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Superintendent of Public Instruction
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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS

One Union Square • 600 University Street • Suite 1500 • Seattle, Washington 98101
(206) 389-3400 • (800) 845-8830 • FAX (206) 587-5135 • www.oah.wa.gov

May 27, 2016

Parent

[REDACTED]
Spokane, WA 99207

Lisa Pacheco, Director of Special Education
Spokane School District
200 N Bernard Street
Spokane, WA 99201-0282

Gregory L. Stevens, Attorney at Law
Stevens Clay PS
421 W. Riverside, Suite 1575
Spokane, WA 99201-0402

In re: **Spokane School District**
OSPI Cause No. 2015-SE-0080
OAH Docket No. 09-2015-OSPI-00181

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 cursive script that reads "Nicole A. Gaines Phelps".

Nicole A. Gaines Phelps
Administrative Law Judge

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

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

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IN THE MATTER OF:

SPOKANE SCHOOL DISTRICT

OSPI CAUSE NO. 2015-SE-0080

OAH DOCKET NO. 09-2015-OSPI-00181

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Nicole A. Gaines Phelps in Spokane, Washington, on March 14, 2016. The Parent of the Student whose education is at issue¹ appeared *pro se* (represented herself). The Spokane School District (District) was represented by Gregory Stevens, attorney at law. Lisa Pacheco, District director of special education, also appeared. The following is hereby entered:

STATEMENT OF THE CASE

The Mother filed a due process hearing request (Complaint) on September 4, 2015. The Complaint was amended by order entered October 2, 2015. Prehearing conferences were held on October 22, November 4, 18, 19, and December 17, 2015, and January 14, 21, March 1, and 8, 2016. Prehearing orders were issued on November 6, 19, December 17, 21, 2015, and January 21 and March 1, 2016.

Pursuant to a joint request for continuance, the due date for the written decision was continued to thirty (30) days after the close of the hearing record. See Prehearing Order of November 6, 2015. The hearing record closed with the filing of post-hearing briefs on April 29, 2016. The due date for the written decision is therefore May 29, 2016.

EVIDENCE RELIED UPON²

The following exhibits were admitted into evidence:

Parent Exhibits: P2 and P7 were admitted without objection. P1, P3, P4, and P6 were conditionally admitted upon a showing of relevancy to the issues. Having reviewed the record, P1, P3, P4, and P6 are admitted but given little weight due to their limited relevance to the issues and remedies. See Prehearing Order of December 21, 2015.

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

² The evidence provided by the parties is de-minimis. Neither party provided a copy of the Student's present or past IEPs; present or past evaluations or reevaluations; or written documentation of the Student's medical diagnoses. Because the record lacked formal documentation, the undersigned's Findings of Fact adopt a substantial amount of information from the 2008 and 2014 OSPI decisions on the Mother's Special Education Citizen Complaints to explain the Student's medical and educational history.

District Exhibits: D1-D10.

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

The Parent of the Student;
Nancy Lopez-Williams, principal at Lincoln Heights Elementary School;
Emma Noble, District special education program assistant;
Elizabeth Guettinger, teacher at Roosevelt Elementary School;
Julie Owen, teacher at Browne Elementary School; and
Heidi Saville, occupational therapist at Lincoln Heights Elementary School.

ISSUES

The issues for hearing are:

- a. Was the District's use of a weighted vest on the Student a violation of the Individuals with Disabilities Education Act (IDEA)?
 - i. If so, what is the appropriate remedy, if any?³
- b. Was Parental consent required for the District to use a weighted vest with the Student?
 - i. If so, was Parental consent given?
 - ii. If Parental consent was required and not given, what is the appropriate remedy, if any?
- c. Were⁴ District personnel properly trained and qualified to use a weighted vest on the Student?
 - i. If District personnel were not properly trained and qualified, what is the appropriate remedy, if any?
- d. Did District personnel withhold information from OSPI in violation of the IDEA?
 - i. If so, what is the appropriate remedy, if any?
- e. And, whether the Parent is entitled to the requested remedies, or other equitable remedies, as appropriate.

See Prehearing Order of December 21, 2015.

