek, Tr. 446; Parent; Parent 2. The District assumed the Student was at Dartmoor and withdrew him from the District because he was not attending a District school. Exhibit D79, p. 1; Burden, Tr. 1813; Parent, Tr. 891.

75. The Parents worked with the Student at home as much as he could handle depending on his seizure activity and fatigue level, usually from half an hour to an hour and half. Parent 2, Tr. 1272. If the Student could then do more after a break, they also worked with him in the afternoon. *Id.*

76. The Student refused to attend Lake Washington High School because he did not feel safe with the people there. Parent, Tr. 1272. The Parent believed the school was not good for him because he had a hard time navigating in large spaces, did not like large crowds, and because it had multiple levels. *Id.*

77. On September 12, 2013, the Parent provided the District with signed consent forms for the reevaluation, authorization for the District to exchange information, a copy of an evaluation of the Student by Eastside Psychology Services, a copy of the letter from Dr. Simon to the District dated May 15, 2013, and a letter from Dartmoor "to whom it may concern" stating that the Student was enrolling at the school in the fall of 2013 and planned to commence his studies as soon as his financial aid application was processed. Exhibit D78. The evaluation by Eastside Psychology Services was for the purpose of determining whether the Student qualified for disability benefits and did not include any educational recommendations. Exhibit D78, p. 8.

78. The Parent responded to the District's request to schedule an IEP meeting to address her concerns by stating in early September 2013 that she would need at least two weeks' notice so Dr. Uherek could participate. Exhibit D77, p. 2. An IEP meeting was scheduled for September 26, 2013, but cancelled at the Parent's request. Exhibit D79, pp. 1-2. The Parent stated that, because she did not agree with the currently proposed IEP, having another IEP meeting before completing a reevaluation or the District providing new information would be "redundant." *Id.* at 2.

79. A reevaluation feedback meeting was held on October 31, 2013. Exhibits D83, P45. The reevaluation team concluded that the Student continued to meet eligibility criteria under the health impaired disability category. Exhibits D8, p. 1; P45, p. 3. The team recommended that he receive special education services including SDI in mathematics, reading and writing, social skills, and organization. Exhibits D83, p. 2; P45, p. 4. It also recommended extended school day services provided by a tutor to accommodate his late start due to medical issues. Exhibits D83, p. 20; P47, p. 1. The team concluded that the Student's needs could be met through the services outlined in his current IEP and denied the Parent's request for private tutoring services at Dartmoor at District expense. Exhibits D83, p. 20; P45, p. 23. The prior written notice stated that the IEP team would initiate a follow up IEP meeting to revise the IEP based on the reevaluation results and to update the Student's transition plan. Exhibits D83, p. 20; P47, p. 1.

80. At the reevaluation feedback meeting, Dr. Uherek had recommended that the Student have a self-paced program that would be attentive to his changing mental state. She did not believe he was well enough for general education classes and the stress of keeping up, and did not see how he could be successful with the team's recommendations. Uherek, Tr. 427. Dr. Uherek did not testify whether she explained at the meeting what she meant by a "self-paced" program.

81. An IEP meeting was held on November 20, 2013, with the Parents and Dr. Uherek in attendance. Exhibits D86; P50, p. 6; P104. The team determined that the Student would have three 50-minute special education classes daily – in mathematics, reading and writing, and social skills and organization. Exhibit D86, p. 12. He would have a late start with no classes the first two periods and a general education class – health in the first semester and ancient civilizations the second semester. Exhibit P104, p. 7. The District also offered tutoring to extend the shortened school day and provide the opportunity for an additional class. Exhibit D86, p. 15; P50, p.21.

82. The Parent testified that Dr. Uherek requested a one-on-one self-paced setting because she was concerned about the stress and fatigue the Student would encounter in a school building. Parent, Tr. 487-88. In the transcript of the IEP meeting, however, Dr. Uherek mentions that the alternative setting requested by the Parents would allow him to work at his own pace to meet his needs in terms of the length of time it takes for him to learn things because of his processing speed and the problems with how his brain works. Exhibit P104, p. 39. She did not expressly recommend the setting the Parent testified about nor did she recommend one-on-one instruction or a smaller school. Exhibit P104. The Parent read out loud at the IEP meeting from an August 2010 letter from Dr. Simon, expressing that placement at a school with a smaller number of students would be ideal for management of the Student's seizures. Exhibit P104, p. 44-46. Mr. Burden correctly stated that the more recent letters from Dr. Simon did not contain such a recommendation and told the Parent that the District would consider new medical information if the Parent provided it. *Id.* at 49.

83. Dr. Simon subsequently wrote a letter to the District dated December 4, 2013. Exhibit P86. It stated the following:

[The Student] has longstanding history of intractable epilepsy and he is also currently on multiple antiepileptic medications for management of his seizures causing impact in his learning. Due to his neurological problems, [the Student] requires extra attention and more time for his learning at school due to his slow processing speed. He had a neuropsychological evaluation to assess his learning abilities and school needs. He is followed by Dr. Ann Uherek that (sic) can provide you more detailed information about his educational needs. It is a consensus that [the Student] needs an individual education program that will fit his medical and educational needs. He will definitively benefit from a small classroom and extra time to complete his school work and also will allow closer supervision in case of seizures at school. I also request that he continues receiving 1:1 tutoring during High School that was very helpful for him during middle school.

