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

June 9, 2017

Guardians
[redacted]

Andrea Schiers, Assistant General Counsel
Seattle Public Schools
PO Box 34165, MS 32-151
Seattle, WA 98124-1165

Tracy Miller, Attorney at Law
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104

In re: Seattle School District
OSPI Cause No. 2016-SE-0112
OAH Docket No. 12-2016-OSPI-00206

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,

Michelle C. Mentzer
Administrative Law Judge

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

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

IN THE MATTER OF:	OSPI CAUSE NO. 2016-SE-0112
	OAH DOCKET NO. 12-2016-OSPI-00206
SEATTLE SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Seattle, Washington, on April 17, 18, and 19, 2017. The Guardians of the Student whose education is at issue[1] appeared and represented themselves. The Seattle School District (District) was represented by Tracy Miller, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Guardians filed a due process hearing request (complaint) on December 12, 2016, and an addendum to the complaint on January 3, 2017. Leave to amend the complaint to add claims from the addendum was granted on February 8, 2017.

Prehearing conferences were held on February 1, March 24, and April 12, 2017. Prehearing orders were entered on January 11, January 26, February 8, February 10, March 28, and April 13, 2017.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to a District request for continuance agreed to by the Guardians. *See* First Prehearing Order of February 8, 2017. The hearing record closed with the filing of post-hearing briefs on May 19, 2017. Thirty days thereafter is June 18, 2017. The due date for the written decision is therefore June 18, 2017.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J-2 through J-5;
Guardian Exhibits: P-1 through P-8; and
District Exhibits: D-1 through D-12.

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

[1] In the interests of preserving the family's privacy, this decision does not name parents, guardians or students. Instead, they are identified as "Parents," "Guardians," or "Student."

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

Michael Dickneite, District vision and deaf and hard of hearing supervisor;
Jack Merchant, PhD, THINK Academic Services;
Aunt of the Student;
Grandmother of the Student;
Amy Schwentor, District principal, TOPS K-8 School;
Alex LaRosa, District special education program specialist;
Caroline Petersen, District speech-language pathologist;
Jessica Horn, District audiologist;
Christina Janssen, District general education teacher, Cascade Parent Partnership Program; and
Owen Gonder, District principal, Cascade Parent Partnership Program.

ISSUES

The Issues Statement below reflects the claims made and remedies requested in the due process hearing request. The inclusion of alleged violations of the Individuals with Disabilities Education Act (IDEA) in an Issues Statement does not guarantee that they constitute violations of the IDEA. The inclusion of requested remedies in an Issues Statement does not guarantee that this tribunal has the authority to award them. The issues for hearing are:

1. Whether the District violated the IDEA and denied the Student a free appropriate public education (FAPE) by:

a. Failing to provide the Guardians the opportunity to fully participate in the individualized education program (IEP) meeting of December 8, 2016 by:

(1) Prematurely ending the meeting;
(2) Predetermining decisions prior to the meeting;
(3) Providing false and vague information to the Guardians at the meeting, and in the three months leading up to the meeting;
(4) Including false documentation of events in the IEP;
(5) Refusing to provide the Guardians with copies of all team member notes from the meeting;
(6) Finalizing a draft version of the IEP when the Guardians were led to believe there would be another IEP meeting before it was finalized;
(7) The Student's general education teacher, Christina Janssen, failing to mention at the meeting all of the Student's outside services that the Guardians had previously told Ms. Janssen about;
(8) The Resource Room teacher, Donna Guise, documenting that the Grandmother (one of the Guardians) was talking with the Student in the hallway, when many other parents talk with their students in the hallway and are not criticized for doing so;

b. Failing to include needed services in the December 8, 2016 IEP;

c. Failing to provide specially designed instruction (SDI) to the Student at Cascade Parent Partnership Program (Cascade);

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

d. Failing to have Stranger Danger and Stop-Look-Listen classes taught to the Student by deaf and hard of hearing (DHH) educators, and instead having them taught by Cascade staff;

e. Failing to provide the Guardians with the following documents they have requested:

(1) Cascade curricula for the first through fifth grades;
(2) All notes taken by Cascade staff at meetings regarding the Student;
(3) All cell phone notes and recordings of meetings with the Guardians that were made by TOPS K-8 School staff in the Fall of 2015 and by Cascade staff in the Fall of 2016;
(4) All documents, emails, and computer documents regarding the Student;
(5) All policies of Cascade and changes in those policies for the 2016-2017 school year;
(6) A true copy of notes taken by Alex [LaRosa], special education supervisor, at the Student's February 22, 2016 IEP meeting (the Guardians allege they received an altered version of those notes);

f. Failing to disclose to the Guardians a sliding scale behavior policy implemented at Cascade in November 2016;

g. Failing to identify for the Guardians who the Cascade special education teacher is since the prior special education teacher left Cascade in August 2016;

h. Incorrectly labeling the Student as having learning disabilities, instead of having skill deficiencies;

i. Asking the Guardians and staff at Cascade, and previously at TOPS K-8, to falsely state that the Student's behavior impedes his learning, in order to obtain an additional staff person for his classroom;

j. Treating the Guardians with disrespect for asking questions and seeking information about the Student's education, and discouraging the Grandmother from being present in the Student's classroom in the future;

k. Failing to provide Signing Exact English (SEE) interpreters, which the Student requires, and instead providing American Sign Language (ASL) interpreters and unskilled Conceptually Accurate Signed English (CASE) interpreters;

l. Determining that the Student is misbehaving when playing the math game Dice, while other students engage in the same behavior during that game but are not determined to be misbehaving;

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

a. Placement at the Northwest School for the Deaf and Hard of Hearing (NWSDHH), to include:

(1) Adoption of an IEP making NWSDHH the Student's prospective placement;

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

(2) Compensatory education in the form of NWSDHH tuition for an additional period of time based on past denials of FAPE;
(3) Transportation of the Student to and from NWSDHH during all periods of attendance;

b. If placement at NWSDHH is not awarded, then tutoring services from THINK to include:
(1) Adoption of an IEP providing four hours per week of tutoring for the Student prospectively;
(2) Compensatory education in the form of THINK tutoring for an additional period of time based on past denials of FAPE;
(3) Transportation of the Student to and from THINK tutoring sessions during all periods he is receiving such tutoring; and
(4) SEE materials and services for use during THINK tutoring sessions.

See First Prehearing Order of February 8, 2017.[2]

FINDINGS OF FACT

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

Background

1. The Student is seven years old and lives with his Aunt and Grandmother. The Aunt is the Student's legal guardian, but for the reasons explained in footnote, both of them are referred to herein as the Guardians.[3]

2. The Student has severe to profound sensorineural hearing loss in his left ear and profound sensorineural hearing loss in right ear, diagnosed when he was three years old, after he came to live with the Guardians. At all relevant times the Student has been eligible for special education and related services under the category of Hearing Impairment.

