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

April 5, 2018

Parents
[redacted]

John Sander, Executive Director of Inclusive Education Services
Kent School District
12033 SE 256th Street
Kent, WA 98030-6643

Ann M. Carey, Attorney at Law
Carey & Lillevik, PLLC
1809 7th Avenue, Suite 1609
Seattle, WA 98101

David Hokit, Attorney at Law
Curran Law Firm
PO Box 140
Kent, WA 98035

In re: Kent School District
OSPI Cause No. 2017-SE-0081
OAH Docket No. 08-2017-OSPI-00383

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. 2017-SE-0081
	OAH DOCKET NO. 08-2017-OSPI-00383
KENT SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

For translation of this document, please call OAH, 1-800-583-8271. [redacted] OAH, 1-800-583-8271.[1]

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Kent, Washington, on February 13, 2018. The Parents of the Student whose education is at issue[2] appeared and were represented by Ann Carey, attorney at law. The Parents were assisted by a foreign language interpreter.[3] The Kent School District (District) was represented by David Hokit, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (complaint) on August 28, 2017. Prehearing conferences were held on September 6 and December 14, 2017. Prehearing orders were entered on September 7, November 29, December 1, 2017 and January 16, 2018. An order setting the date for closing arguments was entered on February 15, 2018.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to a joint request for continuance. *See* First Prehearing Order of September 7, 2017. The hearing record closed on March 8, 2018, with the delivery of an oral closing argument by the Parents and the filing of a written closing argument by the District. Thirty days after March 8, 2018 is April 7, 2018. The due date for the written decision is therefore April 7, 2018.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J-1 through J-6;

[1] To provide greater confidentiality for the family, the Office of Administrative Hearings will request that OSPI redact the foreign language identified here before posting this decision on its website.

[2] In the interest of preserving family privacy, the names of all family members of the Student are omitted from this decision. Instead, they are identified as, e.g., "Parents," "Mother," "Father," "Student," or "Sibling."

[3] The foreign language spoken by the Parents is omitted to provide greater confidentiality for the family.

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

Parent Exhibits: P-1 through P-4; P-9; and P-12;
District Exhibits: D-1 through D-3.

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

The Mother of the Student;
The Father of the Student;
Shelley Vessey, District physical therapist;
Randy Furukawa, District physical education teacher;
Amanda Gornick, District physical education teacher; and
John Sander, District Executive Director of Inclusive Education Services.

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 hold an individualized education program (IEP) meeting with the Parents before issuing a prior written notice on August 17, 2017, adopting an IEP effective August 31, 2017;

   b. Failing to implement the physical therapy portion of the Student's prior IEP beginning in late-October 2016;

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

   a. An order that the District promptly convene an IEP meeting facilitated by Sound Options to develop an IEP for the Student; and

   b. Compensatory education for failing to implement the Student's physical therapy services beginning in late-October 2016.

First Prehearing Order, September 7, 2017.

On January 16, 2018, the Order on Parents' Stay-put Motion and Motion for Summary Judgment (Order on Summary Judgment) was entered. It affected the issues for the due process hearing. No issue was dismissed, but certain findings were made which narrowed the fact-finding to be done at the due process hearing. The Order on Summary Judgment decided as follows:

a. The Parents have established as a matter of law that the District committed a procedural violation of the IDEA by issuing the August 17, 2017 Prior Written Notice changing the Student's placement from her stay-put placement to a different placement. The Parents

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

have not met their burden of proof on summary judgment that this procedural violation resulted in a denial of FAPE.

b. The Parents have established as a matter of law that the District failed to implement the physical therapy provisions of the Student's IEP during the periods October 25, 2016 through November 20, 2016, and December 6, 2016 through November 8, 2017. The Parents have not met their burden of proof on summary judgment that this was a material, as opposed to a minor, failure to implement, and therefore have not established a violation of the IDEA on this claim.

Order on Summary Judgment, January 16, 2018, at pp. 22 – 23.

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. This case is related to a prior case between the same parties. The decision in the prior case was issued on August 10, 2017, by the undersigned ALJ. It is referred to herein as the Prior Decision and is incorporated by reference.[4] Its findings and conclusions are summarized below as needed to understand the present decision.

2. The Student is now eight years old. The current school year, 2017-2018, is her second-grade year. She is being home-schooled this year. Testimony of Mother. Previously, the Student attended school in the Kent School District (District) for preschool, kindergarten and first grade. Prior Decision, Findings of Fact 2, 6 and 7.

3. Throughout her years in the District, the Student has been eligible for special education and related services under the category Developmental Delay. The Student lives with her Parents and an older sibling. The primary language spoken in the home is a foreign language. Prior Decision, Finding of Fact 1. The Mother was an elementary school teacher for nine years in her native country, but was not trained in special education. Testimony of Mother; P-12:5.[5]

4. During the summers of 2016 and 2017, the Student participated in a private gymnastics class. Over the two summers she progressed from saying "no," sitting and observing the class, and being very anxious about participating, to ultimately doing the entire set of exercises with the other children. The staff at the gym made modifications for the Student to encourage her

---

[4] The Prior Decision, *Kent School District*, cause no. 2016-SE-0111 (OAH docket no. 12-2016-OSPI-00204), is available on OSPI's website at: http://www.k12.wa.us/ProfPractices/adminresources/SpecEdDecisions/2016/2016SE0111.pdf

[5] Citations to the exhibits are in the following format. "P-12:5" refers to Parent Exhibit 12, page 5.

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

participation. The Student also receives private physical therapy (PT) and aqua therapy services. Testimony of Mother; Testimony of Father.

Prior Decision

5. The Prior Decision found that during adoption of the Student's November 2016 IEP, the District committed five procedural violations, each of which denied the Student FAPE.[6] First, the District failed to notify the Parents, prior to the November 2016 IEP meeting, that one of the purposes of the meeting was to determine the Student's placement. This was a violation of WAC 392-172A-03100(3)(a). The District engaged in a course of conduct, including deliberate misrepresentation by the school psychologist, that allowed the Mother to walk into the IEP meeting unaware that the District was going to discuss a change of placement which the parties knew, from the prior year, the Mother would vehemently oppose. Had the Mother known this topic was on the agenda, she would have requested two weeks to prepare for the meeting, would have brought extensive records to share at the meeting, and would have wanted time to question each member of the IEP team individually about their views on placement. Prior Decision, Conclusions of Law 12 – 18. The District's course of conduct was aimed from the start at blunting the Mother's ability to fight a change of placement that the District wanted to adopt. *Id.*, Conclusion of Law 23.

6. Second, the District failed to obtain written parental consent for the Student's general education teacher to be excused early from the November 2016 IEP meeting, in violation of 20 USC §1414(d)(1)(C). The Student was in the general education setting 80% of the time. At issue in the placement decision was whether she should remain in this mostly general education placement at her neighborhood school, or should be moved to a special education Support Center at a different school, where her general education participation would be reduced to 53%. The member of the IEP team who knew the most about the Student's general education placement was her general education teacher. Yet that teacher was absent for much or all of the discussion about placement. *Id.*, Conclusions of Law 24 – 27.

7. Third, by allowing only five to ten minutes at the November 2016 IEP meeting to discuss the Student's placement, the District denied the Parents the opportunity to meaningfully participate in decision-making about that placement. *Id.,* Conclusions of Law 34 – 38.