Id. The Parent testified that she made sure the District had the letter. Parent, Tr. 497. Mr. Burden testified that the District did not have this letter until it received the Parent's exhibits for this hearing. Burden, Tr. 1831. On December 19, 2013, after the date of this letter, Mr. Vine sent the Parent a list of the letters the District had received from Dr. Simon and did not include this letter. Exhibit P55, p. 22. On January 27, 2014, the Parent sent Mr. Vine "the letters that were missing" but without identifying what those letters were. Exhibit P55, p. 23. It cannot be determined that the District received this letter before the instant hearing.

84. After reviewing Dr. Simon's letters, some of which recommended a smaller setting, Mr. Vine thought of another option within the District. Vine, Tr. 1493. Mr. Vine told the Parent in an email on January 28, 2014, that he believed the District had another school location that could meet the Student's needs and the current health plan recommendation in addition to the program already offered. Exhibit P55, p. 23. He offered to set an IEP meeting to discuss his idea further. *Id.* When he did not hear from the Parent about scheduling a meeting, he sent another email, dated February 4, 2014, identifying Emerson High School as the other possible placement. Exhibit P55, p. 24. He stated that it is a smaller campus with a smaller student population. *Id.* He attached a link to the school's website as well as the application form and

student intake schedule. *Id.* He noted that the school requires an intake meeting with the principal and that he had made arrangements with the principal to extend the application deadline if needed. *Id.* He noted that the start date would be March 3, 2014. *Id.*

85. The Parent wanted to see the Emerson campus, but learned that parent observations were not allowed during school hours. Parent, Tr. 502-03. She did not want to place the Student there if she could not see the classes, talk to the staff, and understand the medical support that would be available. *Id.* at 504. Additionally, she did not want to apply and go through the interview process. *Id.* On February 6, 2014, the Parent sent an email to Mr. Vine reiterating her request for an alternative placement for the Student for the following reasons: 1) he no longer feels safe and experiences extreme anxiety while in the care of District staff after the alleged physical, verbal, and mental abuse received from Mr. Dewitt; 2) his intractable epilepsy with multiple seizure types that are difficult to recognize, requiring close supervision and medical interventions; 3) the Student's psychological needs: Asperger's Syndrome, extreme anxiety, learning disabilities, and moderate depression, which impair his ability to function in the public education setting; 4) his academic needs for a self-paced educational setting that is able to provide specific SDI, allowing for mastering grade appropriate material, and offering a flexible extended school year schedule; 5) the several failed plans that led to the Student decompensating, his seizures increasing, hospitalizations, and a lack of academic progress; and 6) the lack of work showing the Student's academic progress. Exhibit P51. The Parent stated that the Student had missed over 100 days of school in seventh, eighth, and ninth grade and was entitled to FAPE. *Id.*

86. On February 12, 2014, Mr. Vine responded with a prior written notice rejecting the Parent's request that the Student attend Dartmoor because the IEP team had determined that the District could meet the Student's needs and provide an appropriate placement in the least restrictive environment. Exhibit D88, P52. He stated that the Parent had not provided any new information that had not previously been considered by the Student's IEP team so another meeting did not appear warranted. *Id.*

87. On March 6, 2014, after the date Mr. Vine had told the Parent that instruction at Emerson would have started, the Parent emailed Mr. Vine asking how to resolve the issue of Emerson not allowing parents to observe. Exhibit D89, p. 1. Mr. Vine responded the next day, stating that he had confirmed that Emerson does not allow campus tours during the school day but that she could view the campus after school. *Id.* The Parent did not pursue placing the Student at Emerson.

88. On March 9, 2014, the Parent informed Mr. Burden in an email that she was requesting an independent educational evaluation (IEE) by Dr. Uherek at the District's expense. Exhibit P55, p. 29. The District filed a due process hearing request to defend its evaluation. Exhibits D90, P54.

89. At a resolution meeting shortly thereafter, the Parent and District agreed that the Parent would withdraw her request for an IEE and the District would provide an evaluation by providers it chose. Parent, Tr. 507. It was also agreed that the District would provide an interim placement for the Student at Lake Washington or Redmond High School. *Id.* at 508. The Student agreed to attend Redmond High School because he knew Students there from his baseball team and Dr. Uherek's group, but the District then said he could only go to Lake Washington because Redmond was closed to variances. *Id.* at 509; Exhibit P63, p. 2.