---

[2] Regarding Issues 1.a.8 and 1.l, the First Prehearing Order included footnotes stating that the Guardians allege the Student was singled out for the criticism in question because he is African American and/or because he has a disability. As discussed in the Conclusions of Law, below, the IDEA does not concern itself with the *motivation* for a school district denying a student FAPE. Other statutes that protect children from discrimination in schools do concern themselves with this motivation. For this reason, the allegations about discrimination were not included in the Issues Statement for this IDEA hearing.

[3] Prior to the Aunt's testimony at the hearing, it was understood from the Aunt and Grandmother that the two of them were joint legal guardians of the Student. At the hearing, the Aunt clarified that only she is the Student's legal guardian. Because the Aunt and Grandmother have been referred to as "the Guardians" in all prior orders, this decision will continue to refer to both of them as "the Guardians" to avoid confusion.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

3. At all relevant times the Student has qualified for services in reading, written language, math, social/behavioral skills, audiology and communication. The Student has never received auditory-only instruction in class without the visual support of sign language. He is able to receive auditory-only instruction in a one-on-one office setting, where it is quieter and the instructor is able to maintain a direct, face-to-face position to facilitate the Student lip reading.

Preschool and Kindergarten

4. The Student attended preschool for two and a half years before entering kindergarten. Most of his preschool years were spent at a program for the deaf and hard of hearing (DHH) at the District's TOPS K-8 School (TOPS). There was an eight-month period when he left TOPS and attended preschool at the Northwest School for the Deaf and Hard of Hearing in Seattle (NWSDHH). NWSDHH emphasizes auditory-aural communication supplemented with Signing Exaction English (SEE).

5. In November 2015, during the Student's kindergarten year, the District conducted his triennial reevaluation. J-3.[4] The reevaluation found he was delayed in all academic areas and had significant social/behavioral difficulties that impeded his learning and the learning of others. The Student was found to be largely unfocused in class and not engaged. He made little to no progress on his audiology goal. A cognitive assessment could not be reliably completed because his behavior interfered with testing, even though the school psychologist who conducted the testing is deaf. In reading, the Student scored at a three to four year old level when he had just turned six years old. *Id.* In written language, the Student scored at the 66th percentile in writing the alphabet fluency. However, on a standardized writing sample assessment he was unable to form any legible handwriting, including his name. In math, the Student's composite score was at the 5th percentile. In communication, his skills were found to be at the 2nd percentile. His speech intelligibility was also impaired, below the 1st percentile. His speech was determined to be 10 to 20% intelligible to a trained, familiar listener in a known context. *Id.*

6. In the area of social/behavioral skills, on a standardized assessment his DHH teacher rated his skills at the 8th percentile, and his general education teacher rated them at the 2nd percentile. Problem behaviors included crumpling worksheets, stabbing pencils into a desk, shoving and knocking down peers, writing on their papers, grabbing peers who got in front of him when running, refusing to come in after recess, running around in class, and being aggressive toward his instructional assistant (IA), resulting overall in a severe lack of learning. *Id.*

7. Following this reevaluation, an IEP was developed for the Student in December 2015. J-4. It adopted annual goals for him in all of the areas discussed above. It placed him in the DHH program the majority of the time, with 25% of his time in the general education setting.

8. The Guardians were displeased with the DHH program, with the windowless room in which it was housed, and with what they believed to be false reporting by school staff about the

---

[4] Citations to the exhibits are in the following format: "J-3" refers to Joint Exhibit 3. "D-1" refers to District Exhibit D-1. "P-1" refers to Guardian Exhibit P-1.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

Student's behavior. For these reasons, the Guardians removed the Student to homeschooling in February 2016, in the middle of his kindergarten year. They supplemented his homeschooling with services in the community and with classes at a District school called Cascade Parent Partnership Program (Cascade).

9. Cascade serves 163 students in kindergarten through eighth grade. The students are homeschooled but supplement their homeschooling with classes at Cascade, the number of classes to be determined by each family. However, Cascade has only one special education teacher and cannot fully implement IEPs that have a high percentage of special education time. Because the Student has such an IEP, he was only permitted to take two general education classes at Cascade in kindergarten, and three classes in first grade. Students with more intensive IEPs are also required to be accompanied by a parent or guardian when the student attends general education classes. The Grandmother has attended all of the Student's Cascade classes with him. School staff report that the Student responds better to her intervention than to intervention by any other adult. In addition to the Grandmother, the Student is assisted during his Cascade classes by a sign language interpreter.

10. Since the Student transferred to Cascade in February 2016, the Guardians have declined all special education services. They have also declined the related service of speech-language therapy, except for two brief sessions. (The Student sees a private speech-language pathologist.) Of all of the special education and related service areas offered in the Student's IEPs since February 2016, the Guardians have accepted only audiology. The Guardians believe the Student should be educated in the general education environment with sign language interpreters, and should be pulled out of that setting for special services as little as possible. For this reason they have declined even the limited special education services that Cascade could offer, which would not fulfill all of the minutes called for in his IEP.

First Grade

11. In his first grade year, 2016-2017, in addition to homeschooling and activities in the community, the Student attends general education classes at Cascade in Language Arts, Math and Art. He attends Cascade Monday through Thursday, from 9:00 a.m. to 12:00 p.m.

12. The Student's Language Arts and Math classes are taught by Christina Janssen. Each class has approximately 16 students. Ms. Janssen testified that the Student is not progressing in the first grade curriculum, though she wrote much more encouraging reports in his Student Learning Plan.[5] D-7:10-23.[6] She provides the accommodations listed in the Student's IEP, but has been unable to conduct any academic assessments on him. On the reading assessment day, the Grandmother did not want the Student tested due to certain circumstances that day. Ms. Janssen attempted a math assessment on another day, but the Student was having a hard time and Ms. Janssen could not gain information on his math level. In addition to the absence

[5] Student Learning Plans at Cascade set forth each student's educational plan and are used to report monthly progress on that plan. Student Learning Plans are part of the Alternative Learning Experience (ALE) requirements for Cascade, which is an ALE program, not a traditional school.

[6] Citations to particular pages in the exhibits are in the following format: "D-7:10-23" refers to District Exhibit D-7, pages 10 through 23.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

of assessments, it is also difficult know the Student's level of learning and understanding because he receives a lot of support from the Grandmother and from interpreters. Ms. Janssen noted that the Student has never said more than a single word at a time to her. For instance, if she asks how he is feeling, he may respond "good". If she asks what the best part of his weekend was, he may respond "church". Ms. Janssen believes the Student is in need of specially designed instruction in academic areas, and she is not providing it. Ms. Janssen further testified that the Student's behavior interferes with his own learning and the learning of others.