8. Fourth, the District made the decision to change the Student's placement after the IEP meeting had ended, and outside the presence of the IEP team, in violation of WAC 392-172A-03090(1), WAC 392-172A-03110(2)(d), and WAC 392-172A-03115. *Id.*, Conclusions of Law 39 – 41. During the five-to-ten minute discussion of placement at the November 2016 IEP meeting, no placement decision was stated, and the matter was left open pending a determination whether the Student could remain in her current 80% general education placement and repeat first grade there. *Id.,* Findings of Fact 58 – 60.

---

[6] Although the Prior Decision has been incorporated by reference herein, the procedural violations found in that case are summarized here as background for understanding a dispute in the present case: Whether the IEP meeting held in November 2016, together with the remedies awarded by the ALJ in the Prior Decision, made another IEP meeting unnecessary before the District could implement the placement it had selected in November 2016.

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

9. Fifth, the District provided written notice of the change of placement four days after the change was effective, in violation of 20 USC §1415(b)(3). The Parents were entitled to receive *prior* written notice of the change, and were entitled to receive it a reasonable time before its effective date. *Id.*, and WAC 392-172A-05010(1). Instead, they received it four days after the change was effective. *Id.*, Conclusions of Law 42 – 46.

10. On the substantive issue the Parents asked the ALJ to decide in the prior case – whether the Support Center placement was inappropriate for the Student – the Parents did not carry their burden of proof. The Parents presented limited and outdated evidence. Their evidence consisted of a single observation of a Support Center by the Mother, which observation lasted only one hour, took place a year and a half before the change-of-placement was adopted, and included only one of the two elementary-level Support Centers. Moreover, during the observation, the Mother and the preschool teacher who accompanied her drew the teacher away from her duties by conversing with her, influencing what occurred in the classroom. Subsequent to the Mother's visit, the District took steps to improve the Support Center program and told the Mother this, but neither the Mother nor anyone on her behalf observed at a Support Center again. At the hearing, the Parents called no Support Center teacher or supervisor as a witness. Neither did the District. The District offered testimony from no one who had observed either of the Support Centers, other than the preschool teacher who accompanied the Mother on her outdated observation. No one on the Student's IEP team other than the Mother had ever visited a Support Center. *Id.*, Conclusions of Law 50 – 62.

11. The Prior decision found the Student's current placement of 80% general education participation was inappropriate for her. It further found that adding a one-on-one paraeducator to that placement would render it inappropriate for other reasons. However, this is not equivalent to a finding that the Support Center was appropriate. The evidence on the Support Center was so scant that the only conclusion that could be drawn was that its lower student-to-staff ratio would be better for the Student than the ratio in her general education class. Prior Decision, Conclusions of Law 51 – 59.

12. Given the paucity of evidence from both parties, the Prior Decision concluded that the party with the burden of proof on the appropriateness of the Support Center placement – the Parents – had not met that burden. *Id.,* Conclusion of Law 62.

13. The Prior Decision awarded 106 hours of compensatory education tutoring for the five procedural violations of the IDEA that denied the Student FAPE. It also ordered the District to provide four hours of training to staff involved in the case concerning the IDEA's requirements on parental participation. Finally, it ordered that a facilitator from Sound Options be used at the Student's next IEP meeting to promote communication between the parties and to discourage them from maintaining fixed positions. *Id.,* Conclusions of Law 63 – 86, and Order. Sound Options asks all parties to commit to a half-day (three to four hours) for a facilitated IEP meeting.[7]

14. The Prior Decision said nothing about when the next IEP meeting must occur, only that it must utilize a Sound Options facilitator. The parties could wait until the Student's annual IEP meeting came due a few months later, in November 2017, unless they chose to meet sooner or

---

[7] *See* stipulation by the parties of February 21, 2018, in case file in the present case.

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

there was a need to meet sooner pursuant to 20 USC § 1414(d)(4)(A). *See* WAC 392-172A-03110(3); 34 CFR § 300.324.

Present Case[8]

Facts Regarding Issue 1.a. -- Failing to hold IEP meeting before issuing the August 17, 2017 PWN that adopted an IEP effective August 31, 2017

15. On August 17, 2017, one week after the Prior Decision was issued, the District sent the Parents a prior written notice (PWN) by US mail. J-1. The PWN notified the Parents that the District would put the November 2016 IEP into effect on August 31, 2017, the first day of school. The PWN included the following: "As ordered in the [Prior Decision] the parents did not establish that the District adopted an inappropriate placement in November of 2016." *Id.* The PWN notified the Parents that the Student's placement would change to the Support Center at Soos Creek Elementary School (the same placement the District adopted in November 2016), but the District would consider Support Centers at other elementary schools if the Parents made that request. *Id.* The District sent the PWN in part because it did not want the family showing up at the neighborhood school on the first day of class. Testimony of Sander.

16. The District sent the August 17, 2017 PWN without communicating with the Parents or their attorney, and without inquiring whether the Parents planned to appeal the Prior Decision. Testimony of Sander; Testimony of Mother; Testimony of Father; P-12:14.

17. Also on August 17, 2017, Parents' counsel emailed a letter to District counsel inquiring about the next steps to implement the Prior Decision. P-2. Neither the Parents nor their counsel were aware of the District's PWN of the same date at the time counsel's letter was emailed. (The PWN was sent by US mail, not by email.) Testimony of Mother. Parents' counsel's August 17th letter included a request for an IEP meeting to plan for the upcoming school year, and asked whether the District intended to appeal the Prior Decision. The letter did not state whether the Parents intended to appeal it. P-2.

18. On August 18, 2017, District counsel emailed a letter in reply. The letter stated the District did not plan to appeal the Prior Decision, but if the Parents appealed it the District would consider a cross-appeal. P-3. District counsel's letter also stated:

> The school district is willing to initiate contact with Sound Options, once it is determined when an IEP meeting will take place.
>
> I have attached a copy of the prior written notice that was sent to the parents yesterday. It reflects the school district's intent to implement the IEP developed on November 14, 2016, which includes the change of placement to a Support Center program. The IEP team will include folks from the Support Center program,

---

[8] Many of the Findings of Fact in this section are based on findings made in the Order on Summary Judgment of January 16, 2018. However, changes are made herein based on additional evidence received at the due process hearing. Also, different exhibit numbering was used at the hearing than had been used in the summary judgment motion.

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

> and the IEP team meeting will need to be scheduled for a date when employees have returned to work.

Id. District teachers would return to work from summer break on August 28, 2017. The first day of school would be August 31st. Order on Summary Judgment, Finding of Fact 9.

19. The District's Director of Inclusive Education Services, John Sander, explained how the Student's IEP meeting would be scheduled:

> [W]e would need to wait until teachers and staff returned from summer vacation and were back to work in order to schedule that meeting. . . .
>
> We would have identified, I think, first who the participants in that meeting would have been. We would have consulted on what the – the set schedule for those days when staff returned to work. There are already prescheduled trainings and orientations and those pieces that they are required to attend.

RP 167 (Sander).[9]

> [O]nce we found several possible dates that were mutually agreed upon, we would contact Sound Options and determine which, if any, of those dates they were available to work with us.

RP 166-167 (Sander).