³ For grammatical purposes, the undersigned corrected the punctuation of original December 21, 2015 prehearing conference order from a period to a question mark.

⁴ For grammatical purposes, the undersigned corrected the wording of the original December 21, 2015 prehearing conference order from "was" to "were."

FINDINGS OF FACT

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

1. The Student has multiple diagnoses including “selective mutism, anxiety disorder and a two-year developmental delay.” Mother, Tr. 105.⁵ The District found the Student eligible for special education services under the category of developmental delay prior to the Student’s entry into the District’s pre-Kindergarten (pre-K) program. See generally Exhibit D7 p. 3; see also Exhibit P2 p. 1. The Student had an individualized education program (IEP) for a number of years. *Id.* His most recent reevaluation occurred on October 21, 2011.⁶ Exhibit D7 p. 3. The reevaluation recommended the Student continue receiving special education and related services “to develop cognitive abilities, social/adaptive skills and communication skills.” *Id.* Additionally, the report notes his teachers’ observations, including the Student’s tendency to “[bolt] around the classroom, avoiding adults who may be directing him.” *Id.* It was recommended that the Student receive services for behavioral/social skills but the evaluation neither included a referral for occupational therapy services nor a recommendation to develop a behavior intervention plan (BIP). *Id.*

2. The Student attended the District’s pre-K program during the 2012-2013 school year at Roosevelt Elementary. Mother, Tr. 97; see also Guettinger, Tr. 132. Elizabeth Guettinger was his pre-K teacher. *Id.* Sometime during March or April 2013, Ms. Guettinger, used a weighted vest on the Student as an intervention to decrease his anxiety and fidgeting. *Id.*, Tr. 116-117; 122. The weighted vest was one of the strategies used to assist the Student with focusing and sitting during whole-group settings and circle periods. *Id.*, 116-117. Other strategies were tried, including a wiggle cushion and a rocking chair, but were not successful. *Id.*, 118.

3. Ms. Guettinger did not use the weighted vest on the Student every day. *Id.*, 130. It was used “no more than two times a week” to assist the Student during the classroom circle period of twenty minutes. *Id.* Although, the District did not have the Mother’s written consent to use the weighted vest, Ms. Guettinger discussed use of the weighted vest with the Mother during a telephone conversation in either “March or April of 2013.” *Id.*, 117. According to Ms. Guettinger, the Mother did not object to use of the weighted vest. *Id.* However, in 2008 the Mother filed a Citizen Complaint with OSPI regarding another school district’s use of a weighted vest on the Student. See generally, Exhibit P2. As such, while the undersigned finds Ms. Guettinger may have perceived the Mother as giving consent for use of the weighted vest, in light of her prior Citizen Complaint, it is unlikely the Mother understood she was consenting to using the weighted vest on the Student.

⁵ Testimony from the hearing record is identified by the witness’s last name followed by the page number where the testimony is located in the transcript (e.g. Mother, Tr. ____). References to exhibits are identified by the party’s exhibit and page number (e.g. Exhibit D1 p. ____).

⁶ The record does not include a copy of the reevaluation.

4. Prior to using the weighted vest, Ms. Guettinger did not specifically discuss using it on the Student with the District's occupational therapist (OT). Guettinger, Tr. 119-121. However, Ms. Guettinger previously received training on the proper use of a weighted vest and the protocol for use from the District's OT. *Id.*; see also *Id.*, 123. As part of her training, Ms. Guettinger understood that the use of a weighted vest should not exceed 30 minutes at a time. *Id.*, 124-125; see also Saville, Tr. 160-161.

5. Ms. Guettinger and the OT worked as a collaborative team. Guettinger, Tr. 120. During the OT's weekly visits, they discussed which students needed additional support and which sensory strategy should be utilized. *Id.* In general, the OT advised Ms. Guettinger to use a progressive approach of strategies (wiggle cushion, rocking chair then weighted vest) with any child who displayed anxiety. *Id.*, 121; see also *Id.*, 136.