13. The Grandmother's testimony contradicts Ms. Janssen's on a number of points. The Grandmother testified the Student's behavior is no worse than other students in the class. Ms. Janssen differed from that, testifying that his behavior is the worst in both classes. She explained that at the beginning of the school year some students' behavior did not conform to classroom expectations, but they learned those expectations. In each class, she testified, there is one other student whose behavior interferes with learning, but to a lesser extent than that of the Student. Regarding the Grandmother's allegation that others besides the Student use the dice from math games inappropriately, Ms. Janssen testified the Student's inappropriate behavior with the dice is significantly more disruptive.

14. Ms. Janssen's testimony about the Student is credited because it conforms with evidence from other educators at the Student's previous school, TOPS, as well as another educator at Cascade. The Student's triennial reevaluation the previous year at TOPS detailed many examples of severely disruptive behavior, and a standardized assessment rated the Student's behavior between the 2nd and the 8th percentiles as compared with same-age peers. At Cascade, the Student's audiologist (with whom the Guardians are very pleased) reported that even in her one-on-one environment, the Student's behavior interferes with his learning and he is distracted and unfocussed. For these reasons, Ms. Janssen's testimony is credited over the Grandmother's testimony concerning the Student's behavior in class.

15. The Grandmother also testified that Ms. Janssen responded inadequately to her complaint that the Student was seated too close to the overhead projector, which emits noise that makes it more difficult for the Student to hear. Ms. Janssen testified to the contrary, that the Grandmother has never expressed any concern to her about the Student sitting too close to the projector. Ms. Janssen has him sit in a location where he can see her well, see the white board, and see his interpreter. Because Ms. Janssen was found more credible than the Grandmother regarding the Student's behavior, her testimony on this matter is accepted over the Grandmother's as well.

16. The Guardians allege school staff falsely stated that the Student's behavior impedes his learning in order to obtain an additional staff person in his classroom. The principal of Cascade, Owen Gonder, explained the following. The school had an IA and needed to decide where to place him. Behavioral data was taken in classes in order to determine which classes needed the IA the most. Each student's daily behavior was rated on a scale of 1 to 4 and the cumulative data was used to make the placement decision. The principal denies the Guardians' allegation that the Student was singled out for false reporting in order to obtain additional staff for his class. The principal's testimony is found credible, and the Guardians' allegation that the Student's behavior was falsely reported has been found not credible above.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

17. The District did not tell the Guardians ahead of time that the 1 to 4 behavior rating scale would be used. The District did not give a copy of it to the Guardians until April 2017, and they allege the school began to use it in November 2016. The Guardians allege the District was obligated to share the rating scale with them before it was used.

18. The Guardians also fault the District for not offering the Student "Stranger Danger" and "Stop-Look-Listen" classes at Cascade taught by a DHH teacher. The District acknowledges that Cascade does not offer either of these classes. The Guardians believe the Student is in need of safety education due to his hearing loss, which causes greater safety risks.

19. The Guardians also allege the Student was not provided with adequate sign language interpretation. His IEP requires a CASE interpreter daily in all school settings. D-4:15. CASE stands for Conceptually Accurate Signed English. American Sign Language (ASL) is a language completely distinct from English. CASE, on the other hand, uses ASL signs but presents them in English word order. Another signing system is Signing Exact English (SEE). That is the Guardians' preferred system, but it is not provided for in the Student's IEP. *Id.* SEE borrows 70 – 75% of its signs from ASL, but they are presented in English word order and using English prefixes and suffixes. There are very few SEE interpreters. CASE is a hybrid between ASL and SEE. Testimony of Dickneite. The Grandmother testified that some of the interpreters were very good, worked very well with the Student, and were willing to learn aspects of signing correct English that were outside the ASL they were familiar with. She testified that other interpreters were very poor. She did not quantify the percentage of time the Student had good interpreters versus bad interpreters, in her view.[7]

20. The District's supervisor for DHH services, Michael Dickneite, testified that the agency with which he contracts for interpreters informs him that a SEE interpreter is provided three days a week, and a CASE interpreter is provided once a week for the Student. (The Student only attends school four days a week.) This testimony is double hearsay. Mr. Dickneite did not testify to ever having observed these interpreters working with the Student. Other district witnesses who *have* observed interpreters working with the Student do not understand sign language and could not offer evidence on what signing system was used or the level of proficiency of its use. The Grandmother is very familiar with SEE, ASL and CASE. She testified that no SEE interpreters have been provided for the Student, and the CASE interpreters have actually been ASL interpreters unskilled in CASE. The Grandmother is the only witness whose testimony on this matter is based on personal knowledge.

21. It is possible that ASL interpreters are capable of serving as CASE interpreters because CASE uses the ASL symbols, though presented in English word order. It is also possible that it takes significant additional training for an ASL interpreter to become proficient enough in CASE to provide simultaneous translation. Simultaneous translation represents a level of skill over and above the mere ability use a language. The District offered no evidence on any of these

---

[7] District witnesses testified that it was when an interpreter acted more like an instructional assistant that the Grandmother classified them as good. There was some support for this view in the Grandmother's testimony. However, these District witnesses acknowledged they had no knowledge of sign language and could not tell whether an interpreter was using ASL, CASE or SEE, nor what their skill level was in any signing system. The Grandmother's evaluation of the interpreters was largely based on the fact that they were not proficient in CASE or SEE.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

matters, nor did it present any witness to contradict the Grandmother's testimony on her evaluations of the interpreters. Nor did the District offer documentary evidence of the credentials of the interpreters.

22. For these reasons, the Guardians have established that the District failed to provide adequately skilled CASE interpreters to the Student daily in all school settings, as required by his IEP.[8]

December 2016 IEP Meeting

23. The Student's annual IEP meeting was held in December 2016. It was scheduled to begin at 4:00 p.m. but began at approximately 4:20 p.m. It lasted for over two hours. Sometime during the meeting, the Guardians asked about teaching the Student safety strategies, and mentioned classes called "Stranger Danger" and "Stop-Look-Listen". The Cascade principal said that he would look into the teaching of safety skills, but explained that Cascade was not a comprehensive school and these services may not be offered. D-5. The Guardians also requested that the speech-language pathologist's (SLP's) summary of the Student's present levels of performance be removed from the IEP, as it was based on too little time spent with the Student. The IEP team agreed to it being removed. *See* P-1:4; D-4:6.

24. Approximately 10 to 15 minutes before the end of the meeting, the audiologist and speech-language pathologist were excused with the Guardians' oral permission. By that time, the team had finished discussing almost all of the IEP and had begun discussing the service matrix.

25. The meeting went smoothly until the discussion of the service matrix. The draft IEP's service matrix had the Student in a general education setting 23% of the time. P-1:14. The remainder of his time would be spent in special education settings receiving instruction in reading, written language, math, social/behavior, communication and audiology. *Id.* The District members of the IEP team were not convinced to adopt the Guardians' view that much more of his time should be spent in the general education setting. The final service matrix remained virtually unchanged from the draft, with only 24% of the Student's time to be spent in general education. D-4:17.[9] The Guardians were told about the special education supports that Cascade's Resource Room teacher, Donna Guise, could offer. The Guardians were informed that they could choose which special education services they wanted the Student to receive, but that not all service minutes could be provided if they remained at Cascade.