90. On May 19, 2014, the District sent the Parent a PWN proposing to initiate an outside evaluation. Exhibits D90, P54. It stated that the "district is proposing" to conduct an outside evaluation of the Student by Drs. Guy Oram and Milani Smith. *Id.*

91. The Parent signed the District's notification and consent forms on May 22, 2014. Exhibits D90, P54, pp. 3-4.

92. On August 26, 2014, the District issued a PWN offering an interim placement at Lake Washington High School until the evaluation was complete, including four weeks of extended school year (ESY) services. Exhibit D92, P56. The Parent rejected the interim services because the Student refused to go to Lake Washington because he did not feel safe there. Exhibit P63, p. 1; Parent, Tr. 518.

93. A reevaluation team meeting was held on October 7, 2014. At the meeting, it was determined that additional assessments were necessary based on the recommendations of Drs. Orem and Smith. Exhibit D99, p. 14. The District proposed that a speech language pathologist (SLP) conduct a social communication evaluation, that curriculum-based assessments in reading, written language, and math be completed, that input from Dr. Tom Collins, one of the Student's private providers, be considered, and that the Parent be interviewed regarding transition and assistive technology. *Id.*

94. The Parent signed the District's consent form for these additional evaluation activities on October 13, 2014. Exhibit D96, p. 2.

95. On November 1, 2014, the Student was diagnosed with diabetes and admitted into the hospital. Parent, Tr. 213. The Parent notified the District that the Student would not be available for testing and would have to reschedule. Exhibit P63, p. 12.

96. The Parent notified the District on November 12, 2014, that the Student would be ready for testing beginning November 19, 2014. Exhibit P63, p. 14.

97. On November 14, 2014, the district issued a PWN stating that the reevaluation was being postponed because of the Student's medical needs and that a Request for Reevaluation Extension would need to be signed. Exhibit P59. The notice also stated that the current IEP would be continued until the completion of the reevaluation. *Id.* The Parent did not agree to approve the extension. Burden, Tr. 1786.

98. On November 20, 2014, the Parent provided the District with a letter from Dr. Preetam Bandla. Exhibits D97, P87. The letter stated that the Student is under Dr. Bandla's care for obstructive sleep apnea and delayed sleep phase syndrome. *Id.* It stated that the Student can have difficulty with both falling asleep and waking up. *Id.* He stated that, because sleep deprivation can cause an increase in the frequency of the Student's seizures, he would benefit from accommodations to ensure he is able to get adequate sleep. *Id.*

99. The Parent also provided questions and answers from Dr. Tom Collins, who replaced Dr. Simon as the Student's doctor, and information from Mary Bridge about the Student's diabetes diagnosis. Exhibits D97, pp. 2-3; P88.

100. The District subsequently learned that another doctor, Jared Mott, replaced Dr. Collins as the Student's doctor and wished to obtain answers to questions from his as well. Findley, Tr. 1696.

101. The reevaluation team met on January 21, 2015. Exhibits D99, P60, P61. Dr. Oram's assessment of the Student's academic skills revealed average performance with respect to core academic skills, but poor performance on measures of academic fluency in reading, writing, and math. Exhibit D93, p. 10. The Student's speed of information processing was at only the second percentile. Exhibit D93, p.10. Dr. Oram's report noted that it had been at the 50th percentile when last tested in 2013. *Id.* at 9. Among other things, Dr. Oram recommended that the Student receive self-paced, one-on-one instruction in his core classes because of his very slow information processing speed coupled with the negative impact of his sleep disorder, fatigue associated with his medical condition, the potential for frequent or prolonged absences associated with his medical condition, and the unpredictable nature of his seizure disorder. *Id.* at 11. Dr. Smith determined that the Student's assessment did not support a diagnosis of an autism spectrum disorder. Exhibit D94, p. 7.

102. The reevaluation team determined that the Student continued to be eligible for special education and related services under the health impaired disability category. Exhibit D99, pp. 1-2. It recommended SDI in reading comprehension, math, writing, social skills, and organization. *Id.* at 2.

103. An IEP team meeting was held on January 21, 2015, as well. Exhibits D100, P62, p. 3. The IEP provided for three daily special education classes of fifty minutes each – in mathematics, reading comprehension and writing, and organization and social skills. Exhibit D100, p. 15. The proposed placement was at Redmond High School. Exhibits D100, p. 18. The IEP did not include any related services related to the Student's health needs, although the PWN stated that the school nurse had developed IHPs related to the Student's diabetes and epilepsy, but the District was awaiting updates from the Student's health care providers. *Id.* A nurse would be available full time on the school's campus to support training and implementation of the Student's finalized plans. *Id.* The District agreed to provide a shortened day, and agreed that the Student could begin by attending fewer than four periods per day on an initial basis with the goal being that he attend at least four periods as soon as reasonably possible. *Id.* He would be provided a late start and have the opportunity to take a general education elective. Vine, Tr. 1577.