6. On May 28, 2013, the Student's IEP team met to develop his annual IEP. Exhibit D7 p.4. The Mother was invited but did not participate. *Id.* During the meeting, the team developed the Student's annual IEP, outlining his services for the upcoming 2013-2014 school year. *Id.* The IEP did not include a behavior intervention plan (BIP) or a referral for OT services.⁷ *Id.* During the meeting, the IEP team also determined the Student would attend an integrated kindergarten class. *Id.* Prior written notice (PWN) of the IEP team's decisions was mailed to the Mother the same day. *Id.*

7. In preparation for the Student's transition from pre-K to kindergarten, on May 30, 2013, staff from the Student's pre-K program and the kindergarten program met. Exhibit D7. The Mother did not attend. *Id.* The purpose was to discuss the Student's transition between the two programs. *Id.* Ms. Guettinger participated in this meeting as the Student's pre-K teacher. During the meeting, Ms. Guettinger shared her experiences and strategies for addressing the Student's anxiety. *Id.* Based upon her comments, use of the weighted vest was included as an "accommodation" in the Student's "move-up transition paperwork." *Id.*; see also Guettinger, Tr. 132. The move-up transition paperwork from the meeting was forwarded to Lincoln Heights, where the Student would attend kindergarten. Guettinger, Tr. 132 and 137; see also Exhibit P6. The Mother was not aware of the District's inclusion of a weighted vest as an accommodation in the move-up transition paperwork. See generally, Mother Tr.

8. The Student began his 2013-2014 school year in Julie Owen's integrated kindergarten class at Lincoln Heights Elementary School. Owen, Tr. 141; see also Exhibit P6. During the second day of class, September 4, 2013, while participating in story time, the Student exhibited "a hard time focusing...he was turning in circles." *Id.*, 141. In accordance with his move-up transition paperwork from the pre-K transition meeting, Ms. Owen instructed her teaching assistant to obtain a weighted vest from the preschool to use on the Student. *Id.* Ms. Owen placed the weighted vest on the Student. *Id.* He "calmed [down] and settled (sic) for the story." *Id.*, 154. About fifteen minutes later, the Student said "he was hot." *Id.* Ms. Owen told him he could take off the vest. *Id.*, 153.

9. Ms. Owens did not consult the District's OT prior to placing the weighted vest on the Student during the September 4, 2013 incident. Owen, Tr. 145. She had not received prior

⁷ The record does not include a copy of the Student's May 28, 2013 IEP. The information regarding the meeting is contained in OSPI's June 30, 2014 decision on the Mother's Citizen Complaint. Exhibit D7.

guidance or training by the District's OT on the use of a weighted vest. *Id.* Her knowledge of use of the weighted vest with the Student came strictly from the information contained within the Student's move-up transition paperwork. *Id.* According to the District's OT, Heidi Saville, specific training on the use of a weighted vest is not necessary.⁸ *See generally*, Saville, Tr.; *see also* Noble, Tr. 181-182.

10. Later that day, during a parent and teacher meeting, Ms. Owen told the Mother that she had used a weighted vest on the Student during story time. Owen, Tr. 142-143. The Mother expressed displeasure with the decision to use the weighted vest as an accommodation with the Student. *Id.*, 143. The Mother removed the Student from school. *Id.* Approximately one week later, the District convened a meeting to discuss options with the Mother. *Id.*, 144. Although the District agreed never again to use a weighted vest, the Mother has not returned the Student to school since the September 4, 2013 incident. Exhibit D7 p. 5; *see also* Noble, Tr. 169. The Mother officially withdrew the Student from the District on September 16, 2013. *Id.* She has not allowed her son to return to school because she distrusts the District. *See generally* Mother, Tr; *see also* Mother's Post-Hearing Brief, p. 5.

Mother's Citizen Complaint

11. The Mother filed a Citizen Complaint with OSPI on May 21, 2014. Exhibit D7. She alleged that, without prior parental consent or knowledge, the District violated the Student's rights by placing a weighted vest on him on September 4, 2013. Mother, Tr. 91 and 95. OSPI investigated the Mother's allegations. *Id.* Information was requested from both the Parent and the District. *Id.* Both parties fully complied with OSPI's request for information. *Id.*; *see also* Noble Tr. 172. After reviewing responses from the Mother and the District, OSPI concluded no corrective action was necessary. Exhibit D7 p. 5. OSPI issued the decision regarding the Mother's Citizen Complaint on June 30, 2014. Exhibit D7 p. 1.