26. As mentioned above, the Guardians oppose pull-out special education services for the Student, believing he benefits most from general education classes supported by a sign

---

[8] The Student's kindergarten IEP of December 2015 stated he had not yet developed the language and self-regulation skills needed to attend to an interpreter enough to receive academic instruction in the general education setting. J-4:4. His first grade IEP of December 2016 does not contain this statement. *See* D-4.

[9] The 1% reduction in special education time from the draft IEP to the final was made because of the audiologist's schedule. Due to other duties, she was able to serve the Student for less time than stated in the draft IEP.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

language interpreter. The District members of the team, on the other hand, believe the Student requires smaller, structured environments and specially designed instruction provided by a teacher of the deaf[10] in order to make educational progress. They expressed to the Guardians that the Student's needs require a special program for DHH students the majority of the time. The DHH program is located at TOPS. The Guardians had previously rejected that program and had no intention of returning to it. They firmly stated this at the end of the meeting.

27. The Guardians were told that the draft IEP would remain open and not locked for a few more days so that they could provide more input if they wished. The Guardians did not thereafter offer any further input. Neither party proposed holding another IEP meeting.

Content of December 2016 IEP

28. The December 2016 IEP contained the following annual goals in special education. In reading, the student would answer literal reading comprehension question on first-grade passages, improving from the current level of 0% correct responses to 100%. In written language, when given a picture the Student would independently write one sentence about it, improving from the current level of doing this in 0% of opportunities to 100%. In math, the Student would independently solve two-digit addition and subtraction problems, improving from the current level of 0% correct to 100%. In social/behavior the IEP had two goals: (1) The Student would follow adult directions, improving from his current level of doing this 5% of the time to 80%; and (2) The Student would independently use pre-taught calming strategies when experiencing intense emotion, improving from doing this 0% of the time to 80%. D-4.

29. In related services, the IEP's annual goals were as follows. In audiology, the IEP had two goals: (1) The Student would correctly follow two-step directions with primarily auditory cues, improving from being able to do this 0% of the time to 80%; and (2) The Student would accurately recall four out of five items given in an auditory list, improving from his current level of 0% to 80%. In communication, the IEP had four goals: (1) Given a picture prompt, the Student would use the format "pronoun is/are verb+ing," improving from being able to do this 0% of the time to doing it 40% of the time; (2) The Student would respond to "where" questions using the following spatial concepts: in, next to, under, and in front of, improving from being able to do this 0% of the time to 100%; (3) When using objects during play, the Student would follow verbal commands containing the same spatial concepts, improving from being able to do this 0% of the time to 100%; and (4) When given a verbal model and a visual prompt, the Student would imitate consonant-vowel-consonant combinations using six sounds in three-syllable words and three-word phrases, improving articulation from doing this 10% of the time to doing it 80%. *Id.*

30. The service matrix provided that a teacher of the deaf would provide the following number of minutes per week of specially designed instruction in the Student's service areas: reading – 225 minutes; written language – 135 minutes; math – 450 minutes; and social/behavior – 300 minutes. In addition, an instructional assistant would provide 450 minutes of social/behavior instruction. *Id.* In related services, the Student would receive the following

---

[10] A teacher of the deaf is someone who has earned a master's degree in teaching DHH students. The coursework for this degree includes studies in audiology, sign language, speech and language development, and special education. Testimony of Dickneite.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

number of minutes per week of specially designed instruction: communication – 42 minutes from a SLP, plus150 minutes from a teacher of the deaf; and audiology – 21 minutes.[11]

31. The IEP also contains a section on program accommodations and modifications. The only one relevant to the Issues Statement for this hearing is the provision of a CASE sign language interpreter daily in all school settings. D-4:15.

Guardians' Document Requests

32. The Grandmother testified that the Guardians still have not received all of the records and emails concerning the Student, pursuant to their January 2016 and September 2016 document requests. The Grandmother testified about two examples of documents they have not received. One was an email written by Mr. Dickneite in December 2016. However, this was after the last of the Guardians' document requests. Another was notes taken on cell phones at the December 2016 IEP meeting. This meeting also occurred after the Guardians' last document request. Thus, even accepting the Grandmother's testimony, no failure to provide requested documents has been established. The District's response to the Guardians' complaint alleges it has fulfilled all of the Guardians' document requests. The Guardians failed to establish the contrary.

Prior Due Process Proceeding

33. In September 2016, early in the Student's first grade year, the Guardians filed their first due process hearing request against the District. It was assigned cause no. 2016-SE-0093X (and OAH docket no. 09-2016-OSPI-00170). The Issues Statement for that case centered on the Student's education at TOPS, and was as follows:

> The Issues statement below reflects the claims made and remedies requested in the due process hearing complaint, as explained during the prehearing conference. The inclusion of alleged violations of the Individuals with Disabilities Education Act (IDEA) in an Issues statement does not guarantee that they constitute violations of the IDEA. The inclusion of requested remedies in an Issues statement does not guarantee that this tribunal has the authority to award them. The issues for hearing are:
>
> 1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
>
> a. Failing to replace the Student's ear mold that was lost at school in June 2013, resulting in the Student being unable to use one of his hearing aids for up to a week;

[11] The number of minutes per week of services from the audiologist and SLP are expressed in the IEP as, respectively: 30 minutes, three times *per month*, and 30 minutes, six times *per month*. D-4:17. These figures have been converted to minutes *per week* in the text above.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

b. Failing to provide a teaching assistant in the Student's general education kindergarten class who was knowledgeable in SEE, ASL, Cued Speech, and DHH culture;

c. Changing the Student's placement in October 2015 to a room with a teacher, an ASL interpreter, and no other students, in violation of the procedural requirements of the IDEA and its mandate for placement in the least-restrictive environment (LRE);

d. Adopting an inappropriate individualized education program (IEP) in December 2015 that:

(1) failed to provide a teacher or interpreter able to both speak and use Signing Exact English (SEE);
(2) contained vague annual goals that were inappropriate for a person who can speak and is hard of hearing, but not deaf;
(3) placed the Student in a self-contained classroom for the deaf and hard of hearing (DHH) instead of in his LRE, which is a general education setting with a SEE interpreter;
(4) failed to provide the following support programs for the Student: training in SEE, training in American Sign Language (ASL), academic tutoring, and a buddy system;
(5) failed to provide family training in SEE;

e. Failing to provide a functioning FM system and TTY phone for the Student during the 2015-2016 school year;

f. Violating the Student's confidentiality by allowing school volunteers, visitors, and University of Washington students to observe in the Student's DHH class;

g. Violated the Student's confidentiality by allowing District staff members to place information about the Student on their personal cell phones, and failing to provide that cell-phone stored information to the family upon request;

h. Providing ASL interpreters who performed their jobs inappropriately;

i. Failing to check the Student's hearing aids twice daily, as required;

j. Providing false reports to the family concerning the Student's behavior and concerning the twice-daily checking of his hearing aids; and

2. Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate: An order that the District correct all of the deficiencies alleged above and adopt an IEP for the Student that appropriately addresses them.

