

**BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION  
ELSIE ARNTZEN  
STATE OF MONTANA**

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**IN THE MATTER OF [Student]**

**Consolidated OSPI No. 2019-02 and  
OSPI No. 2018-02**

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

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**BACKGROUND**

On May 9, 2018, [School District], [Elementary School District No.] filed a request for due process against [Student] (OSPI No. 2018-02). On July 10, 2018, [Student] filed his response to [School District's] request for a due process hearing. On March 20, 2019, [Student] filed his own request for a due process hearing (OSPI 2019-02). Thereafter, the parties stipulated that the two cases could be consolidated, and on May 8, 2019, the Hearing Officer ordered the cases consolidated. On June 13, 2019, [School District] filed its response to [Student's] request for a due process hearing.

The hearing in this matter was conducted from November 12-15, 2019, in front of Hearing Officer DeeAnn Cooney. [Student] was represented by Andree Larose and Rob Farris- Olsen, MORRISON, SHERWOOD, WILSON & DEOLA, PLLP. [School District] was represented by Mary E. Duncan, FELT, MARTIN, FRAZIER & WELDON, PC.

The following witnesses testified on behalf of [School District]: [Student's First Grade Regular Education Teacher], [Student's Special Education Teacher in First Grade], [Principal at Elementary School in First Grade], [Program Specialist for the Special Education Department], and [Director of Student Services].

The following witnesses testified on behalf of [Student]: [Student's Second Grade Teacher at Private School], [Student's Third Grade Teacher at Private School], [Student's Special Education Teacher in Third Grade at Private School], Carol Quirk, Ed.D., and [Student's Parents].

The Hearing Officer received into evidence without objection the following exhibits:

SD1, SD2, SD3, SD4, SD5, SD6, SD7, SD8, SD9, SD15, SD17, SD18, SD19-1, SD19-2, SD19-4, SD19-5, SD19-6, SD19-7, SD19-8, SD19-9, SD19-10, SD19-11, SD19-12, SD19-13, and P16, P18, P20, P22, P26, P28, P30, P31, P32, P34, P37, P38, P40, P41, P42, P43, P46, P47.

The Hearing Officer also admitted Joint Exhibits A, B, C, D, E, F, G, H, I, J, K, and L.

The Hearing Officer received into evidence over objection the following exhibits: P48 and P51.

The following exhibit was offered, but not admitted: P15. All remaining proposed exhibits identified by the parties were not offered and admitted.

[Student] alleges that the District violated his right to a Free Appropriate Public Education ("FAPE") under the Individuals with Disability Education Improvement Act of 2004 ("IDEA"), 20 U.S.C. §§ 1401 *et seq.* during the 2017-2018 school year. [Student] further alleges that the March 15, 2018 proposed IEP did not offer FAPE in the Least Restrictive Environment ("LRE") and failed to provide supplementary aids and services, including physical education. [Student], therefore, alleges and requests that [School District] is liable for the costs of [Student's] private placement at [Private School]. [School District] denies that the private school is the proper placement and denies that it has any obligation to pay for the private placement. [School District] contends it provided

[Student] FAPE during the 2017-2018 school year and that its proposed IEP dated March 15, 2018 offers FAPE in the LRE.

## FINDINGS OF FACT

### **I. STIPULATED FACTS**

1. [Student] was born on October 2, 2009.
2. [Student] resides with his [Parents] and siblings in the family home at \*\*\*.
3. [Student] was enrolled in kindergarten for the 2016-2017 school year at [Elementary School Student Attended in Kindergarten]. \*\*\* was his regular education teacher, and \*\*\* was his Special Education teacher.
4. [Student] was enrolled in first grade for the 2017-2018 school year at [Elementary School Attended in First Grade]. \*\*\* was his regular education teacher, and \*\*\* was his Special Education teacher.
5. [Student] did not attend [School District] after the 2017-2018 school year.
6. [Student] attended [Private] School as a second grader for the 2018-2019 school year and is currently a third grader at [Private School].
7. The last IEP signed in approval by [Parents] is dated April 27, 2017.
8. An IEP meeting was held November 16, 2017. Additional IEP meetings were held December 14, 2017; February 1, 2018; March 15, 2018; and April 12, 2018.
9. [Student] has been diagnosed with Down Syndrome.
10. At all times relevant to this complaint, [Student] has qualified under the IDEA as a student with a disability under the category of "Cognitive Delay," entitled to receive Special Education and related services.