CONCLUSIONS OF LAW

The IDEA

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

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

⁸ Ms. Saville is a certified occupational therapist. She is endorsed as an school occupational therapist. She is trained on sensory integration issues, including the use of weighted vests in school settings to assist student's with anxiety issues. Saville, Tr. p. 158-159.

Act, as follows:

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

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

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

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

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

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

5. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Mother. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

Statute of Limitations

6. On September 4, 2015, exactly two years after the day she discovered the District was using a weighted vest the Student, the Mother filed her complaint. On the day of that discovery, she removed the Student from the District and never returned him to school in the District.

7. The issue is whether (1) the Mother's claims are limited to the one day (September 4, 2013) that the Student attended school during the two years prior to the date she filed her complaint (September 4, 2015), as the District argues; or whether (2) the Mother may raise claims for the two-year period preceding from the date of discovery (September 4, 2013). The latter alternative would permit the adjudication of two years' worth of claims instead of a single day.

8. The IDEA provides that states may adopt their own statutes of limitations for IDEA due process hearings. 20 USC §1415(f)(3)(C). Washington has done so.⁹ WAC 392-172A-05080(2) provides:

The due process hearing request must be made *within two years of, and allege a violation that occurred not more than two years before*, the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint except the timeline does not apply to a parent if the parent was prevented from filing a due process hearing request due to:

- (a) Specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process hearing request; or
- (b) The school district withheld information from the parent that was required under this chapter to be provided to the parent.

(Italics added).

The regulation places two time constraints on parties who wish to file a due process hearing request.¹⁰ First, they must file the request within two years of the date they knew or should have known about the alleged action that forms the basis for their complaint.

9. This type of statute of limitations is commonly referred to as a “discovery rule,” since the statute begins to run not when the alleged violation occurs, but when the opposing party discovers it or should have discovered it. The Parent fulfilled this first requirement of the regulation: she filed her complaint two years after the day she learned the District had been using a weighted vest on the Student. The second requirement of the regulation is that the complaint must allege a violation that occurred not more than two years *before* the date the party knew or should have known about the alleged action that forms the basis of the complaint. Here, that means the Parent’s complaint may encompass not more than two years before September 4, 2013, the date she learned the weighted vest had been used. If use of the weighted vest had started *more* than two years before she discovered it, claims for this older period would be barred. However, the Student was not in school more than two years before September 4, 2013, so that is not an issue.

10. The District’s argument that the Mother may only make claims for the single day of September 4, 2013 ignores the second part of the regulation. That part allows parties to make claims going backward for two years from the date they discover the alleged violation. The District’s argument would make the discovery rule pointless in some cases: If a parent discovers a violation and demands that it stop, and the school district immediately complies and

⁹ For this reason, a recent case construing the language of the IDEA’s statute of limitations, which differs from the language of the Washington limitations provision, is not persuasive. *G.L. v. Ligonier Valley Sch. Dist. Authority*, 802 F.3d 601 (3rd Cir. 2015).

¹⁰ The part of the quoted regulation that is at issue is italicized. The exceptions in the regulation, (a) and (b), concern extending the two-year period to file a complaint *following* accrual of a claim. Those exceptions are not at issue here because the Parent’s complaint was filed within two years of the date it accrued, September 4, 2013. She therefore has no need to rely on exception (a) or (b).

stops the violation, the parent is entitled to a period of two years following her discovery within which to file a complaint. Those two years are not shortened just because the parent is using the discovery rule. That would put her at a disadvantage relative to all other parents, and there is nothing in the regulation that deprives her of the full two-year period in which to try to resolve her claim and decide whether to embark on litigation. If she timely files her complaint two years after discovery of the violation, then under the District's theory she would be entitled to no compensatory education (or only one day's worth), since the violation stopped upon her discovery of it. The plain reading of the regulation bars this result, as does the purpose of having a discovery rule.