104. The District did not follow Dr. Oram's recommendations for a one-on-one self-paced program. Vine, Tr. 1577. The District planned that the resource room classes would provide smaller class sizes and the opportunity for reteaching and an individualized approach. *Id.* The team believed that one-on-one instruction was too restrictive and knew that the Student had a history of being successful in general education. Vine, Tr. 1588. Mr. Vine believed that the Student could receive the general education curriculum in the special education classroom while the Student received SDI. Vine, Tr. 1581. The Parent thought it was not the Student's least restrictive environment to be in all special education classes. Parent, Tr. 541. She wanted him to have greater supervision and a self-paced education that she believed was not possible within the District. Parent, Tr. 1062.

105. Following the meeting, Mr. Burden sent the Parent an email with options for electives. Exhibit D98; P63, p. 20. He asked the Parent to let him know as soon as possible if she

intended to enroll the Student at Redmond High School. *Id.* If that was her intent, he would arrange a meeting to confirm his schedule and finalize the health plans. *Id.*

106. On February 2, 2015, the Student began attending Dolan Academy (Dolan). Dolan, Tr. 552. Dolan provides one-on-one, self-paced academic instruction to students, who are able to earn high school credit. *Id.* at 551, 554. Dolan uses curriculum based on state core standards. *Id.* at 563. Janet Dolan, the school's director and teacher, is a certificated special education teacher. Exhibit P64.

107. At the time of the hearing, the Student had attended Dolan on six occasions. *Id.* at 560. He had worked on English, algebra, and typing, and Ms. Dolan anticipated instruction in science as well. *Id.* at 562.

108. On February 18, 2015, the Student was in a car accident. Parent, Tr. 1067. Per his doctor's recommendations, he was not to attend school or participate in a number of other activities until April 1, 2015, when he was to return to the doctor. Parent, Tr. 625. For this reason, he had not been attending Dolan at the time of the hearing. Dolan, Tr. 561.

109. Dr. Britney Frazier, who was treating the Student with respect to his diabetes, had provided a letter dated January 20, 2015, stating that the Student requires total assistance in blood glucose monitoring, preparing and administering of insulin, determining the amount of insulin to be administered, and monitoring for the acute complications of diabetes. Exhibit D91, p. 1. She recommended, among other things, that the Student needed an assigned competent fully trained individual to provide for his complex diabetes care. *Id.* Exhibit P91, p. 1.

110. Following the IEP meeting, calls were scheduled with Dr. Frazier and with Dr. Mott, who was following the Student for his epilepsy so the District could ask questions about the Student's health needs at school. Findley, Tr. 1699; Parent, Tr. 613. Ms. Findley, the school nurse, testified that she read the District's proposed health plans to the doctors and they agreed with them. Findley, Tr. 1700, 1703. The Parent denied that the District read the plans during the calls. Parent, Tr. 1879. She believed the District was only asking questions. Parent, Tr. 612-13; 1879-80. Thus, whether or not the District read the proposed plan, the Parent did not understand that the proposed plan had been presented in the phone calls. The proposed IHPs are not in the hearing record and were never provided to the Parent. Parent, Tr. 616. The Parent was waiting to see the health plans to determine whether she would enroll the Student at Redmond High School under the newly proposed IEP. Parent.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As the Parent is the party seeking relief in this case, she has the burden of proof.

The IDEA

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

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

Id. at 206-07 (footnotes omitted).

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

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

Id. at 188-189.

Appropriateness of IEPs

5. As explained above, an IEP must be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07. In this case, the statement of the issues asks whether the District's IEPs provided appropriate SDI, related services, and educational placements for the Student from the commencement of the 2012-2013 school year through January 21, 2015.

6. Specially designed instruction means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction to address the student's unique

needs that result from the student's disability and to ensure access of the student to the general education curriculum. WAC 392-172A-01175; 34 CFR §300.39(b)(3).

7. "Related services" under the IDEA are supportive services required to assist a child with a disability to benefit from special education. 20 USC §1401(26)(A); see WAC 392-172A-0155(1). Related services include "school nurse services" designed to enable a child with a disability to receive a FAPE. *Id.* IEPs must include a statement of the related services to be provided to the Student 20 USC § 1414(d)(1)(A)(i)(IV); WAC 392-172A-03090(1)(d).

November 9, 2012 IEP⁴

SDI

8. The November 2012 IEP provided for SDI in each of the areas recommended in the Student's most recent evaluation. The Parent argues that the Student should also have received social and adaptive skills training because Dr. Uherek "diagnosed" him as being on the autism spectrum. A medical diagnosis of autism alone does not qualify a student for special education and related services let alone for any particular services. See 34 CFR §300.8 (the diagnosed developmental disability affecting verbal and nonverbal communication and social interaction must have an adverse effect on the child's educational performance). Moreover, Dr. Uherek's report did not actually diagnose the Student as having autism or Asperger's and did not recommend social or adaptive skills training. Additionally, the school evaluation team determined, based on the observation of school staff, that the Student was not in need of these services. Accordingly, the Parent has not proven a violation with respect to the SDI provided in this IEP.

Related services

9. The November 2012 IEP provided for tutoring services. The Parent's providers were not recommending specific nursing services or an assigned paraeducator for the Student at that time. Accordingly, the Parent has not proven a violation with respect to the related services provided in this IEP.