11. At all times relevant to this complaint, [Student] and his parents have resided, and continue to reside, within the geographic boundaries of [School District] at \*\*\* Montana.

12. At all times relevant to this complaint, [School District] has been a duly organized public school district under the laws of the State of Montana and a recipient of federal funds through various federal programs.

## **II. FINDINGS OF FACT**

13. [Student] began attending public preschool at age three. (Tr. II, 225:20-227:4.)

14. [Student] attended kindergarten at \*\*\* Elementary School beginning in August 2016. (Tr. III, 227:5-9.) While enrolled at \*\*\*, [Student] was educated in the general education classroom most of the day, and he made significant educational progress in academic content areas, work habits, and social development. (Ex. SDI at [School District] 19-20; Tr. III, 229:12-25; Tr. IV, 5:11-6:19.)

15. While in kindergarten, [Student] received some assistance from a paraprofessional (aide) in the general education classroom, but the aide was not assigned one-to-one to [Student]. (Tr. III, 232:21-233:7.)

16. By the end of kindergarten, [Student] had gained academic skills in almost all areas. (Ex. SDI at [School District] 19-20; Tr. IV, 5:11-6:19.) In language arts, his skill level increased from minimal mastery to partial mastery in several discrete areas - in composing opinion pieces, actively engaging in group reading, participating in collaborative discussions, being able to ask and answer questions about key details, and being able to identify the main topic and retell key details. (Ex. SDI at [School District] 19.) In mathematics, he achieved partial mastery comparing written numbers between 1-10 and fluently adding and subtracting numbers within 5. (Ex. SDI at [School District]

19.) [Student] learned one-to-one correspondence when pointing to objects, could identify numbers 0-10 in random order, and knew concepts of above, below, beside, in front of, and behind. (Ex. SDI at [School District] 20.) In most other academic areas, [Student] at least made "adequate progress from previous quarter." (Ex. SDI at [School District] 19-20.)

17. [Student's] functional and academic-readiness skills also improved. By the end of kindergarten, his work habits and social development were all at least average, if not above average. (Ex. SDI at [School District] 19-20.) He improved from average to above average at, *inter alia*, following school rules, working cooperatively with others, and accepting responsibility for his behavior. (Ex. SDI at [School District] 19-20.) He improved from below average to average on following directions, organization, utilizing his time, effort to show quality work, and paying attention. (Ex. SDI at [School District] 19.)

18. [School District's] progress report for the IEP in effect during most of [Student's] kindergarten year shows that [Student] met two IEP goals and was making progress and expected to meet all remaining IEP goals, with the exception of one goal regarding gross motor skill development. (Ex. SD2 at [School District] 400-408.)

19. Throughout his kindergarten year at \*\*\*, [Student's] teacher praised his educational progress. At the end of the school year, she noted he showed "progress" and had "come a long way." As his teacher noted, he developed some skills by modeling, or taking cues from, his classmates in the regular education classroom. (SDI at [School District] 20.)

20. [Student] attended first grade at \*\*\* Elementary School the following school year. His IEP for that year included both academic and functional goals. (Ex. J-C at [School

District] 195-198.) Again, he was placed in a regular education classroom. He received instruction in a Special Education setting 300 minutes (5 hours) per week. (Ex. J-C at [School District] 199.)

21. In August 2017, before school started, [Student's] first grade teacher, \*\*\*, met with [Student] and his mother and they met the Special Education teacher, \*\*\*. [First Grade Teacher] received [Student's] file, including his IEP and documentation from [Prior School], the day before school started. Both she and [Special Education Teacher], who was new to the school, were unfamiliar with the file. [First Grade Teacher] asked to look through it and to figure a few things out. (Tr. I, 17:23-25; 18:1- 7, 14-22; 21:9-25; 22:1-14; 23:2-21. Ex. SD2.)