20. The Parents were shocked by the District's August 17, 2017 PWN. They thought an IEP meeting facilitated by Sound Options was required before the District could decide the Student's placement. Testimony of Mother; Testimony of Father. The Mother believed a facilitator from Sound Options would help the IEP team reach a mutually acceptable placement for the Student:

> I understood the value of having an assigned specialist . . . who would be able to help us create a plan and a vision for the future that would both satisfy the school district and myself.
>
> . . .
>
> The main idea was to have myself heard at the IEP, that this Sound Options agency would be able to assist me in making my views heard at the IEP and finally a decision would be made with my input.
>
> . . .
>
> So the Sound Options would facilitate the discussion of the IEP team so that every member of the IEP team would be able to speak up, would be able to express their opinion as to why this self-contained placement would be the best for my daughter, as to why her development would be best facilitated by that placement or the other placement. For example, the speech therapist would be able to express in the presence of a specialist their view as to why self-contained classroom is the most

---

[9] Citations to the Report of Proceedings (transcript) are in the following format. "RP 167 (Sander)" refers to Report of Proceedings page 167, during the testimony of Mr. Sander.

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

appropriate placement for my daughter's vocabulary development. And Sound Options would be essentially a facilitator. . . . They would allow me to be heard, allow for me to be heard. And when the IEP team makes its decision, they would actually include the input of all of its members, and my input as well.

RP 24-25; 48; 57-58 (Mother).

21. Mr. Sander had a very different plan for the facilitated IEP meeting. He testified it would include staff from Soos Creek "*which would be the site that would be implementing the IEP.*" Staff who knew the Student from her neighborhood school would be there "to assist in *transitioning*" her to the Support Center and answering questions. RP 164 (Sander) (italics added). Mr. Sander further explained that he issued the August 17th PWN because he "wanted to be clear that we were implementing this IEP, and *that required the change of school.*" RP 164-165 (Sander) (italics added). He further testified on cross-examination:

Q: [B]y August 18th you were aware of the [Parents'] request for an IEP?
A: That's what I remember.
Q: IEP meeting.
And you discussed your vision for that IEP meeting.[10] So there's no question in your mind that her placement as of October 31st [sic – August 31st] would be Soos Creek; is that correct?
A: Yes.
. . .
Q: And the focus of the meeting would be about her transition to Soos Creek. Correct?
A: I think it would be looking at implementing the IEP from 2016, which was created in November, and how we went about that.
Q: So the issue was implementation of the IEP from November 2016, Right?
A: Yes.
. . .
Q: And certainly the parents could provide any data, any new data that they obtained with regard to –
A: Absolutely.
Q: -- her. And yet the focus of the IEP meeting, if it were to have occurred, would be the implementation of the November 2016 IEP; is that correct?
A: Certainly. But as we do any IEP, we certainly listen to parent questions and considerations and additional information.

RP 181-182 (Sander).

22. The only aspect of the November 2016 IEP the Parents had ever objected to was its placement provision: the increased percentage of time the Student would spend in special education as opposed to general education. This increase is what required the move to a Support

---

[10] This is not a reference to Mr. Sander discussing his vision of the IEP meeting *with the Parents*. He had no communication with the Parents in August 2017, other than the correspondence in the record. Rather, this appears to be a reference to Mr. Sander's testimony earlier in the hearing about his vision of the IEP meeting. *See* RP 164-165 (Sander).

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

Center, because the neighborhood school was not staffed for this level of service. Prior Decision, Findings of Fact 55-56, 63-64.

23. After learning the District had changed the Student's placement without a facilitated IEP meeting, the Parents took a week to decide what to do. It was clear to them from the PWN that the Student's placement had been determined without their input. Instead of sending the Student to the Support Center when school started on August 31st, as directed by the PWN, they chose to pursue a legal challenge to the District's action and home-school her in the meantime. Testimony of Mother; Testimony of Father.

24. Mr. Sander acknowledged he knew it was a "possibility" the Parents would withdraw the Student from the District and home-school her in response to his PWN. RP 177 (Sander). The weight of the evidence supports a further finding, that Mr. Sander knew this was a probability, not a mere possibility. Not only did the Mother tell the District at the November 2016 IEP meeting that she *would* refuse to send the Student to school rather than send her to a Support Center, the Mother had actually done this the prior year. In the spring of 2015, the District assigned the Student to a Support Center for her upcoming kindergarten year. In September 2015, the Mother refused to send the Student to kindergarten for the first week or two of the year, until the District relented and assigned her to an 80% general education placement, not a Support Center. *See* Prior Decision, Findings of Fact 5, 56. The PWN of August 17, 2017 was sent in part because, "knowing that the family had considered other options such as homeschooling, I wanted to provide them with opportunities to determine what options and decision they were going to make." RP 162 (Sander).

25. It was a difficult decision for the Parents to remove the Student from school and home-school her. They see the Student as benefiting greatly from socializing and communicating with other students. She had attended school in the District continuously since age three, and the Parents had seen great growth in that time. They did not want the Student to be socially isolated in a home-school setting. They also saw the Student as patterning after and learning from typically-developing children. In addition, the Mother's English is limited. She speaks to the Student primarily in the family's native language. The Mother cannot give the Student the rich presentation of vocabulary and the English language generally that the Student received at school. However, they did not believe that most of the benefits of school attendance would be present at a Support Center, and believed that negative factors made that placement highly unsuitable. Therefore, they decided that the Mother would home-school the Student pending their legal challenge to the District's action. Testimony of Mother; P-12:5.

26. On August 24, 2017, the Parents submitted a home-schooling declaration to the District. On that same date, Parents' counsel signed the due process complaint in the present case.[11] Order on Summary Judgment, Finding of Fact 10.

27. The District had taken no steps toward scheduling an IEP meeting before receiving the August 24th home-school declaration. The District was waiting until teachers returned to work on

---

[11] The due process complaint was signed on August 24, 2017, but was not received by the Office of Superintendent of Public Instruction (OSPI) until August 28th. Finding of Fact 11, Order on Summary Judgment.

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

August 28th to begin that process. After receiving the home-school declaration, the District decided not to convene the IEP meeting. The District did not consult with the Parents about this decision. Testimony of Sander; Testimony of Mother; Order on Summary Judgment, Finding of Fact 13.

28. On August 29, 2017, Mr. Sander sent the Parents a PWN stating it planned to discontinue special education services effective September 11, 2017, due to the Student's withdrawal from the District. J-5. The PWN also stated: "The Kent School District stands ready to offer a free appropriate public education with special education and related services to the student *if / when she is re-enrolled.*" *Id.* (italics added). A cover letter accompanying the August 29th PWN stated the same. P-4. The Mother did not know she could request an IEP meeting without first reenrolling the Student. Testimony of Mother.

29. On November 8, 2017, the 90-day period for seeking judicial review of the ALJ's Prior Decision ended. Neither party sought judicial review of that decision. Finding of Fact 14, Order on Summary Judgment.

Facts Regarding Issue 1.b. – Failing to implement the physical therapy portion of the Student's IEP beginning late-October 2016

30. The Student's November 2015 IEP required that a physical therapist (PT) serve her for 30 minutes per week during physical education (PE) class, to help her follow directions and encourage her to participate when she was fearful of new activities. The Student was reevaluated the following year, in October 2016. The PT who served the Student, Shelley Vessey, determined that PT services could be discontinued if another adult, such as a paraeducator, took her place to provide the same services she was providing to the Student. Prior Decision, Finding of Fact 35; Testimony of Vessey. At the hearing, Ms. Vessey explained that PE teachers typically do not have time to focus on just one student, so another adult was needed to help the Student. Testimony of Vessey.

31. Ms. Vessey's PT assessment was agreed to by the full reevaluation team, with no dissenting opinion. Exh.3:5 to Sander Decl. on Summary Judgment. The District terminated PT services immediately following the October 2016 reevaluation. However, the District did not provide the Student with a paraeducator (or other adult) in PE class, as Ms. Vessey's reevaluation stated was needed for her to fully participate in her educational environment:

> Although [the Student] demonstrates a gross motor delay when compared with same aged peers, *with the support of an adult in PE class*, she is able to fully participate in her educational environment.