Placement

10. The Student was to receive his SDI in small resource room classes offered later in the day to accommodate his need for a late start. The Parent has not demonstrated that the Student's private providers were recommending a different placement at that time, and the Parent has not otherwise proven a violation with respect to the Student's placement.

11. The Parent has not demonstrated that the November 2012 IEP was not reasonably calculated to enable the Student to receive educational benefits.

⁴ The Parent argues that the June 2012 IEP should also be considered. Because the issue statement addresses only the provision of appropriate IEPs from the commencement of the 2012-2013 school year and the June 2012 IEP was not developed or implemented in that school year, it is not considered.

February 2013 IEP

SDI

12. The February 2013 IEP continued to provide for SDI in each of the areas recommended in the Student's most recent evaluation. Although the Student received a smaller number of minutes in written expression, reading comprehension, and organization/executive functioning than he had under the November 2012 IEP, this was to allow him to both take general education classes and receive SDI in the limited amount of time he had available for school. The letter from Dr. Simon received just before the IEP meeting did not recommend a specific amount of SDI or a particular class, size, but focused on a late start and receiving tutoring. Nor is there evidence that Dr. Uherek provided such a recommendation to the team with respect to this IEP.

13. The Parent argues that the Student should also have received social or adaptive skills training but there is no evidence any professional had recommended these services or that the Student was demonstrating problems in these areas at school. Accordingly, the Parent has not demonstrated a violation with respect to the SDI in the February 2013 IEP.

Related services

14. The Student was receiving tutoring as requested by Dr. Simon. The Parent has not demonstrated that the Student's providers were recommending specific nursing services, a paraeducator, or other related services during this time or that such services were necessary for the Student to benefit from his education. Accordingly, the Parent has not proven a violation with respect to the related services for this IEP.

Placement

15. The Parent argues that she wanted a more flexible placement for the Student during this time period, presumably private one-on-one tutoring at Dartmoor. Taking on more general education classes than attempted in the November 2012 IEP was not inconsistent with Dr. Simon's recommendation at that time, conveyed through Dr. Uherek, that the Student should attempt increasingly challenging educational settings. The Parent has not demonstrated that her private providers were recommending a different placement at this time, and the Parent has not otherwise demonstrated a violation with respect to placement.

16. The Parent has not demonstrated that the November 2012 IEP was not reasonably calculated to enable the Student to receive educational benefits.

May 2013 IEP

SDI

17. The May 2013 IEP continued to provide for SDI in each of the areas recommended in the Student's most recent evaluation. Because the Student was no longer able to get to school in time to benefit from the SDI offered during Pride time and because the IEP team determined that the Student needed additional special education supports, it increased his SDI time by transferring him from a general education language arts class to a resource room setting. Although the Parent had argued with respect to the February 2013 IEP that the District was not

providing adequate SDI, the Parent argues that the May 2013 reduced the Student's time in general education. The reality is that, with the combination of the Student's need for a shortened school day and his fatigue issues, the Student could not at this time access a full day of both special and general education.

18. The Parent argues that the tutor's time should not have been considered SDI. Special education must be provided by appropriately qualified staff. WAC 392-172A-02090. Other staff, including general education teachers and paraprofessionals, may assist in the provision of special education provided that the instruction is designed and supervised by special education certified staff and the Student's progress is monitored and evaluated by special education certificated staff. *Id.* Because Ms. Brown was to supervise Mr. Dewitt's delivery of SDI to the Student, attributing SDI minutes to his time was appropriate.

19. The Parent argues that the Student should also have received social or adaptive skills training but there is no evidence any professional had recommended these services or that the Student was demonstrating problems in these areas at school. Accordingly, the Parent has not demonstrated a violation with respect to the SDI in the May 2013 IEP.

Related services

20. The Student's tutoring time was increased from the November 2012 IEP because the team determined he needed additional support. The Parent has not demonstrated that the Student's providers were recommending specific nursing services, a paraeducator, or other related services during this time or that such services were necessary for the Student to benefit from his education. Accordingly, the Parent has not proven a violation with respect to the related services for this IEP.

Placement

21. The Student was to attend general education classes as well as receive SDI in a push-in general education class, in a resource room, and from his tutor after school in order to accommodate his need for an increasingly late start. The Parent has not demonstrated that the Student's private providers were recommending a different placement at that time, and the Parent has not otherwise proven a violation with respect to the Student's placement.

Appropriateness of the May 2013 IEP for high school

22. The middle school IEP team informed the Parent that she would meet with the high school IEP team before school started. Before school started, the Parent informed the District that she had unilaterally enrolled the Student at Dartmoor and declined to attend an IEP meeting until after the District's reevaluation was complete. Because the Student was not attending a District school and the Parent rejected the opportunity to meet with the IEP team, no consideration is made as to whether the May 2013 IEP was appropriate for Student at the high school.

November 2013 IEP

SDI

23. The November IEP provided SDI in each of the areas recommended in the Student's October 2013 reevaluation, including social skills. The Parent has not demonstrated any violation with respect to the SDI in the November 2013 IEP.