See First Prehearing Order in cause no. 2016-SE-0093X (October 28, 2016)

34. On December 12, 2016, the parties executed a Resolution Agreement (agreement) settling that case. D-9. The agreement waived and released any and all claims contained in

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

the Guardians' complaint and provided that the Guardians would seek dismissal with prejudice of the case. In exchange, the District agreed to provide seven items of consideration. The agreement stated that it did not constitute an admission of fault on the part of the District. *Id.* Pursuant to the agreement, the due process hearing request was dismissed with prejudice on December 13, 2016. D-10.

NWSDHH and THINK Academic Services

35. In the present case, the Guardians have requested placement at NWSDHH or, in the alternative, tutoring from THINK Academic Services (THINK). No findings are made about the appropriateness of NWSDHH. That is because, as discussed below, full-time private placement is an inappropriate remedy for the District's one violation of the IDEA.

36. As also discussed below, tutoring by a certificated teacher of the deaf who is proficient in CASE is awarded as the appropriate remedy. THINK does not employ a certificated teacher, nor a teacher of the deaf, nor one who is proficient in CASE. No further findings are therefore made concerning THINK.

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 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.

3. *Rowley, supra*, 458 U.S. at 206-207 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley,* 458 U.S. at 200 - 201.

4. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

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

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

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

M.C. v. Antelope Valley Union High Sch. Dist., ___ F.3d ___, 2017 U.S. App. LEXIS 9359, at 22 (9th Cir. 2017).

Burden of Proof

5. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Guardians. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). A parent or guardian is entitled to placement of the student at a private school only if they establish two things: that the district denied the Student a FAPE and that the proposed private school placement is appropriate. *See Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361 (1993).

Res Judicata[12]

6. The District argues that some of the Guardians' claims are barred under the doctrine of *res judicata*. *Res judicata* bars the litigation of claims that were raised, or could have been raised, in a previous case between the parties that reached a final judgment on the merits. *See T.G. v. Baldwin Park Unified Sch. Dist.*, 443 Fed. Appx. 273, 275, 57 IDELR 33 (9th Cir. 2011) (applying *res judicata* in an IDEA case to determine whether decision in first due process hearing barred claims in second due process hearing); *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 859, 726 P.2d 1 (1986).

7. *Res judicata* need not be applied to bar an entire case. It may be applied to bar only certain claims in a later case: claims that were raised, or could have been raised, in an earlier case. *See Noel v. Hall*, 341 F.3d 1148, 1171-1172 (9th Cir. 2003); *Meder v. CCME Corp.*, 7 Wn. App. 801, 807-811, 502 P.2d 1252 (1972), *rev. denied*, 81 Wn.2d 1011 (1973).

---

[12] In its Post-Hearing Brief, the District's *res judicata* argument is presented as motion for judgment as a matter of law under Washington Civil Rules for Superior Court (CR) 41(b)(3). However, CR 41(b)(3) concerns motions made by a defendant *during trial*, after the plaintiff rests their case and before the defendant presents its case. The District did not make such a motion during the hearing. If it had, the tribunal could have either ruled on the motion at that time, or deferred ruling on it until the close of all the evidence. *Id.* For these reasons, the *res judicata* argument is considered alone, without the rubric of a CR 41(b)(3) motion, since no CR 41(b)(3) motion was made during the hearing.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

8. The threshold requirement for *res judicata* is a final judgment on the merits in the prior case. Once that threshold is met, *res judicata* requires sameness of: subject matter; cause of action; people and parties; and the quality of the persons for or against whom the claim is made. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 865-866, 93 P.3d 108 (2004).

9. The threshold requirement of a prior judgment on the merits is met here because the prior case was dismissed *with prejudice*, meaning the same claims could not be filed again. *See Hisle,* 151 Wn.2d at 866, n. 10; *Surface Waters of the Yakima River Drainage Basin v. Yakima Reservation Irrigation Dist.*, 121 Wn.2d 257, 290-291, 850 P.2d 1306 (1993). By contrast, a dismissal *without prejudice* does not constitute a final judgment on the merits and cannot be used to establish *res judicata*, because the dismissed claims may be filed again. *Zarbell v. Bank of America National Trust & Savings Assoc.*, 52 Wn.2d 549, 554, 327 P.2d 436 (1958); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 223, 770 P.2d 182 (1989).

10. Turning to the other requirements for establishing *res judicata*, the parties involved in the two cases are identical: the Guardians and the Seattle School District. Where the parties are identical, the quality of persons in the cases are identical as well, which is another required element for *res judicata*. *See Pederson v. Potter*, 103 Wn. App. 62, 73, 11 P.3d 833 (2000), *rev. denied,* 143 Wn.2d 1006, 25 P.3d 1020 (2001). This disposes of two of the elements for establishing *res judicata*.

11. The remaining two elements (cause-of-action and subject matter) will be discussed with regard to each individual issue below. The determination whether two causes of action (claims) are the same depends on the weighing of four factors: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Hayes v. City of Seattle*, 131 Wn.2d 706, 713, 934 P.2d 1179 (1997). The subject matter requirement is similar to the cause-of-action requirement. *Landry v. Luscher*, 95 Wn. App. 779, 785, 976 P.2d 1274, *rev. denied,* 139 Wn.2d 1006, 989 P.2d 1140 (1999). "[W]hen courts examine subject matter '[t]he critical factors seem to be the nature of the claim or cause of action and the nature of the parties.'" *Hayes,* 131 Wn.2d at 712 (internal citation omitted).

12. What follows is a list of the issues in the present case that are potentially barred by *res judicata*, followed by a determination as to whether the cause-of-action and subject matter requirements for *res judicata* have been met so that they are, in fact, barred.

13. *Failing to provide the Guardians documents they requested.* (Issue 1.e, above). The Guardians' document requests were made in January and September 2016. School districts have up to forty-five days to respond to requests for educational records under the IDEA. *See* WAC 392-172A-05190; *see also* 34 CFR §300.613. Even if the Guardians' second document request was made at the *end* of September 2016, their claim for an alleged records denial accrued forty-five days later, on November 14, 2016. It could have been included by amendment in the prior case, which was not dismissed until a month later, on December 13, 2016. The failure to provide documents claim therefore could have been raised in the prior proceeding. Turning to whether the cause-of-action and subject matter requirements for *res judicata* have been met with regard to the document request claim: (1) no rights or interests

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

established in the prior judgment would be impaired by allowing this claim to proceed, since the prior judgment was simply a dismissal that did not rule on any rights or interests; (2) substantially the same evidence would not be presented in the two actions, because the document request claim is distinct and different from any of the claims in the prior case; (3) the two proceedings do not involve infringement of the same rights, as the document access right is distinct from the rights pursued in the prior case, albeit both arise under the IDEA; and (4) the two proceedings do not arise out of the same transactional nucleus of facts, since document request and production are a distinct set of facts from those involved in the prior proceeding. For these reasons, the Guardians' claim regarding failure to provide them with requested documents is not barred by *res judicata*.