Exh. 3:18 to Sander Decl. on Summary Judgment (italics added). The PE teachers did the best they could to keep an eye out for the Student to keep her on task and with a group. Testimony of Furukawa. However, this was a double class of 50 to 55 six-year olds, with two PE teachers. Testimony of Gornik; Testimony of Furukawa. The lead PE teacher, Randy Furukawa, explained that teaching this class was like "herding cats." RP 119 (Furukawa). He acknowledged he was unable to observe what the PT had done with the Student in September and October 2016 due to this busy situation. Testimony of Furukawa.

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

32. Only after Mr. Furukawa went on medical leave in mid-April 2017, and was replaced by a long-term substitute in May 2017, is there evidence that a paraeducator was present in the PE class. Testimony of Furukawa; Testimony of Gornik. The long-term substitute was Amanda Gornik.

33. The Parents argue that Ms. Gornik's testimony about a paraeducator being present in the class should be rejected as not credible. Ms. Gornik at first testified that the paraeducator was female, and later testified the paraeducator was male. However, she also testified that if the male paraeducator was not there, someone else was, and there just always seemed to be an extra person in that class. RP 143-144, 149-155 (Gornik). Thus, the apparent contradiction in her testimony about the gender of the paraeducator is resolved because there was more than one pareducator who assisted in the class. Another credibility issue in Ms. Gornik's testimony is that she stated the Student's physical strength and physical skills were normal for a first-grader. RP 150-151 (Gornik). This assertion contradicts not only Ms. Gornick's own report card grade on the Student's physical skills (below grade level standard, D-3:2), but also contradicts the opinions of Mr. Furukawa and Ms. Vessey. RP 127-128 (Furukawa); RP 111 (Vessey).[12] However, Ms. Gornik's overestimation of the Student's physical strength and skills may have stemmed more from a lack of ability to observe her than from a lack of truthfulness. The double class made observation of any one student difficult. There was no testimony that the classes were kept separate in the gym, with each teacher focused on only half of the total group. What was described was co-teaching of all the students together, with one teacher being the lead and the other being the "overload" teacher. RP 116 (Furukawa). Thus, Ms. Gornik's opportunity to observe the Student was limited, and this likely caused her to mistakenly overestimate the Student's physical strength and skills. For these reasons, Ms. Gornik's testimony about the presence of a paraeducator in the Student's class in May and June 2017 is accepted. A logical inference from the evidence is that, with the departure of a veteran teacher (Mr. Furukawa),[13] and his replacement by a teacher who had previously worked only as a substitute for two years (Ms. Gornik), the District decided to add a paraeducator to the class.[14]

34. Ms. Gornik testified the paraeducator assisted at least five students, mostly on behavior issues, but spent more than half his time supporting the Student. Testimony of Gornik. This

---

[12] The higher estimation of the Student's physical strength and skills given by Ms. Gornik, in contrast to Mr. Furukawa and Ms. Vessey, was not due to her strength and skill improving as the year went on. Both Mr. Furukawa and Ms. Gornik testified the Student's strength and skills did *not* improve over the course of the year. Testimony of Furukawa; Testimony of Gornik. The report card grades they each gave her on this item remained the same: below grade level standard. D-3:2. By contrast, the Student did improve on another graded item. It is inaptly named on the report card, but according to Ms. Gornik, it involved using skills from PE class in another environment, i.e. on the playground at recess. D-3:2; Testimony of Gornik.

[13] Mr. Furukawa received his bachelor's degree in physical education in 1981, and his master's degree in technology and education in approximately 1989. He was the lead teacher in the double PE class in question. Testimony of Furukawa.

[14] The Parents argue that if a paraeducator was, in fact, provided in PE class in May and June 2017, as Ms. Gornik testified, the District would have identified that person (or persons) by name at the hearing. However, the District did not have the burden of proof and was not required to come forward with this evidence. The District was entitled to rely on Ms. Gornik's uncontradicted testimony on this matter.

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

amount of assistance is similar to the amount of assistance previously provided by the PT, Ms. Vessey. Ms. Vessey would intervene only as needed, then stand aside until the next need arose, because the Student's annual goal in PT involved independence. In September and October 2016, when Ms. Vessey was still present, the Student required this intervention an average of 10 times during the 30-minute class. P-11:5. The assistance came in the form of prompts or directions when the Student did not appear to understand where to go, what group to join, or what to do for the activity. Testimony of Vessey. The Student's need for this assistance continued after the PT left in October 2016. Mr. Furukawa explained that the Student needed help because she would not be on task, or with her partner or group. He noticed that simple games were challenging for her. In jump rope, for instance, he was not sure she even understood the concept of what one is supposed to do with a jump rope. Testimony of Furukawa. Ms. Gornik testified similarly, that the paraeducator helped keep the Student on task, and keep her where she was supposed to be. Testimony of Gornik. Both of these teachers stated the Student's ability to participate did not improve throughout the time they taught her. Testimony of Furukawa; Testimony of Gornik.

35. The Order on Summary Judgment determined that the District failed to implement the PT provisions of the Student's IEP during two periods: October 25, 2016 through November 20, 2016; and December 6, 2016 through November 8, 2017. During both of those periods, the IEP that included PT services (the November 2015 IEP) was still in effect. During the first of those periods, it was in effect because a revised IEP did not come into effect until November 21, 2016. During the second of those periods, it was in effect by virtue of the IDEA's stay-put provision in the prior case.

36. Two questions remained to be answered at the due process hearing to determine whether the Parents were entitled to relief for the District's failure to provide PT services during those two periods:

> Was adult support, in fact, provided for the Student in PE class once a PT was no longer present? And if so, did that adult support allow the Student to participate in the PE class and receive similar benefit from it as when a PT was present?

Order on Summary Judgment, Conclusion of Law 48.

37. The evidence at the due process hearing answered these questions. The Parents have established that adult support was not provided for the Student in PE class during the first period (October 25, 2016 through November 20, 2016) or during the initial part of the second period (December 6, 2016 through April 30, 2017).

38. Adult support was provided for the remainder of the second period (May 1, 2017 through June 27, 2017). This period ends at June 27, 2017 (the last day of the school year) rather than extending through November 8, 2017 (which would otherwise be the end of the second period), because the Student did not return to school after June 27, 2017. She was home-schooled in the fall of 2017.

39. Thus, the total amount of time the Student was without adult support in PE was 23.5 weeks. During four of those 23.5 weeks the District was closed for breaks, thus reducing the period without adult support in PE class to 19.5 weeks. D-1:1.

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

40. Relevant to any remedy that may be awarded for these 19.5 weeks is that the Student was frequently absent from PE class. Testimony of Furukawa. Attendance records support Mr. Furukawa's testimony: The Student was absent from school 25 days in the first semester of the 2016-2017 school year, and 25.5 days in the second semester. Her absence rate in first grade was therefore 28%. D-3:1.

41. Turning to the second question that remained for the due process hearing, it is found, based on the testimony of Ms. Vessey and Ms. Gornik, that the paraeducator support provided to the Student in May and June 2017 was similar in type and amount to what Ms. Vessey had provided, and thus allowed the Student to participate in PE class and receive similar benefit as when Ms. Vessey was present. The Parents did not carry their burden of proof in disputing this evidence. Neither of the Parents observed the Student in PE class. Testimony of Mother; Testimony of Father. They did not offer evidence from anyone who observed the PE class on their behalf, or who interviewed school staff about the class.