Related services

24. The November IEP provided tutoring support for the Student. The Parent argues that the District did not include appropriate information in the Student's IHP. The IHP is not itself part of the IEP and may contain services or information that do not constitute related services. More importantly, the Parent has not identified in what way the November 2013 IHP is inappropriate. Accordingly, the Parent has not demonstrated any violation with respect to the related services in this IEP.

Placement

25. The Student's instruction would be delivered on a late start schedule in three special education classes, one general education class, and through a tutor. There is no evidence that the Parent's providers were expressly or clearly recommending one-on-one instruction, only smaller classes, or a smaller school or that the Student needed such a placement at this time. Accordingly, the Parent has not demonstrated a violation with respect to the placement in this IEP.

January 2015 IEP⁵

SDI

26. The January 2015 IEP provided SDI in each of the areas recommended in the Student's reevaluation completed the same day. The Parent has not demonstrated any violation with respect to the SDI in the January 2015 IEP.

Related services

27. Dr. Frazier recommended that an individual be trained to provide for the Student's complex diabetes care and the District acknowledges this need. Yet this necessary related service was not included in the Student's IEP. Nor can the IHP be interpreted as supplementing the IEP in that regard because it was not completed at the time of the IEP, has never been presented to the Parent, and is not a part of the record in this case. Accordingly, the January 2015 IEP fails to include a related service necessary for the Student.

⁵ The parties each agree that the January 2015 IEP is at issue in this case even though it was developed after the Parent's most recent amendment of her due process hearing request. Parent's Supplemental Post-Hearing Brief; District's Response to the ALJ's Request for Supplemental Post-Hearing Briefing.

Placement

28. Dr. Oram, the evaluator selected by the District, recommended that the Student receive self-paced, one-on-one instruction in his core classes because of his very slow information processing speed coupled with the negative impact of his sleep disorder, fatigue associated with his medical condition, the potential for frequent or prolonged absences associated with his medical condition, and the unpredictable nature of his seizure disorder. The IEP team opted to serve the Student in a resource room instead because a one-on-one program is so restrictive and because the Student had a history of being successful in general education classes. However, the Student had not been in a general education class in the District since May 2013, when his information processing speed was much higher. The Parent has proven that the District's placement in special education resource classes, rather than one-on-one instruction, was not appropriate.

29. Because the January 2015 IEP did not include the necessary related service of an individual trained to provide diabetic care or an appropriate placement, it was not reasonably calculated to enable the Student to receive educational benefits and denied him FAPE.

Other IEP issues

30. The Parent also argues that the IEPs were not individually designed to meet the Student's needs because his seizure disorder was not properly evaluated as to how it impacted him educationally. Similarly, the Parent argues that the District did not conduct its own evaluation with respect to autism when it disagreed with Dr. Uherek's findings. However, neither the Parent's request for due process hearing, including the amendments thereto, nor the issue statement include allegations about the District's evaluations. Accordingly, the District's evaluations of the Student are not addressed. See WAC 392-172A-05100(3). Other arguments that do not go to the Student's SDI, related issues, or placement are similarly not considered because they do not fall within the statement of the issues.

Implementation of IEPs

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

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

* * *

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

Id. at 821 and 822 (*italics in original*).

Tutoring

32. Under the May 2013 IEP, Mr. Dewitt was to provide 360 minutes per week of SDI through his tutoring. This instruction was to be supervised by Ms. Brown. See WAC 392-172A-02090 (general education teachers and paraprofessionals may assist in the provision of special education provided that the instruction is designed and supervised by special education certified staff). Because Ms. Brown did not supervise Mr. Dewitt's delivery of instruction, it is not properly considered SDI and, therefore, the District failed to provide SDI to the Student through Mr. Dewitt's tutoring.

33. The Parent demonstrated that Mr. Dewitt did not provide the amount of tutoring the Student was supposed to receive on most days during the 2012-2013 school year because he left early from the family's home, or he sent the Student home early from tutoring sessions at school. While it is difficult to quantify the amount of missed tutoring, Mr. Dewitt's failure to provide some instruction on most days, coupled with Ms. Brown's failure to supervise Mr. Dewitt's instruction, constitutes a material failure to implement the IEPs in place during the 2012-2013 school year with respect to tutoring.

Assistive technology not operable in eighth grade

34. The Parent argues that the District failed to implement the IEP because of the intermittent problems with the Student's netbook and writing programs. The Parent proved that the netbook did not always work and that the writing programs were not loaded on the netbook the District loaned him during repairs. However, there were no writing assignments during much of this time for which the Student would have needed the writing programs. The Parent has not demonstrated a material failure to implement the IEPs with respect to the Student's assistive technology.

Parental Participation

35. 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).