11. In summary, the Mother's complaint was timely under the statute of limitations established by WAC 392-172A-05080, and under that regulation she may state claims for the two-year period preceding her discovery of the alleged violation, i.e., the two years preceding September 4, 2013.

Procedural Compliance with the IDEA

12. 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).

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

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

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

Use of weighted vest

14. When a student's behavior impedes the child's ability to learn or the learning of others, the IDEA mandates that the IEP team consider the use of positive interventions and supports. 34 CFR §300.324(a)(2)(i). This generally occurs during the develop of the Student's IEP. Specifically, WAC 392-172A-03110 (2)(a) states:

When considering special factors unique to a student, the IEP team must:

- (i) Consider the use of positive behavioral interventions and supports, and other strategies to address behavior, in the case of a student whose behavior impedes the student's learning or that of others.

WAC 392-172A-03110(2)(a)(i). Generally, the IEP team will address a student's possible need for a BIP as part of the student's IEP. This may include an evaluation of a student's behavioral needs. Once the IEP team determines a student's educational opportunities are negatively impacted by a student's behaviors the failure to develop a BIP can result in a denial of FAPE. See *R.K. v. New York City Dept't of Educ.*, 56 IDELR 168 (E.D.NY 2011), *aff'd* 59 IDELR 241 (2d Cir. 2012).

15. A weighted vest is a type of behavioral intervention within the definition of an adverse intervention. WAC 392-172A-03120(1)-(2).¹¹ A search of IDEA decisions (administrative and judicial) in the last seven years for the words "weighted vest" reveals 50 decisions. In cases where weighted vests were used, the student was eligible for and receiving occupational therapy (OT). The only clear exception was a single case in which the student did not qualify for OT, but the parents brought a weighted vest to the school and asked that it be used. *St. Cloud Indep. Sch. Dist.*, 114 LRP 9994 (SEA MN 2013).

16. Contrary to Ms. Saville's testimony, numerous cases from many jurisdictions indicate that the use of weighted vests is not independently decided by classroom personnel, but rather is determined and supervised by OTs. OTs develop sensory regulation plans for certain students, and weighted vests may be one of several strategies used, depending on the student's individual needs and the student's behavior at the moment. While the regulations require "the IEP Team to consider the use of positive behavioral interventions and supports, and other strategies," it does not specify the particular interventions, supports, or strategies that must be used." 71 Fed. Reg. 46,683 (2006). Therefore, once a child has a BIP, implementation of the strategies in the BIP fall within the classroom personnel's choice of methodology. However, this is different than a staff member making an independent determination that a behavioral intervention tool is appropriate for a student without first consulting a trained professional on the appropriateness for that *specific* student. An analogous situation would be a classroom teacher who has an assistive communication device in her classroom for one student, but decides to use it to assist another student who has not been assigned to use it by a speech-language pathologist. Another analogous situation is a classroom teacher who has a walker in her classroom and thinks that in some situations it would help a child to whom it has not been assigned by a physical therapist.

17. Weighted vests are often used no more than 30 minutes in an hour, and rotated with other sensory strategies. They are often listed in IEPs and/or BIPs. In some cases, weighted vests are contraindicated (e.g., because they cause anxiety or discomfort) and are accordingly removed from sensory regulation plans. Classroom staff implement the use of weighted vests,

¹¹ Since the time of this incident, WAC 392-172A-03120 has been amended twice—effective October 25, 2013 and most recently effective January 29, 2016. The undersigned applied the regulation as it existed at the time of this incident. Prior to the amendments, the regulation stated, "aversive interventions means the systematic use of stimuli...for the purpose of discouraging undesirable behavior on the part of the student... (2) The purpose is to assure that students eligible for special education are safeguarded against the use and misuse of various forms of aversive interventions. Each school district shall take steps to assure that each employee, volunteer or other agent of the district... responsible for the education, care or custody of a special education student is aware of aversive intervention requirements and conditions under which they may be used. Positive behavioral supports interventions shall be used by the school district and described in the individualized education program prior to the determination that the use of aversive intervention is a necessary part of the student's program."