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.

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.

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

> To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the

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

> child's circumstances. . . [H]is educational program must be appropriately ambitious in light of his circumstances . . .

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

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

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

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

Issuing a PWN the August 17, 2017 PWN without holding a facilitated IEP meeting

5. The Order on Summary Judgment concluded, *inter alia*:

> The District violated the IDEA in its PWN of August 17, 2017, by changing the Student's placement from the stay-put placement at her neighborhood school to a Support Center placement at another school without holding an IEP meeting.
> . . .
> Even if the District had held an IEP meeting before issuing the PWN, it would still have constituted an IDEA violation if the change was made over the Parents' objections, because the Parents still had stay-put rights in the neighborhood school placement.

Order on Summary Judgment, Conclusions of Law 33 and 39. The issue that remained for the due process hearing was whether this procedural violation of the IDEA caused a denial of FAPE to the Student.

6. Before addressing this issue, it is noted that the District now attempts to re-argue a ruling from the Order on Summary Judgment: that a parent's stay-put rights continue not only during all levels of judicial appeal following an ALJ decision (which is settled law), but also during the period preceding that -- the period provided by statute for parties to decide whether to file a judicial appeal. *See* District's Post-Hearing Brief at pp. 3 – 5. However, the District failed to file an objection to the Order on Summary Judgment within 10 days after it was issued. That Order therefore controls the proceedings, since it was not modified by any subsequent order. *See* Order on Summary Judgment, p. 23; *see also* WAC 10-08-130(3).[15] Even if the District's objection had

[15] The Order on Summary Judgment, p. 23, stated: "IT IS HEREBY FURTHER ORDERED that if no objection to this Order is filed within ten (10) days after its mailing, it shall control the subsequent course of the proceeding unless modified for good cause by subsequent order." This language is drawn from WAC 10-08-130(3). The District may believe the present decision is a "subsequent order" that could be used to modify the Order on Summary Judgment. This cannot be. It would deny the opposing party notice of what

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

been timely made, it would have been rejected. First, the District argues that if Congress had intended stay-put to remain in place during the 90-day appeal period, it would have expressly stated this in the statute. There is an entire jurisprudence of decisions interpreting matters not expressly stated in the IDEA. This is not uncommon for federal legislation, which often leaves matters unaddressed for the courts to fill in based on perceived legislative intent.[16] Second, the District cites an OSEP guidance letter which states that state education agencies must ensure timely implementation of ALJ decisions unless either party appeals the decision. *Letter to Zirkel*, 68 IDELR 142 (OSEP 2016). The District argues OSEP would have said stay-put applies during the 90-day appeal period if that was a correct interpretation of the statute. However, the OSEP letter did not focus at all on stay-put or the appeals process. The latter was mentioned only in passing and the former not at all. The OSEP letter was focused instead on the amount of time school districts are allowed to complete their compliance with ALJ orders. The reference to appeals was so minor and passing that it actually misstated the law.[17] Finally, the District argues that the due process complaint in the present case triggered stay-put, and the ALJ's ruling means stay-put was disruptively switched in the middle of the second case, when the appeal period from the first case expired. This is untrue. As explained in the Order on Summary Judgment, the due process complaint in the second case had *no effect* on stay-put, for the reasons correctly argued by the District and adopted by the ALJ. *See* Order on Summary Judgment, Conclusions of Law 27 – 30.

7. Turning to the question at hand, we must determine whether the District's violation of the IDEA by issuing the August 17, 2017 PWN resulted in 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 decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.

---

issues remain for the due process hearing and what arguments must be addressed in their closing brief. Parties are entitled to rely on prehearing orders, including summary judgment orders, settling the matters ruled on therein for the due process hearing if no objection is filed within 10 days. Otherwise, parties filing simultaneous closing briefs would feel compelled to reargue all rulings made in prehearing orders, in case the opposing party reargues some of them and persuades the ALJ to modify an earlier ruling.

[16] Even the much broader principle of settled law referred to earlier in this paragraph was not expressly stated in the IDEA. It was inferred by case law from legislative intent. *See Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1039-40 (9th Cir. 2009) (relying on legislative intent behind IDEA to hold that parents' stay-put rights extend through all levels of appellate review of ALJ decisions).

[17] Filing an appeal of an ALJ decision does not excuse a school district from timely complying with it. Only if the district goes to court and obtains an injunction staying the effect of the ALJ decision is the district temporarily excused from complying with it. *See Los Altos Sch. Dist. v. L.S.*, 2018 U.S. Dist. LEXIS 8326, 71 IDELR 130, at n. 2 (N.D. Cal. 2018); *Tehachapi Unif'd Sch. Dist. v. K.M.*, 2017 U.S. Dist. LEXIS 55403, 2017 WL 1351417 (E.D. Cal. 2017); *Tamalpais Union High Sch. Dist. v. D.W.*, 2016 U.S. Dist. LEXIS 137971, 2016 WL 5791259 (N.D. Cal. 2016); *District of Columbia v. Masucci*, 13 F. Supp. 3d 33, 39-40 (D.D.C. 2014).

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

20 USC §1415(f)(3)(E)(ii); *see* WAC 392-172A-05105(2); 30 CFR §300.513.

8. The District's stay-put violation unlawfully changed the Student's educational placement without the Parents' agreement, thereby significantly impeding their opportunity to participate in decision-making, i.e., deciding whether or not to agree to the change.[18] Also, the PWN forced the choice on the Parents of either declining to send the Student to school, or else subjecting her to "a heightened risk of irreparable harm inherent in the premature removal" from her stay-put placement. *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1040 (9th Cir. 2009). It was clear the District was not going to allow the Student to attend her prior placement at the neighborhood school: part of the purpose in sending the PWN was specifically to avoid the Student showing up there on the first day of school. The Parents' testimony at the hearing established that their decision to withdraw the Student was caused by the August 17, 2017 PWN. (On summary judgment, they did not offer any declarations about what caused this decision.) Not only was their participation in decision-making significantly impeded by forcing this choice on them, but FAPE was also denied because withdrawing the Student caused a deprivation of educational benefit to her. The Student lost the benefit of socializing and communicating with peers, and lost the rich English-language environment she had at school, which helped with language skills and vocabulary-building. The District argues the Parents would have to prove the *Support Center* would have deprived the Student of educational benefit in order to establish a FAPE denial based on a deprivation of educational benefit. This is incorrect. Parents should not be put in the position of depriving their children of the benefit of attending school with peers as the price of avoiding the heightened risk of irreparable harm inherent in the child's premature removal to a new placement. This is true regardless of the merit, of or lack of merit, of the new placement. That is the essence of stay-put as an automatic injunction that is not based on a showing of the likelihood of prevailing on the merits.

9. The PWN of August 17, 2017 resulted in a denial of FAPE in another way as well. While the Parents never rescinded their August 17th request for an IEP meeting after receiving the PWN of that date, they did not reiterate it because they saw the District had already decided on placement without their input. The District could have avoided closing the door on the Parents' participation by stating in the PWN (or in the letter sent the next day) something like the following: The ALJ's decision results in the Support Center being the placement presently in effect for the Student (something the District believed, albeit incorrectly), but at the upcoming Sound Options-facilitated IEP meeting you are welcome to raise the issue of her placement going forward. However, the District did not say something like this in its correspondence because this was not the District's intent. Mr. Sander's testimony makes clear that the door to the Parents participating in the placement decision was already closed. As discussed below, placement was *not* up for decision at the upcoming IEP meeting, only how the Student would be served at the placement in which the District had already determined she would remain following that meeting.