36. 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. La. Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

37. A district violates this procedural requirement if it predetermines a student's placement, meaning that it "independently develops an IEP, without meaningful parental participation, and

then simply presents the IEP to the parent for ratification.” *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). Likewise, a district “may not enter an IEP meeting with a ‘take-it-or-leave-it’ approach.” *Id.* However, preparation by a district prior to an IEP meeting, including developing a draft IEP, does not itself establish predetermination. *Lee’s Summit R-VII Sch. Dist.*, 112 LRP 14677 (SEA MO 2012). And Parents do not have veto power over individual provisions or the right to dictate any particular educational program. *Ms. S.*, 337 F.3d at 1131.

38. The Parent argues that she was denied her participation rights because the District discounted her concerns, discounted Dr. Uherek’s recommendations, and refused to consider Dr. Simon’s recommendations because they were not clear enough. The Parent participated in many meetings with the District and it considered her requests and the recommendations of her private providers in developing IEPs. That the District did not adopt the Parent’s primary desire – a private tutoring placement at District expense – does not prove that the District did not seriously consider her concerns about the Student’s program and safety. That they sought additional information from Dr. Simon in order to ensure they understood her recommendations did not deny the Parent her fundamental right to participate. Nor does the failure to adopt a provider’s recommendation necessarily constitute a denial of a parent’s participation rights.

39. The issue statement included allegations that the District made changes to the Student’s IEPs without providing the Parent written notice and/or made changes to the Student’s IEPs without notice to the Parent. As the Parent has not provided evidence or argument on these allegations, she has not proven a violation of her parental participation rights.

Changes to the IHP Without the Parent’s Knowledge

40. The Parent argues that the District made changes to the Student’s IHPs without her knowledge because Valerie Martin, one of the school nurses, testified that she did not always provide IHPs to the Parent. Parent’s Closing Brief, p. 56. To the contrary, Ms. Martin testified that she may not always have included the Parent in the email when she circulated IHPs to District staff because the Parent had already seen the plan. Accordingly, the Parent has not proven that the District made changes to the Student’s IHPs without her knowledge.

Autism Training

41. Although autism services are set forth in a separate portion of the statement of the issues, they are addressed with the discussion of the IEPs above.

Timely Completion of Reevaluations

42. Reevaluations “shall” be completed within “[t]hirty-five school days after the date written consent for an evaluation has been provided to the school district by the parent.” WAC 392-172A-03015(3)(a).

43. The District argues that first reevaluation in 2014 was not subject to the 35-school-day timeline because it was an “agreed upon resolution” to a dispute between the parties about the Parent’s request for an IEE rather than a District reevaluation. While the process began with the Parent’s request for an IEE, once the agreement to proceed with evaluators chosen by the District was made, it became a District reevaluation. The District provided a PWN proposing to

initiate the reevaluation and obtained the Parent's consent to the reevaluation. That the process began with the agreement to resolve the Parent's request for an IEE does not relieve the District of the reevaluation timelines.

44. Both of the reevaluations conducted in 2014 took substantially longer than 35 days from the Parent's consent to complete. The District correctly points out that some of the delay in the second evaluation was caused by the Student's hospitalization and that the Parent refused to agree to an extension of the deadline. The timeline does not contain exceptions. Instead, those types of factors are considered in determining whether a violation caused a denial of FAPE and/or in fashioning an appropriate remedy. The District twice violated the requirement to timely evaluate the Student in 2014.

45. A district's failure to timely evaluate a student is a procedural violation. *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3rd Cir. 2009); *Lake Washington Sch. Dist.*, 113 LRP 45513 (SEA WA 2013). Not all procedural violations result in a denial of FAPE. *LM v. Capistrano Unified Sch. Dist.*, 538 F.3d 1261 (9th Cir. 2008). Procedural violations constitute a denial of FAPE when they impede a student's right to a FAPE, significantly impede a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. WAC 392-172A-05105(2); 34 CFR §300.513(2).

46. Here, the failure to timely evaluate the Student impeded the Parent's ability to participate in the decision-making process because it substantially increased the time she had to wait for a District response to her request for a private placement, and to participate in the drafting of a new IEP. While it was the Parent who removed the Student from school unilaterally, the District's delay in completing the reevaluations and the resulting delay in formulating a new IEP increased the amount of time the Student's educational program was undecided. Although a small portion of the delay was attributable to the Student's hospitalization, rather than the District's delay, the procedural violations constituted a denial of FAPE.

Abuse of the Student and Falsification of School Assignments

47. The Parent alleges that Mr. Dewitt's alleged abuse of the Student denied the Student a FAPE. The Ninth Circuit has determined that actions against a student only result in a denial of FAPE if the district was "deliberately indifferent" to the action and the abuse is "so severe that the child can derive no benefit" from the services offered by the district. *M.L. v. Federal Way School District*, 394 F.3d 634 (9th Cir. 2005).