22. [First Grade Teacher] established good communication with [Student's] mother from the beginning of school as they helped [Student] transition to the new routine. (Tr. I, 24:17-25:1-10.)

23. [First Grade Teacher] testified that the first couple of months, providing instruction to [Student] was challenging for her. She was not sure what to do. She met with [Special Education Teacher] and got some suggestions, but [Student] was spending most of his time with [First Grade Teacher] in her classroom. [Student] was in the Resource Room for only 300 minutes per week. It was up to [First Grade Teacher] to "guess and check." [First Grade Teacher] would try various teaching strategies to see if [Student] knew what to do; if that did not work, she would reassess and try something different. [First Grade Teacher] had [Student's] IEP and asked [Special Education Teacher] for clarification if she had questions. (Tr. I, 27:4-18, 76:25, 77:1-5, 11- 15.)

24. To prepare for the school year with [Student], [Special Education Teacher] focused on the general education curriculum. The fact that [Student] had only 300 minutes a week in the Resource Room indicated to her that he was almost to grade level and his IEP was a support IEP. (Tr. II, 10:1-11.)

25. The note of the IEP established April 17, 2017 states "We have discussed during Big Picture Planning that there may come a time where he might need to be serviced in the Resource Room and that he might have to transition to another classroom down the road." [Special Education Teacher] construed this to mean [Parents] knew that [Student] would eventually have to be placed in a different placement, and they knew that would be coming. (Joint Ex. C [School District] 202; Tr. II, 16:12- 24.)

26. Within the first few weeks of school, [Special Education Teacher] determined that [Student] needed a placement where he would have the opportunity to have social skills with other students and his academic needs would be met. He could not keep up with the general education curriculum. (Tr. II, 19:9-16.) When [Student] was in the Resource Room, he had individualized instruction. He was always taught alone and [Special Education Teacher] provided most of the instruction. (Tr. II, 24:20-25, 25:9-13.)

27. [Special Education Teacher's] aide will sometimes go into classrooms and work with the students who are almost at grade level in the general education classroom. However, it was her opinion that [Student] should be able to access the curriculum with accommodations and supports in place. He was unable to do so and would not benefit from a classroom aide. (Tr. II, 90:1-7; 1-19.)

28. [Special Education Teacher] believed [Student] should have been able to access the first grade curriculum and have some independence to remain in the general education classroom. (Tr. II, 92:25-93:1-4, 93:18-24- 94:1-5.)

29. [First Grade Teacher] and [Special Education Teacher] began a shared journal on [Student] on August 24, 2017. This was eventually shared with everyone involved with the case at the school, but it was not shared with [Parents]. (Tr. II, 99:9-18, 25; 100:2-3.)

30. [First Grade Teacher] and [Special Education Teacher] met with [Parents] on September 14, 2017 and shared their concern regarding the lack of progress [Student] was making on the first grade curriculum, even though [First Grade Teacher] was modifying as much as she could. (Ex. SD9 @ [School District] 1944.)

31. At the meeting, [Special Education Teacher] suggested that an IEP could be written in which [Student] would have time with his peers by attending P.E., recess, and lunch and still attend a Life Skills class that would meet his educational needs. [Parents] disagreed with the suggestion. (Ex. SD 9 @ [School District] 1945.)

32. During the meetings related to the proposed IEP amendment, [Parents] asked about [Student] having more time in the Resource Room as opposed to going into a different placement. [Special Education Teacher] believed that would be the most restrictive environment and would isolate [Student] from his peers and he would lose out on social skills. She stated this would be more restrictive than the Life Skills classroom and "the most restrictive". (Tr. II, 51:19-25-52:6-16.)

33. [First Grade Teacher] and [Special Education Teacher] attempted to figure out what [Student] needed. However, they never established specific meeting times. They would communicate during a lunch break if there was time or maybe in the morning or in the afternoon. (Tr. II, 70:14-24.) There is no co-teaching approach with the general education teacher in [Student's] classroom. (Tr. II, 84:3-6.)

34. [First Grade Teacher] prepared curriculum modifications on her own or with the assistance of [Student's] mother, \*\*\*, and there was no systematic approach for providing training or Special Education support to facilitate delivery of instruction in the regular education classroom.