14. *Incorrectly labeling the Student as having learning disabilities, instead of having skill deficiencies.* (Issue 1.h, above). The alleged labeling of the Student as having learning disabilities rather than skill deficiencies is a claim that pertains to the Student's evaluation. It is in evaluations that children's disabilities are determined. *See* 20 USC §1414(a)(1)(C)(i)(I).[13]

15. The Student's most recent reevaluation was completed in November 2015. The Guardians' prior due process complaint was not filed until 10 month later, in September 2016. A claim regarding labeling the Student as having a certain disability could have been brought in the prior proceeding. Turning to whether the cause-of-action and subject matter requirements for *res judicata* have been met with regard to this claim: (1) no rights or interests established in the prior judgment would be impaired by allowing this claim to proceed, since the prior judgment was simply a dismissal, as discussed above; (2) substantially the same evidence would be presented in the two actions: evidence concerning the Student's academic performance and educational needs; (3) both proceedings involve infringement of the same right to FAPE under the same statute, the IDEA, during the same period: the two years preceding the filing of the complaint in September 2016; and (4) the two cases arose out of the same transactional nucleus of facts, for the reasons stated under factors (2) and (3). Since three of the four factors to be considered when determining the cause-of-action element weigh in favor of that element being established, it is found that it has been established. The subject matter element is really not distinct in this case from the cause-of-action element. It, too, is found to be established. All of the requirements for *res judicata* having been met with regard to this claim, it is barred.

16. *Asking the Guardians and school staff[14] to falsely state that the Student's behavior impedes his learning in order to obtain an additional staff person for his classroom.* (Part of Issue 1.j, above). This claim is substantially similar to one actually brought in the prior case. In that case, the Guardians claimed that the District violated the IDEA and denied the Student a

---

[13] The Guardians have not pointed out where in the evaluation, or in any other document, the District has stated the Student has a learning disability. The only disability mentioned is a hearing impairment. The fact that the Student requires specially designed instruction in academics is not the same as finding that he has a learning disability. *See* WAC 392-172A-03045 through -03080; *see also* 34 CFR §300.307 through §300.311. In any event, such a claim is barred by *res judicata* for the reasons explained in text.

[14] This claim explicitly includes school staff at both TOPS and Cascade. *See* Issue 1.i, above. Any part of the claim that concerns events at Cascade that occurred *after* December 13, 2016 (the date the prior case was dismissed) are not subject to the discussion that follows. Events after that date are not barred by *res judicata*.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

FAPE by "[p]roviding false reports to the family concerning the Student's behavior". The fact that the new claim mentions a motivation for the alleged misdeed (to obtain an additional staff person) is irrelevant. The IDEA does not concern itself with motivations, unlike other causes of action frequently brought against school districts on behalf of students with disabilities, such as Section 504 and the Americans with Disabilities Act.[15] The claims in both cases are virtually identical and no factor-by-factor analysis needs to be performed. This claim was brought in the prior case, dismissed with prejudice, and is therefore barred by *res judicata*. As mentioned in footnote, only events through December 13, 2016 (the date the prior case was dismissed) are barred; events after that date are unaffected by *res judicata*.

17. *Failing to include needed services in the December 2016 IEP.* (Issue 1.b, above) In the prior case, the Guardians challenged the appropriateness of the *December 2015* IEP. In the present case, they challenge the appropriateness of the successor IEP of December 2016. The District argues that the two IEPs are very similar, so the cause-of-action and subject matter requirements for *res judicata* are met. This argument is not accepted. The Student's educational needs may be different from one year to the next. That is precisely why IEPs must be reviewed annually. *See* 20 USC §1414(d)(4); 34 CFR §300.324; WAC 392-172A-03110(3). Also, parents and guardians should be free to argue that re-adopting the same IEP provisions may indicate the successor IEP team failed to actually review the student's progress and evolving needs. For these reasons, this claim is not barred by *res judicata*.

18. *Failing to provide SEE interpreters, and instead providing ASL interpreters and unskilled CASE interpreters.* (Issue 1.k, above). A claim that inappropriate interpreter services were provided after December 13, 2016 (the date the prior case was dismissed) is not barred by *res judicata*. However, part of that claim is barred for a different reason.

19. The resolution agreement in the prior case required the District to: "Revise the Student's IEP to provide interpreter services in Signed Exact English instead of CASE . . . " D-9:2. To the extent the District failed to comply with this requirement, the Guardians have two potential remedies: a Citizen's Complaint to OSPI for enforcement of the resolution agreement, *see* WAC 392-172A-05025(2); *see also* 34 CFR §300.537; or a lawsuit in court for breach of the resolution agreement. *See* WAC 392-172A-05090(4)(a)(ii); *see also* 34 CFR §300.510. The resolution agreement itself states that it is "legally binding" and "enforceable in any court of competent jurisdiction." D-9:2.

20. This tribunal, by contrast, lacks jurisdiction to enforce the terms of a resolution agreement, which is a private contract. *See Seattle Sch. Dist. 2014-SE-0071*, 115 LRP 54788 (SEA WA 2015). Breach of contract is not a statutory IDEA claim, the only type of claim over which this tribunal has jurisdiction. For these reasons, the Guardians' claim of failing to provide SEE interpreters will not be considered.

21. The portion of the Guardians' claim that concerns not *SEE* interpreters, but the absence of adequately skilled *CASE* interpreters, is subject to a different analysis. It is a classic claim of failure to implement an IEP that falls within this tribunal's jurisdiction. The Student's December

---

[15] *See* Section 504 of the Rehabilitation Act of 1973, 42 USC §12131 *et seq.*; Title II of the Americans with Disabilities Act, 29 USC §701 *et seq.*

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

2016 IEP required the provision of CASE interpreters daily in all school settings. Any claim of failure to implement this requirement after December 13, 2016 (the date the prior case was dismissed) is not barred by *res judicata*.

The Guardians' Remaining Claims

22. The Guardians' claims that are not barred by *res judicata* and that are within the jurisdiction of this tribunal are addressed below.

Failing to provide the Guardians the opportunity to fully participate in the December 2016 IEP meeting (Issue 1.a, above)

23. The Guardians have not established any violation of the IDEA on this claim. The claim has various sub-parts, which are examined in turn. First, they claim the District prematurely ended the IEP meeting. The meeting was approximately two hours long and covered every aspect of the IEP. The parties simply disagreed about the last aspect that was discussed: the service matrix. However, the IEP was left open for several days following the meeting, and the Guardians were encouraged to offer any further input they wished before the IEP was finalized. The Guardians offered no further input and requested no further meeting.