but they do so based on determinations and instructions from an OT. See, e.g., *In re: Student with a Disability*, 115 LRP 50221 (SEA NY 2015); *Council Rock Sch. Dist.*, 115 LRP 44628 (SEA PA 2015); *In re: Student with a Disability*, 115 LRP 31919 (SEA NY 2014); *Baltimore County Pub. Schs.*, 114 LRP 39984 (SEA MD 2014); *Hawaii Dept. of Ed.*, 113 LRP 24618 (SEA HI 2013); *In re: Student with a Disability*, 113 LRP 11172 (SEA NY 2013); *Reyes v. New York City Dept. of Ed.*, 60 IDELR 64 (S.D. NY 2012); *Rim of the World Unfd Sch. Dist.*, 112 LRP 50989 (SEA CA 2012); *In re: Student with a Disability*, 58 IDELR 118 (SEA NY 2011); *In re: Student with a Disability*, 115 LRP 779 (SEA NY 2011); *Klamath Falls City Schs.*, 111 LRP 34176 (SEA OR 2011); *Green Bay Area Pub. Sch. Dist.*, 114 LRP 31913 (SEA WI 2011); *Howard County Pub. Schs.*, 111 LRP 54911 (SEA MD 2011); *Regional Sch. Unit #84*, 111 LRP 5864 (SEA ME 2010); *Moriarty (NM) Sch. Dist.*, 111 LRP 6798 (OCR NM 2010); *St. Paul Indep. Sch. Dist.*, 110 LRP 44949 (SEA MN 2010); *In re: Student with a Disability*, 109 LRP 76737 (SEA NY 2009).

18. In this matter, prior to using the weighted vest on the Student, Ms. Guettinger completed training on using weighted vests for students with sensory deficits. She and the OT worked collaboratively as a team on managing her students' sensory needs and the best use of progressive approaches. However, although Ms. Guettinger understood the Mother as having given oral consent for use of the weighted vest, at no time did the OT suggest nor did anyone from the District create a BIP or amend this Student's IEP to include the use of a weighted vest as an intervention for his sensory needs. Instead, Ms. Guettinger applied her knowledge of weighted vests to this Student's perceived needs. This was inappropriate.

19. Likewise, Ms. Owen's use of a weighted vest was inappropriate. Unlike Ms. Guettinger, Ms. Owen has no formal training on the use of a weighted vest and did not consult the District's OT prior using it with the Student on September 3, 2013. She admitted her decision to use the weighted vest stemmed from her review of the Student's move up transition paperwork; information provided by Ms. Guettinger during the transition meeting.

20. It is up to an evaluation team (including the parent), not individual classroom personnel, to determine whether a student suffers from sensory dysregulation and if so, whether the student requires OT consultation to determine the appropriate supplemental aids and services to address that dysregulation. See 20 USC §1414(b); WAC 392-172A-03020; 34 CFR §300.304. It is then up to the IEP team (including the parent) to adopt any recommended supplemental aids and services, and to decide whether OT consultation is required to supervise their use. See 20 USC §1414(d)(1)(A)(i)(IV); WAC 392-172A-03090(1)(d); 34 CFR §300.320. None of these things occurred in the present case. The Mother has therefore established a procedural violation of the IDEA for Ms. Guettinger's use of the weighted vest.

21. The Mother has also established a procedural violation of the IDEA for Ms. Owen's use of the weighted vest on September 4, 2013. In accordance with the above cited case law, the use of an intervention must be directed by a professional with certain qualifications. The classroom staff then implements the intervention. If classroom staff implement an intervention without a decision by or direction from such a professional, then the IDEA has been violated. In this matter, Ms. Owen was not trained on the use of weighted vests as an intervention. Additionally, as previously discussed, she was using a weighted vest as an intervention tool without the direction of an amended IEP, BIP or input from an OT addressing the use of a weighted vest with this specific Student.