35. [Special Education Teacher's] familiarity with concepts of including a cognitively impaired student in the general education classroom is based on her experience of teaching. Sometimes it works out and sometimes it doesn't. She has never recommended a paraprofessional as a way to support a student with intellectual disabilities in the general education classroom and believes a self-contained classroom is less restrictive than general education for [Student] because that's where he will receive the most benefit. (Tr. II, 96:1-25.)

36. Although social skills and incidental learning occur for students in the general education first grade classroom (Tr. II, 100:18-25), [School District] was proposing that all of [Student's] academics would occur in the self-contained classroom. [Student] would have no neurotypical peers in the self-contained classroom to model. (Tr. II, 108:8-25-109:1-2.)

37. \*\*\*, the Program Specialist for [School District], is responsible for supporting Special Education teachers in coaching, mentoring, assisting and supporting them. (Tr. II, 114:3-11, 117:4-9.) In early September, [Program Specialist] received an email from [Special Education Teacher], who observed that [Student] was struggling with the curriculum and the IEP would probably need to be changed. [Program Specialist] suggested they start to collect data and then have a meeting with [Parents] (Tr. II, 119:15-20; 121:1-10.)

38. [School District] is obligated to provide [Student] with specialized instruction necessary for him to be independent, academically as well as in self-help independence, social, emotional, and behavioral skills. [Program Specialist's] opinion was that this could not be achieved outside instruction contained in Life Skills classroom as set out in

the IEP. (Tr. II, 132:7-13; 17-25.)

39. [Program Specialist] is not familiar with research conducted on the outcomes of students with cognitive disabilities who are educated in the regular classroom; she has only her experience as a teacher. (Tr. II, 148:15-21.)

40. Very early in the school year, [School District] personnel had concluded that [Student] should be placed in the Life Skills classroom.

41. Assistants in the self-contained classrooms are called Special Needs assistants. They are under the guidance of the teacher in the classroom and are given lesson plans to help instruct under the supervision of the teacher. The situation in the Resource Room is the same. (Tr. II, 146:19-25; 147:1-3.)

42. \*\*\* is the Director of Student Services at [School District]. She was qualified as a highbred expert. As part of her duties, she is responsible for overseeing and supervising all the related services provided and related service programs. She oversees all the Special Education programs throughout the K-12 School District. She oversees all the policy and procedural issues in the School District in terms of compliance with state and federal law. (Tr. III, 6:7-8; 7:14-18, 8:4-7.)

43. Within the School District (though not in every school), [School District] provides a continuum of services, from the least restrictive, to support in the regular education classroom, and through out-of-district placement. (Tr. III, 10:3-7.)

44. "Support" means students are supported by staff going into regular education classrooms to assist with prompting and organization and reinforcement of what is being taught in the regular classroom. Sometimes, Special Education teachers provide instruction alongside regular education teachers, though this does not happen extensively across the

School District. There are students who receive the bulk of their instruction in regular education classrooms who go to Resource Rooms for additional instruction in the area of their IEP goals. (Tr. III, 10:24-25; 11:1- 16.)

45. The next step on the continuum of Least Restrictive Environment after the Resource Room is specialized instruction in classrooms called Life Skills classrooms, in which kids who are closer to one another academically in terms of their achievement levels, are placed. The specialization of the classroom is focused on students with intensive academic needs and intensive academic instruction at a much lower level than grade level. These students can access regular education where appropriate. Access to regular education depends on the individual student. (Tr. III, 12:11-21; 13:1-6.)

46. The philosophy of [School District] is that the least restrictive environment is not a location or place. [Director of Student Services] testified to her understanding that the law states students with disabilities need to be educated with nondisabled peers to the maximum extent possible, and that is assumed to be the regular education classroom. However, it is her opinion it is a common misconception that the regular education classroom is the least restrictive environment. (Tr. III, 16:11-14, 20-25; 19:1.)

47. [School District] employs a concept of "big picture planning" which starts at pre-school and continues throughout the student's entire academic career. The big picture planning is meant to provide more data to the IEP team in terms of what academic and social/emotional and self-help independence goals they should have in the IEP. (Tr. III, 29:13-17.)