24. Next, the Guardians claim the District members of the team predetermined decisions prior to the meeting. School members of an IEP team are not required to come to the table with a "blank mind" regarding what they think should be in an IEP, but they must listen to parents' views with an "open mind". *See D.M. v. Seattle Sch. Dist.*, 2016 U.S. Dist. LEXIS 122519, 68 IDELR 165 (W.D. WA 2016); *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992), *cited with approval in K.D. v. Hawaii Dept. of Educ.*, 665 F.3d 1110, 1123 (9th Cir. 2011). What is prohibited is entering an IEP meeting with a decision already finalized, with a "take-it-or-leave-it" approach. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003).

25. School members of the team may come to the table "with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions." *Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 610 (6th Cir. 2006) (internal citation omitted). In *M.C.E. v. Bd. of Educ. of Frederick County*, 2011 U.S. Dist. LEXIS 74266, 57 IDELR 44 (D. Md. 2011), the court found the parents were given meaningful input regarding the student's placement and no predetermination was found:

> Though the school board may have come to the meeting with the idea that the Pyramid Program was the best place for M.C.E., that is not a violation of the IDEA. . . . [The board] came prepared to recommend placing M.C.E. at the Pyramid Program, but had not predetermined where she would go.

Id.

26. The Guardians have not carried their burden of proof that the District members of the IEP team took a take-it-or-leave it approach to the IEP. The only real point of conflict over the IEP concerned the service matrix. The fact that the Guardians were unable to persuade the other members of the IEP team that the Student did not need specially designed instruction, and

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

should instead be taught in general education classes with an interpreter, in no way establishes that the District predetermined the IEP. Parents and guardians do not have veto power over individual provisions or the right to dictate any particular educational program. *Ms. S.*, 337 F.3d at 1131.

27. The Guardians also claim the school members of the IEP team provided false and vague information at the IEP meeting and in the three months leading up to the meeting, and included false documentation in the IEP. The Guardians have not carried their burden of proof on these matters, and it is unclear what information or documentation the Guardians are referring to. To the extent they are referring to information about the Student's behavior, school staff's accounts of his behavior have been credited over the Grandmother's account of his behavior. *See* Findings of Fact, above.

28. The Guardians next claim they were denied the opportunity to fully participate in the IEP meeting because school staff refused to provide them with copies of all team member notes from the meeting. First, the Guardians have not established that they made a records request for such notes, if they exist. The last records request they made was in September 2016, several months before the December 2016 IEP meeting. Second, the Guardians have not established that personal notes taken by school staff come within the definition of education records that parents and guardians must be provided upon request. Education records subject to such disclosure do *not* include: "Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record." 34 CFR 99.3(b)(1).[16] The Guardians failed to elicit testimony from any witness that "education records" subject to disclosure (and not exempted by the provision quoted above) were in fact created at the IEP meeting or shortly thereafter.

29. The Guardians also claim that the District finalized the IEP when the Guardians were led to believe there would be another IEP meeting before it was finalized. No witness, including the Guardians, testified that there was any discussion or proposal for another IEP meeting. The Guardians were, however, given the opportunity to provide further input about the draft IEP for several days after the meeting. They did not provide any further input.

30. The Guardians next claim they were denied participation rights at the IEP meeting because the Student's teacher, Ms. Janssen, did not mention all of the Student's outside services at the IEP meeting. Assuming Ms. Janssen did not mention these things, no violation of the IDEA has been established. There is nothing in the IDEA requiring IEP teams to discuss that portion of a child's education that is provided not by the District but by homeschooling. Also, the Guardians had a full opportunity to mention these outside services during the meeting if they believed them pertinent to something discussed in the meeting.

31. Finally, the Guardians claim they were denied participation rights at the IEP meeting because the Cascade special education teacher, Ms. Guise, criticized the Grandmother for

---

[16] This regulation is under the Family Educational Rights and Privacy Act (FERPA), 20 USC §1232g. The IDEA's definition of educational records adopts the FERPA definition. *See* WAC 392-172A-05180; *see also* 34 CFR §300.611.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

talking with the Student in the hallway, whereas other parents do this without criticism. The Grandmother did not testify about any such event during the hearing. An unsworn allegation in a complaint does not constitute evidence on which a finding can be based. Even if the Grandmother had testified to this allegation, it would not have established any IDEA violation.

32. For all of these reasons, the Guardians have not carried their burden of proof that they were denied the opportunity to fully participate in the December 2016 IEP meeting.

Failing to include needed services in the December 2016 IEP (Issue 1.b, above)

33. It is unclear what services the Guardians are referring to with this claim. They presented evidence that SEE interpreters were not provided and alleged this was a needed service. However, as discussed above, this claim was included in the parties' resolution agreement and the tribunal lacks jurisdiction to enforce resolution agreements. The Guardians also testified that no safety classes were provided at Cascade, and they allege the Student needed such classes. However, this is not an area of special education or related services covered by the IDEA. Though highly unusual, a child's IEP might include such services if the IEP team determined they were necessary in order for the child to receive a FAPE. The Guardians did not establish that such classes were necessary in order for the Student to receive a FAPE.

34. For these reasons, the Guardians have not carried their burden of proof that the December 2016 IEP failed to include needed services.

Failing to provide specially designed instruction to the Student at Cascade (Issue 1.c, above)

35. Throughout the Student's time at Cascade, the Guardians have explicitly rejected specially designed instruction other than from the audiologist (and on two brief occasions, from the speech-language pathologist). It would be unlawful for Cascade to provide services to students where parents or guardians have withdrawn consent for services. *See* WAC 392-172A-03000(2)(e); *see also* 34 CFR §300.300. The regulations further provide that when parents revoke consent for special education and related services, school districts:

> Will not be considered to be in violation of the requirement to make FAPE available to the student because of the failure to provide the student with further special education and related services;

WAC 392-172A-03000(2)(e)(iii); *see also* 34 CFR §300.300.

36. For these reasons, the Guardians have not carried their burden of proof that the District violated the IDEA by failing to provide specially designed instruction to the Student at Cascade.

Failing to have Stranger Danger and Stop-Look-Listen classes taught by DHH educators

37. As discussed above, such safety classes are not an area of special education or related services covered by the IDEA, and the Guardians have not proven such classes are required in order for the Student to receive a FAPE. It is also noted that the Student is being homeschooled. He only takes three classes at Cascade: Language Arts, Math and Art. The Guardians cite no legal authority requiring a part-time, homeschool partnership program like Cascade to offer every non-academic class that a homeschool parent might desire.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

38. For these reasons, the Guardians have not carried their burden of proof that the District violated the IDEA by failing to have Stranger Danger and Stop-Look-Listen classes taught by DHH educators.