Procedural Violations and Denial of FAPE

22. However, not all procedural violations amount to a denial of FAPE. Procedural violations of the IDEA amount to a denial of FAPE only if they:

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

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

23. The District's failure to amend the Student's IEP, create a BIP and include specific input from an OT on the appropriateness of using a weighted vest with him prohibited the Mother from participating in the decision making regarding the Student's education. This is a denial of FAPE. Although, she did not participate in the May 28, 2013 IEP meeting, had the District appropriately created a BIP or otherwise provided written notice of the intention to use the weighted vest, the Mother would have had an opportunity to respond upon receipt of the PWN. However, because the District failed to do so, the Mother was unaware of the inclusion of the weighted vest as an intervention. This significantly impeded her procedural right to participate in the Student's education.

Withholding of Information

24. The Mother alleged the District withheld information during the OSPI investigation into her Citizen Complaint. However, this issue is not properly before the undersigned. See WAC 392-172-05030 through 392-172A-05045. Even if the undersigned had the authority to rule on this issue, the Mother has not carried her burden. Indeed, in the June 30, 2013 decision, OSPI found the District in compliance with all requests for information. Testimony during the hearing supports OSPI's finding.

Compensatory Education

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

26. The Mother has established that the District's use of the weighted vest without amending the Student's IEP, creating a BIP or including input from an OT was a procedural violation of the IDEA. It is concluded that this procedural violation significantly impeded the Mother's right to participate in the decision-making process regarding provision of FAPE to the Student. Her right to participate in that decision-making process was significantly impeded because the

weighted vest was used without her knowledge or consent. Accordingly, it is concluded that the District's procedural violation amounted to a denial of FAPE to the Student. WAC 392-172A-05105(2)(b).

27. But, the record is silent regarding how, or even if, use of the weighted vest had any adverse impact on, or caused any harm to, the Student's education. The available evidence of record supports a finding that use of the weighted vest helped to reduce the Student's anxiety at school. See Findings of Fact #2, 7, and 9. Therefore, the undersigned declines to award any compensatory education as a remedy.

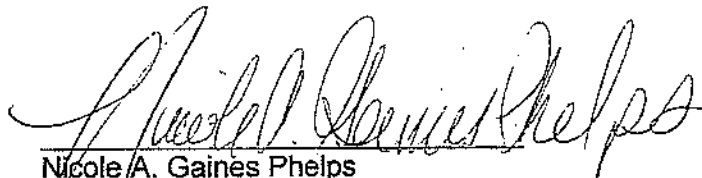
28. In light of the above findings and conclusions, however, the undersigned concludes it is appropriate to order the District to provide 3 hours of training to the District staff involved with the use of the weighted vest on the Student. The District staff are: Emma Noble; Elizabeth Guettinger; Julie Owen; and Heidi Seville. The training shall focus on the appropriate development of IEPs and/or BIPs in conjunction with use of a weighted vest or other positive behavioral interventions. The District may determine the method by which this training shall be provided but the training must be provided by a qualified individual with knowledge, experience and training on the subject. The training shall be completed prior to commencement of the District's 2016-2017 school year.

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

ORDER

District staff Emma Noble, Elizabeth Guettinger, Julie Owen, and Heidi Seville shall receive 3 hours of training on the appropriate development of IEPs and/or BIPs in conjunction with use of a weighted vest or other positive behavioral interventions.¹² District may determine the method by which this training shall be provided but the training must be provided by a qualified individual with knowledge, experience and training on the subject. The training shall be completed prior to commencement of the District's 2016-2017 school year.

Signed at Seattle, Washington on May 27, 2016.



Nicole A. Gaines Phelps
Administrative Law Judge
Office of Administrative Hearings

¹² The District is not responsible for training any identified staff who are no longer employed by the District.

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 mailing addresses postage prepaid and a copy via secured emailed to Parent and Counsel, at their respective email addresses, on the date stated herein. *lan*

Parent
[REDACTED]
Spokane, WA 99207

Lisa Pacheco, Director of Special Education
Spokane School District
200 N Bernard Street
Spokane, WA 99201-0282

Gregory L. Stevens, Attorney at Law
Stevens Clay PS
421 W. Riverside, Suite 1575
Spokane, WA 99201-0402

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