10. The District attempts to blame the Parents for the fact that the planned IEP meeting never occurred. The District's cross-examination of the Mother seemed to fault her for not repeating her request for an IEP meeting after receiving the August 17, 2017 PWN. RP 52 and 56 (Mother). In

---

[18] This argument was not made by the Parents on summary judgment. If it had been, the FAPE issue may have been decided in their favor at that time. The tribunal focused on the lack of declarations from the Parents in ruling that a denial of FAPE had not been established as a matter of law on summary judgment.

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

its brief, the District incorrectly asserts the Mother "*decided to not participate in the proposed IEP meeting* that would be facilitated by Sound Options". District's Post-Hearing Brief at p. 15 (italics added). In support of this assertion, the District cites the Mother's testimony at RP 28, 35 – 36, and 52 – 57. None of those citations supports the District's allegation.

11. In fact, the Parents never refused to attend the IEP meeting. Nor did they communicate to the District that they *would* refuse to attend if it was scheduled. Nor did they ever rescind their August 17th request for an IEP meeting. The District decided on its own, without any communication with the Parents, not to convene the meeting after receiving the home-school declaration on August 24th. The District never sent the Parents an invitation for the IEP meeting it had agreed to convene early in the 2017-2018 school year, or even an email attempting to schedule that meeting. Moreover, the District's August 29th PWN and letter gave the incorrect impression that the Parents would have to first re-enroll the Student before the District would offer an IEP. *See* Order on Summary Judgment, Conclusion of Law 40. The Mother did not know this was incorrect.

12. The District next argues the Parents' opportunity to participate in decision-making about placement was not significantly impeded because they already had that opportunity at the November 2016 IEP meeting. The only thing done in the August 17, 2017 PWN, the District argues, was to state that this IEP was now in effect. Any procedural defects that occurred at the November 2016 IEP meeting were redressed by the remedies awarded in the Prior Decision, the District argues. District's Post-Hearing Brief at p. 18.

13. These arguments are rejected. The November 2016 IEP meeting provided virtually no opportunity for the Parents to participate in decision-making about the Student's educational placement. Therefore, one of the remedies for the deficiencies of that meeting was that the next meeting would be facilitated by Sound Options. This had not yet occurred when the District issued the August 17, 2017 PWN.[19] It was clear from the Prior Decision that the facilitated IEP meeting was a remedy to ensure the Parents an opportunity to participate in decision-making *about educational placement.* That was the only part of the IEP the Parents ever objected to. Sound Options facilitation was ordered "to discourage the parties from maintaining fixed positions." Prior Decision, Conclusion of Law 67. The only "fixed positions" the parties maintained at the prior IEP meeting concerned educational placement. All other matters in the IEP were easily agreed to. It would be pointless to convene a half-day, Sound Options-facilitated IEP meeting, as the District planned, *after* placement was already determined, simply to discuss *how* the Student would be served in that predetermined placement. The Parents did not establish predetermination as a matter of law on the limited evidence presented on summary judgment. However, Mr. Sander's testimony at the due process hearing made it abundantly clear that placement in a Support Center was predetermined *in advance* of the planned Sound Options IEP meeting, and the purposes of that meeting were to discuss transition to the new placement and how the IEP would be implemented in that placement. *See* Finding of Fact 21, above. Adding at the end of his testimony

---

[19] There were two other remedies awarded in the Prior Decision for the procedural violations of the November 2016 IEP meeting: compensatory education for the Student and training for school staff on parental procedural rights. Neither of those remedies had been completed by the time the parties planned to hold their next IEP meeting near the beginning of the 2017-2018 school year. The Prior Decision did not require that they be completed before the next IEP meeting. Sound Options facilitation, however, did have to be completed at the next IEP meeting.

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

on this matter that, "as we do any IEP, we certainly listen to parent questions and considerations and additional information," *id.,* did not negate the predetermination he had so explicitly stated.[20]

14. Even if the District had been correct that the November 2016 IEP automatically became the Student's educational placement on August 10, 2017 (upon issuance of the Prior Decision) rather than on November 8, 2017 (upon expiration of the appeal period following the Prior Decision), it was still a violation of the IDEA to predetermine that the *same* educational placement currently in place would result from the *next* IEP meeting. First, 10 months had passed since the Support Center placement was adopted in November 2016. As stated in the Order on Summary Judgment:

> An IEP team meeting 10 months later would have reviewed the data on the Student's progress in her neighborhood school placement, which she attended throughout the 2016-2017 school year. Only two months' worth of data from that school year were available when the IEP team met in November 2016. Data through June 2017 would now be available to the IEP team at the late-August or September 2017 IEP meeting that the Parents requested and the District agreed to convene. Also, as found in the Prior Decision, the Parents do significant amounts of academic work with the Student at home. Information from the Parents about the Student's progress over the summer of 2017 would now be available.

Order on Summary Judgment, Conclusion of Law 34. Second, the IEP team would now include staff that actually worked at the Support Center, who the Mother could meaningfully question about the problems she perceived there, including whether the students in the class were non-verbal, as she believed. When the prior placement was adopted, the IEP team included no one from the District who had visited either of the Support Centers, let alone worked in one of them. Third, Sound Options would be present to promote productive communication about the Student's placement and discourage fixed positions. Fourth, the law is clear that at IEP meetings, educational placement must be determined only *after* the other aspects of the IEP have been decided. *See K.D. v. Hawaii Dept. of Educ.,* 665 F.3d 1110, 1123 (9th Cir. 2011) ("the Act requires that the placement be based on the IEP, and not vice versa.") To do otherwise is to predetermine the educational placement. That is what occurred here. For all of these reasons, even under the District's belief that the November 2016 Support Center placement became the Student's placement upon entry of the Prior Decision on August 10, 2017, this did not license the District to predetermine what placement would result from the *next* IEP meeting, and to do so without any communication with the Parents, let alone any opportunity for them to participate in decision-making.[21]

---

[20] The Prior Decision did not dictate when the next IEP meeting had to be held, only that it had to be facilitated by Sound Options. The District states that the Order on Summary Judgment required an IEP meeting to be held sooner than November 2017, when the annual meeting was due. District's Post-Hearing Brief at p. 16. That was not the intent of the Order. The Order stated that by law, one year is the maximum amount of time that may pass between meetings, but the parties in this case had agreed to meet sooner than that. Order on Summary Judgment, Conclusions of Law 37 – 39.

[21] The District argues that the Order on Summary Judgment wrongly analyzed the August 17th PWN as a separate instance of predetermination, apart from the question reserved for the due process hearing: whether the District predetermined the placement that would result from the IEP meeting planned for several weeks later. The District argues that if the PWN was a stay-put violation, it should only have been

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

15. The District next argues the Parents' participation in decision-making was not impeded by the PWN at issue because a facilitated IEP meeting could have been held *prior to* August 31, 2017 – the date the PWN and the Support Center placement would go into effect. District's Post-Hearing Brief at p. 19. However, it is highly unlikely, if not impossible, that this could have occurred based on timing. Mr. Sander's testimony establishes this: The District would begin the scheduling process once school staff returned from summer break on August 28th. A date and time had to be found when all participants from two schools would be available, and available for half a day, much longer than the usual IEP meeting. During the days before classes started on August 31st, staff already had prescheduled trainings and orientations they were required to attend. Once several possible dates were mutually agreed upon by all team members, the District would contact Sound Options to find out which, if any, of those dates a facilitator was available. Given the mandatory trainings and orientations that staff needed to attend, the number of team members involved from two schools, the half-day length of the meeting, and the need for a Sound Options facilitator to be available on the same date school staff were available, it is highly unlikely, if not impossible, the meeting would have been held prior to August 31, 2017. The first steps in this complicated scheduling process were not going to begin until August 28th.