Failing to provide requested documents (Issue 1.e)

39. As stated in the Findings of Fact, the Guardians have carried their burden of proving that that any requested documents were withheld from them.

Failing to disclose to the Guardians the sliding scale behavior policy implemented at Cascade in November 2016 (Issue 1.f, above)

40. The Guardians cite no legal authority that all classroom tools must be disclosed to parents and guardians in advance. Here the school did daily behavior ratings on a wide swath of students, on a 1 to 4 scale, to determine which classrooms were most in need of the IA assistance available at Cascade. The taking of such data did not implicate the Student's IEP. There is no evidence that school staff abandoned the Student's IEP goals in the social/behavior area when they implemented the daily behavior ratings for all students.

41. For these reasons, the Guardians have not carried their burden of proof that the District violated the IDEA by failing to disclose to them the sliding scale behavior policy implemented at Cascade in November 2016.

Failing to identify for the Guardians who the Cascade special education teacher was after August 2016 (Issue 1.g, above)

42. This claim is puzzling. The Guardians had rejected, in February 2016, all special education services that might have been provided by Cascade's special education teacher. They did this long before there was an alleged change in that position in August 2016, with the arrival of Ms. Guise. Ms. Guise subsequently attended the Student's IEP meeting in early December 2016. Between August and December 2016, if the Guardians did not know the identity of Cascade's special education teacher, they could have asked. The District had no duty to inform the Guardians of the name of the new special education teacher given that the Guardians had revoked consent for all special education services.

43. For this reason, the Guardians have not carried their burden of proof that the District violated the IDEA by failing to identify for them who the Cascade special education teacher was after August 2016.

Asking the Guardians and staff at Cascade to falsely state that the Student's behavior impeded his learning in order to obtain an additional staff person for his classroom (Issue 1.i, above)

44. As discussed above, this claim is barred by *res judicata* for all such events alleged to have occurred through the date of December 13, 2016. Regarding such events after that date, it has been found that they did not occur. *See* Findings of Fact, above.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

45. For this reason, the Guardians have not carried their burden of proof that the District violated the IDEA by asking them and Cascade staff to falsely state that the Student's behavior impeded his learning.

Treating the Guardians with disrespect for asking questions and seeking information about the Student's education, and discouraging the Grandmother from being present in the Student's classroom in the future (Issue 1.j, above)

46. The Guardians offered little if any evidence to support this claim. However, even if they had, it would not establish a violation of the IDEA. There is nothing in that statute that makes disrespectful responses to questions into a violation of the IDEA. Treating parents or guardians with disrespect would violate that statute and deny FAPE if it rose to the level of "significantly imped[ing] the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child." 20 USC §1415(f)(3)(E)(ii). There is no such evidence in this case.

47. Testimony from school staff was very supportive of the Grandmother's presence in the classroom, and in fact Cascade *requires* parent or guardian presence where a student has intensive IEP needs and the student is attending a general education class. To the extent any staff person may have stated to the Grandmother that it would not be advisable for her to be a constant presence in the Student's classroom forever, there is nothing in the IDEA that is violated by such a statement.

48. For this reason, the Guardians have not carried their burden of proof that the District violated the IDEA by treating them with disrespect for asking questions and seeking information, or by discouraging the Grandmother from being present in the Student's classroom in the future.

Providing ASL interpreters and unskilled CASE interpreters (Issue 1.k, above)

49. As discussed in the Findings of Fact, the Guardians have established that the Student was not provided with adequately skilled CASE interpreters during the period that remains at issue (after the December 13, 2016 dismissal of the prior case). This constituted a failure to implement his IEP, which required CASE interpreters daily in all settings.

50. Material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007). There was uncontradicted testimony from both parties that the Student does not benefit from auditory instruction in the classroom without sign language support. Based on this, and based on the fact that his IEP requires CASE interpretation daily in all school settings (not just "as needed" or in large-group activities), it is found that the failure to implement this provision was not merely a minor discrepancy, but was material.

51. It is determined that the appropriate remedy for this violation is 40 hours of academic tutoring by a certificated teacher of the deaf who both speaks and is proficient in CASE. The tutor must be able to support his or her own speech by signing in CASE. (The tutor need not be capable of simultaneously translating for another speaker; that is an additional and higher level of skill.) The number of hours of tutoring is selected in light of the fact that the Student only attends school 12 hours per week, and the period of violation is only half of one school year:

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

December 14, 2016 (the day after the prior case was dismissed) through June 23, 2017 (the end of the current school year).[17] It is also selected in light of the fact that some of the Student's interpreters were very adequate, according to the Guardians, while others were not.

52. The location for tutoring is not required to be at Cascade. This is because the Student is only at Cascade part-time, and the Guardians take him to many different locations in the community for other activities and services. The location for tutoring may be at TOPS or at any school district location within a reasonable distance from the Student's home or from Cascade. The District is responsible for transportation to and from the tutoring location, either by providing it directly or by reimbursing the Guardians at the federal mileage reimbursement rate if the Guardians choose to transport the Student themselves.

53. If the Student misses a tutoring appointment with less than 24 hours' advance notice, it will count against the award of 40 hours unless the cancellation was due to an unforeseeable urgent event. If the tutor cancels or misses a tutoring appointment for any reason, it will not count against the award of 40 hours.

54. The requested remedy of placement at a private school, NWSDHH, would be disproportionate to the District's violation. Moreover, the District offered the Student FAPE in a DHH program, but the Guardians declined that offer and chose to homeschool the Student with supplementary non-DHH classes at Cascade. Under these circumstances, placement in a private DHH school will not be awarded.

Determining that the Student is misbehaving when playing the math game Dice, while other students engage in the same behavior but are not determined to be misbehaving (Issue 1.I, above)

55. As discussed in the Findings of Fact, above, the Guardians have not carried their burden of proving the factual basis for this claim.

56. 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

a. The District violated the IDEA by failing to provide adequately skilled CASE interpreters daily in all school settings, as required by the Student's IEP. The period of violation is December 14, 2016 through June 23, 2017.[18]

---

[17] This decision is being issued on June 9, 2017. If the District is able to provide proficient CASE interpreters for the Student for some of the days prior to June 23, 2017, the period of violation will be slightly shorter.

[18] See footnote 17, above.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

b. As the remedy for this violation, the Guardians are awarded forty (40) hours of academic tutoring to be provided by a certificated teacher of the deaf who both speaks and is proficient in CASE. The terms of this award are set forth in the Conclusions of Law, above.

c. The Guardians have established no other violation of the IDEA.

Signed at Seattle, Washington on June 9, 2017.

Michelle C. Mentzer
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.

Guardians
[redacted]

Andrea Schiers, Assistant General Counsel
Seattle Public Schools
PO Box 34165, MS 32-151
Seattle, WA 98124-1165

Tracy Miller, Attorney at Law
Karr Tuttle Campbell
701 Fifth Avenue, Suite 3300
Seattle, WA 98104

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

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135