48. Here, there is no evidence that the District was aware of the allegations of abuse by Mr. Dewitt until the Parent reported them in July 2013. The District never assigned Mr. Dewitt to work with the Student again after learning of the allegations. Thus, it cannot be said that the District was deliberately indifferent as it did not again expose the Student to Mr. Dewitt. Moreover, the only facts found with respect to the alleged abuse are that the Parents on a small number of occasions saw him hold the Student's arms, acts which they only considered abusive in retrospect once the Student reported that Mr. Dewitt hit him. These actions are not so severe that the Student could have derived no benefit from the District's services. Accordingly, the Parent has not proven a denial of FAPE based on alleged abuse of the Student by Mr. Dewitt.

49. The Parent's issue statement includes an allegation that District employees "falsified school assignments." The Parent provides no briefing or other explanation of this issue. The

Parent testified at the hearing that, on one occasion, Mr. Dewitt completed an assignment for the Student and then had the Student trace over it, rather than having the Student complete the assignment himself. The Parent did not know whether the assignment had been turned in. It is unclear whether it is this incident the Parent considers a "falsification" and she has not explained how, even if true, this allegation would violate the IDEA. Accordingly, she has not proven a violation with respect to falsification of school assignments.

REMEDIES

Private Placement

50. Parents who unilaterally enroll a student in a private school are entitled to reimbursement only if 1) the district placement violated the IDEA, and 2) the parent's private school placement is proper under the IDEA. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7 (1993). Thus, parents who unilaterally change their child's placement do so at their own financial risk. *Burlington v. Dep't of Ed. of Mass.*, 471 U.S. 359, 374 (1985).

51. In order for a private placement to be proper, parents must demonstrate that it "provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." *C.B. v. Garden Grove Sch. Dist.*, 635 F.3d 1155 (9th Cir. 2011). Parents do not need to show that a "private placement furnishes every special service necessary to maximize their child's potential." *Id.* *Id.* (affirming a decision holding that a private placement was proper, even though it did not provide math instruction, because it met some, but not all, of the student's educational needs). But a private placement is not proper when instruction is not provided for "most" of a student's needs and the student does not show significant growth. *M.N. v. State of Hawaii*, 509 F. App'x 640, 58 IDELR 6 (D.C. Hawaii 2011), *aff'd*, 58 IDELR 6 (9th Cir. 2013).

52. A private placement does not have to be the Student's least restrictive environment to be appropriate for reimbursement purposes. *C.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981 (8th Cir. 2011).

53. The Parent has proven that Dolan is a proper placement for the Student based on the services provided.

54. The District shall reimburse the Parent for any instruction received by the Student at Dolan, including tuition and transportation, through the date of this decision upon presentation to the District of proof of the expenses incurred.

55. The District will be ordered to develop an IEP placing the Student at Dolan at District expense, including tuition and transportation expenses, beginning with the start of the 2015-2016 school year.

Compensatory Education

56. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from the special education services the school district should have provided in the first place." *Reid v. Dist. of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). It is an equitable remedy, meaning the tribunal must consider the equities existing

on both sides of the case. Flexibility rather than rigidity is called for. *Id.* at 523-24. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994).

57. As compensatory education, the Parent seeks four weeks of instruction at Dolan to take place starting at the end of July 2015. The District is ordered to fund four weeks of instruction at Dolan for two hours per day, four days per week, which is a total of 32 hours. If possible, this is to begin the week of August 3, 2015, in order to provide the instruction during the summer as requested by the Parent. If it is not possible, because Dolan or the Student is unavailable, this instruction may be delivered at other times mutually agreed-upon by the Parent and Dolan within one year from the date of this order.

Therapy for Posttraumatic Stress Disorder and Trauma

58. The Parent requests therapy with Dr. Uherek for the Student as a remedy for the allegation that the District denied the Student FAPE based on the alleged abuse by Mr. DeWitt. As the Parent did not prove a denial of FAPE in this respect, this remedy will be denied.

Autism Training

59. The Parent's request for autism training is denied because the Parent did not prove a denial of FAPE with respect to the failure to provide such services.

Other Remedies

60. The Parent requests that the District be ordered to develop an appropriate IHP to be approved by Dr. Uherek so the Student may access electives and extracurricular activities at Redmond High School. The ALJ declines to impose obligations on the District related to the development of an IHP beyond those already existing in the law. For that reason, this request is denied. No other remedies will be awarded.

ORDER

1. The District violated the IDEA and denied the Student a FAPE by:
 - a. Failing to implement the IEPs in effect during the 2012-2013 school year with respect to tutoring;
 - b. Failing to timely evaluate the Student in 2014; and
 - c. Failing to offer an appropriate IEP in January 2015.
2. The District did not otherwise deny the Student FAPE.
3. The District shall reimburse the Parent for instruction provided by Dolan Academy, including tuition and transportation, through the date of this order upon presentation of proof of the expense incurred.

4. As compensatory education, the District shall pay for 32 hours of instruction at Dolan Academy to be delivered, if possible, in the month of August 2015.
5. The District shall develop an IEP placing the Student at Dolan Academy at District expense, including tuition and transportation, to begin with the start of the 2015-2016 school year.
6. The Parent's remaining requested remedies are denied.

Signed at Seattle, Washington on July 30, 2015.



Anne Senter
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein.



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