16. Finally, two matters raised by the Parents need to be addressed. First, the Parents argue the District knew the August 17, 2017 PWN would cause the Parents to withdraw the Student from the District, and issued the PWN with the intent to cause this outcome. While motivations are generally not relevant in adjudicating IDEA violations, they may be relevant to determining the equities between the parties when awarding relief for violations. *See* discussion *infra*. However, the evidence does not go as far as the Parents allege. Mr. Sander knew it was probable that the Parents would withdraw the Student from the District in response to his PWN. However, knowing something will probably occur as a result of one's actions is not the same as taking the action for the purpose of causing it to occur. While there is some evidence of the latter and this is a close question, the Parents have not presented sufficient evidence to establish that the PWN was designed in part to bring about the Student's withdrawal from the District.

17. The second matter raised by the Parents concerns the attorney's fees they have incurred in this second due process hearing. *See* P-12: 5. The Parents placed this in evidence but made no legal argument why it is relevant at the ALJ level of a due process proceeding (as opposed to a later judicial proceeding, in which a prevailing parent may request attorney's fees incurred at the ALJ level).[22] On summary judgment, the Parents cited *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189 (9th Cir.), *cert. denied*, __U.S. __, 138 S. Ct. 556 (2017) on an unrelated matter. They did not cite *M.C.* in their closing argument after the due process hearing, nor offer any reason why they placed their attorney's fees in evidence. Therefore, this tribunal made no

---

analyzed as a stay-put violation. District's Post-Hearing Brief at pp. 11 - 12; *see* Prior Decision, Conclusions of Law 33 and 43; *see also* RP 9 – 10. Once again, the District failed to file an objection to the Order on Summary Judgment within 10 days. Even accepting the District's argument *arguendo*, it does not change the result that the District significantly impeded the Parents' opportunity to participate in decision-making at the facilitated IEP meeting by predetermining the Student's placement, leaving for that meeting only how the Student would be served in the predetermined placement. This was a denial of FAPE.

[22] *See* 20 USC §1415(i)(3)(B).

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

Finding of Fact concerning attorney's fees and declines to make a ruling on a matter not argued by the Parents.

18. For the reasons set forth above, the Parents have established that the District's issuance of the August 17, 2017 PWN in violation of the IDEA resulted in a denial of FAPE to the Student.

Failure to implement the physical therapy portion of the Student's IEP beginning late-October 2016

19. Following the Order on Summary Judgment, the physical therapy issue that remained for the due process hearing was as follows: Was the District's failure to implement the PT provisions of the Student's IEP a material failure to implement the IEP, or only a minor one? *See Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 821-822 (9th Cir. 2007). The District argues the Order on Summary Judgment should have characterized the issue as a procedural violation of the IDEA: failing to amend the Student's IEP to reflect the October 2016 reevaluation, which exited her from PT services. Accordingly, the District contends the issue remaining for the due process hearing is whether its procedural violation resulted in a denial of FAPE. However, the District failed to file an objection to the Order on Summary Judgment within 10 days. That Order therefore controls the proceedings, as discussed above. In any event, "[e]ven if the violation could be characterized as a procedural one, . . . [t]he same kind of evidence needed to establish a material (as opposed to a minor) failure-to-implement would be needed to establish that the violation caused a deprivation of educational benefit to the Student," i.e., a denial of FAPE. Order on Summary Judgement, Conclusion of Law 51.[23]

20. The District argues the Parents failed to carry their burden of proof on this matter. While the Parents themselves did not observe the Student in PE class, the Parents have carried their burden of proof via the testimony of Ms. Vessey, the PT, and Mr. Furukawa, the PE teacher.

21. Ms. Vessey's data shows that in the final month she served the Student (October 2016), the Student required Ms. Vessey's assistance in order to understand directions and participate in the class an average of 10 times during the 30-minute class. This high level of prompting was given despite Ms. Vessey hanging back and trying to give as few prompts as possible, intervening only when there was an actual need. If Ms. Vessey had believed the Student could navigate the class on her own, with only the assistance she would receive from the PE teachers, Ms. Vessey would simply have recommended exiting her from PT services. Instead, she determined that another adult staff member needed to be assigned to deliver *the same services* Ms. Vessey was delivering. The decision to exit the Student from PT was not based on an assessment that the

---

[23] Even if the District had timely objected to the Order on Summary Judgment, its objection would have been denied on the merits. First, the District *did* amend the IEP to remove PT services, and did so within a few weeks of the reevaluation that exited the Student from PT. However, the District failed to restore PT services when stay-put went into effect a short while later. Second, the cases on which the District relies are inapposite. In those cases, the failure to amend a student's IEP to reflect changes in an evaluation or services is treated as a procedural violation. District's Post-Hearing Brief at p. 20. However, none of those cases occurred in a stay-put situation. Once stay-put occurs, a school district is *prohibited* from amending the student's IEP, unless the parents agree otherwise. As stated in the Order on Summary Judgment: "The District had no *duty* to obtain such an agreement [from the parents]; it *did* have a duty to implement the [stay-put] IEP." Order on Summary Judgment, Conclusion of Law 51 (italics in original).

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 no longer needed the services she received. Rather it was based on a determination that the *person* who delivered those services did not need to be a PT.

22. Mr. Furukawa testified about the Student's impaired ability to understand what was said in class, and how to participate in activities. He then testified that her ability to participate *did not improve* during the time he taught the class. Ms. Gornik testified to the same lack of improvement in ability to participate. Thus, the need that Ms. Vessey identified for services to address this problem continued throughout the school year, but no services were provided from October 25, 2016 until on or about May 1, 2017.

23. Ms. Vessey was the witness most competent to determine the Student's needs – not only due to her professional training, but also to her eye-witness experience focused on the Student in her PE class. Ms. Vessey's determination was accepted by the full reevaluation team and is accepted here as establishing the Student's needs. Mr. Furukawa kept an eye out for the Student and provided individual attention to the best of his ability. But there were 50 to 55 other six-year-olds in the class to be managed by himself and his co-teacher. Ms. Vessey determined the Student needed another adult to support her individually because the two PE teachers were unable to do so while performing their other duties.

24. In summary, although the District failed to implement the PT services of the Student's IEP during certain periods, that failure would have been found minor, and not material, had an adult staff member been provided to deliver similar services, as the Student's reevaluation team decided was necessary. Once a paraeducator was added to the PE class in May 2017, and spent more than half his time assisting the Student, the failure-to-implement became minor in nature and did not violate the IDEA. *See Van Duyn,* 502 F.3d at 821-822.

25. The District argues that, regardless of whether an IDEA violation was committed, the Parents' claim for compensatory education is moot because the Student is no longer eligible for PT. The District relies on *A.L. v. El Paso Indep. Sch. Dist.,* 610 F. Supp. 2d 582, 596 (W.D. Tex. 2009), *aff'd sub nom. M.L. v. El Paso Indep. Sch. Dist.,* 369 Fed. Appx. 573 (5th Cir. 2010). That case is readily distinguishable. In *A.L.*, the court reasoned: "providing additional compensatory speech therapy services for A.L. when A.L. *has no speech disability* would serve only as a form of damages, a remedy that is not appropriate under the IDEA." *Id.*, 610 F. Supp. 2d at 598 (italics added). The student in *A.L.* had never been found to have a disability other than a speech impairment. Here, by contrast, the Student continues to have gross motor delays and, more importantly, significant cognitive delays that *caused* her need for assistance in PE class. The October 2016 reevaluation, which exited the Student from PT services, stated as a Significant Finding that despite the Student's gross motor delays, "*with the support of an adult in PE class,* she is able to fully participate in her educational environment." Exh. 3:18 to Sander Decl. on Summary Judgment (italics added). The corollary of this finding is that *without the support of an adult in PE class* the Student is *not* able to fully participate in her educational environment. Ms. Vessey's testimony at the hearing was consistent with what she recommended in the October 2016 reevaluation. The assistance the Student was deprived of by the District's IDEA violation was cognitive in nature, whether provided by a PT or a paraeducator: individual assistance to help the Student go to the correct place in the gym, join the group she was supposed to join, 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

perform the activity she had been instructed to perform, but could not understand the instructions.[24]

26. The District's mootness argument is further inapposite because the Parents' requested remedy is not restricted to the services of a PT. Rather, they requested "compensatory education *for failing to implement* the Student's physical therapy services." Issues Statement, above (italics added). Even if the Parents had requested the services of a PT in particular, this tribunal would not be restricted to such an award. Rather, the tribunal has discretion to award either the Parents' requested remedies, or "other equitable relief as appropriate." *Id.* The District's argument is accepted only to the extent that an award of *physical therapy itself* would be inappropriate given that the Student's most recent reevaluation exited her from those services. Rather, an appropriate compensatory award should focus on placing the Student in an environment that provides the assistance neeeded for her to participate, together with peers, in a physical education activity.

27. For the foregoing reasons, the Parents have established that the District materially failed to implement the Student's IEP by failing to provide PT services, or equivalent services from another adult, during her PE class. This violation of the IDEA occurred for 30 minutes per week during the periods October 25, 2016 through November 20, 2016, and December 6, 2016 through April 30, 2017.

Remedies

28. For prevailing on Issue 1.a., the Parents are awarded their requested remedy: an order that the District promptly hold an IEP meeting facilitated by Sound Options to develop an IEP for the Student that the Parents may consider in determining whether to re-enroll the Student in the District. The IEP meeting shall be convened within three weeks[25] of the date of this Order, unless a Sound Options facilitator is not available during that time, in which case the meeting will be convened as soon as possible thereafter. The PWN of August 17, 2017 is ordered rescinded, as it was issued in violation of the IDEA. The main focus of the facilitated IEP meeting shall be the Student's educational placement, unless the Parents and the District agree otherwise in advance of the meeting.

---

[24] The Student needed individual assistance throughout the school day, not just in PE class, due to her significant cognitive delay. School staff found a way to provide that assistance, even though it was beyond the services required by her IEP at that time:

> The Student's special education teacher, Ms. Hickey, set up four separate schedules for personnel to support the Student, drawing on all available staff at the school. First, she created a schedule of paraeducators to help meet the Student's needs in adaptive skills, reading, written expression, and math. Second, she created a schedule of staff to help with the Student's bathroom needs. Third, a recess monitor was assigned to watch the Student on the playground and ensure her safety. Fourth, staff were assigned to ensure the Student arrives and departs from school safely. This is more support than required by the Student's IEP, but Ms. Hickey found the Student needed this level of attention.

Prior Decision, Finding of Fact 75.

[25] Three weeks is a longer period than usually allowed for convening an IEP meeting ordered by a due process decision. However, Sound Options requires that parties to commit to 3 – 4 hours for a facilitated IEP meeting. This is more difficult to schedule than a normal IEP meeting.

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

29. For prevailing on Issue 1.b., the Parents are awarded their requested remedy of compensatory education. The legal framework governing such an award is as follows. 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), *cited with approval in R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). "[C]ompensatory education is not a contractual remedy, but an equitable remedy." *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. Because it is an equitable remedy, the tribunal may consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra,* 401 F.3d at 524.

30. The Student was without adult support in PE class for 23.5 weeks. During four of those weeks the District was closed for breaks, thus reducing the period without adult support in PE to 19.5 weeks. The Student's high absence rate of 28% during the period in question is an equitable consideration that should reduce the award: the Student did not miss any services 28% of the time because she was not present to receive them.[26]

31. Reducing19.5 weeks of missed services by the Student's 28% absence rate, the result is 14 weeks. Fourteen weeks at 30 minutes per week yields seven hours of missed services. Since the services were individual in nature, there is no reason to reduce them further.[27] The Student is therefore awarded seven hours of compensatory education.

32. As stated in the Conclusions of Law, the compensatory award should focus on placing the Student in an environment that provides the assistance necessary for her to participate, together with peers, in a physical education activity. Since the Student is not presently enrolled in the District (a circumstance that was the direct result of the District's unlawful PWN of August 17, 2017), it would be unjust, as well as logistically difficult, to require the compensatory award to be delivered at school during the school day. Individual tutoring in physical education by a District staff person outside of school hours would not provide the interaction with peers that was part of the lost educational benefit here.

33. The most feasible and appropriate remedy is for the District to fund seven hours of the gymnastics class that has been successful for the Student in the last two years. It is an environment that provides the assistance necessary for her to participate, together with peers, in a physical education activity.[28] If the Parents wish to wait until the summer of 2018 for the Student to receive this award (her prior participation was in the summer) they may do so. If the same or

---

[26] This is not intended as a criticism of the Parents. The Parents may have been addressing other needs of the Student during her absences. They have shown that they are highly devoted to the Student's education. There was no evidence, in either the prior case or the present one, concerning the reason for the Student's absence rate.

[27] The reasoning for this was discussed in the Prior Decision, Conclusion of Law 64.

[28] Aqua therapy is not considered as an area for potential compensatory education because there was no evidence whether it is done individually or with peers. Nor was there evidence whether it has benefited the 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

similar class is offered sooner, they may utilize the award sooner. If the same gymnastics class is no longer offered, the Parents may choose a similar class or physical activity in which the Student would receive the assistance necessary for her to participate together with peers. The price per hour that the District must pay shall not exceed 10% above the average price for elementary-school age gymnastics classes in King County.

34. The Parents shall utilize this compensatory education award within one year from the date of this decision. However, if unforeseeable circumstances prevent the use of the award within one year, the Parents shall utilize it as soon as practicable thereafter.

35. 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

1. The District violated the IDEA and denied the Student a FAPE by:

   a. Issuing the August 17, 2017 prior written notice in violation of the Parents' stay-put rights and without holding a Sound Options-facilitated IEP meeting.

   b. As a remedy for this violation, the District shall promptly convene an IEP meeting facilitated by Sound Options on the terms set forth in Conclusion of Law 28.

2. The District violated the IDEA and denied the Student a FAPE by:

   a. Materially failing to implement the physical therapy provisions of the Student's IEP during the periods October 25, 2016 through November 20, 2016, and December 6, 2016 through April 30, 2017.

   b. As a remedy for this violation, the District shall fund seven hours of compensatory education on the terms set forth in Conclusions of Law 33 and 34.

Signed at Seattle, Washington on April 5, 2018.

Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

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

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.

Parents
[redacted]

John Sander, Executive Director of Inclusive Education Services
Kent School District
12033 SE 256th Street
Kent, WA 98030-6643

Ann M. Carey, Attorney at Law
Carey & Lillevik, PLLC
1809 7th Avenue, Suite 1609
Seattle, WA 98101

David Hokit, Attorney at Law
Curran Law Firm
PO Box 140
Kent, WA 98035

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