48. [Director of Special Services] testified as to the post-education success of students in self-contained classrooms once they are in the adult world. She testified that

teachers have worked at establishing relationships with employers outside of the school. There are students who work at animal shelters. She is aware of at least two students who work at Albertson's, students that work in fast food, and a student who works at Walmart. All the kids have received some level of instruction in the Life Skills classroom. (Tr. III, 32:4-18.)

49. This anecdotal testimony is not supported by specific data and is not persuasive as to the specific decisions [School District] was making with regard to [Student].

50. In determining the Least Restrictive Environment for a student, [School District] considers the needs of the child but also where other students are, comparatively, with that child, the number of staff available in a particular school, the staffing needs throughout the entire School District, resources that are available, and the skill level of the teachers, both regular education teachers and Special Education teachers. (Tr. III, 38:22-25; 39:12-17, 23-25; 40:1.)

51. [Director of Student Services] does not believe that students receiving the vast majority of their instruction in a resource classroom in a one-on-one setting is inclusive. She believes it is isolating and restrictive and does not provide the student an opportunity to interact with other students at their similar level. (Tr. III, 40:13-19.)

52. [Director of Student Services] considered the 1,360 minutes of instruction being provided by [First Grade Teacher] to be specialized one-on-one individually, which was not represented in [Student's] IEP. (Tr. III, 47:18-25.)

53. That number of minutes could not have been provided in the Resource Room at \*\*\* Elementary because there were no other students receiving that amount of service. [Student] would have been receiving services one-on-one with an aide and/or the teacher

in the Resource Room and would not have the opportunity to interact with other students at varying levels of disability.

54. This conclusion is based on [Director of Student Services'] opinion that "we" tend to hyper focus on the fact that the law states students need to be educated to the maximum extent possible with nondisabled peers. According to [Director of Student Services], this focus is at the expense of the "incredibly important interaction that is going on between students at similar ability levels, at different ability levels, and isolating a child is unethical and indefensible." (Tr. III, 38:3-19.)

55. Depending on the Special Education teacher, the administrator, and the regular education teacher, there are inclusive practices going on in the School District, but it is not systemic. (Tr. III, 58:21-25.)

56. [School District] recognized that [Student] was receiving education benefit in the least restrictive environment from the regular education teacher, however it was "wearing her out." (Tr. III, 62:24-25; 63:1-7.)

57. [School District] policy is that a designated aide is not provided to a student, because there is the capacity for a lot of unhealthy interaction to occur between the aide and the student and the teacher. (Tr. III, 75:17-21.)

58. This conclusion, to which a number of [School District] witnesses testified, was not supported by any specific data or factual evidence. It is not persuasive.

59. [Director of Special Services] testified that [First Grade Teacher] was given an option of an aide for her classroom with the apparent presumption that she would train the aide. According to [Director of Special Services], [First Grade Teacher] responded that she did not have time to train an aide for [Student] and it would be easier to do it herself

than teach someone else. (Tr. III, 75:22-25; 76:1-14.) This is contradicted by [First Grade Teacher's] testimony in which she stated she'd been advised that a paraprofessional aide was enabling and considered more restrictive, so she did not attempt to discuss this further as an option. (Tr. I, 105:3-12.) [Principal] was also advised that an aide would create a more restrictive environment. (Tr. III, 190:22-25;191:1-6.)

60. The testimony of [First Grade Teacher] and [Principal] on this issue is persuasive.

61. [School District] was short approximately six aides in the school and an aide in [First Grade Teacher's] classroom would have created one more. (Tr. III, 77:1-9.)

62. [Director of Special Services] presented anecdotal testimony about an aide "enabling or a more restrictive environment by describing a situation in which a child became so dependent on his aide that he suffered academically for four months after the aide had to be replaced. She testified generally that there had been circumstances in which the students would become co-dependent on the aides. (Tr. III, 78:17-24; 79:1-19.)

63. This is not persuasive evidence.

64. [Director of Special Services'] conclusions may reflect [School District] policy and application, but her conclusions regarding inclusive practices are not supported by research or publication.

65. [Director of Special Services] has not had training focused on inclusive practices. She is unaware of research over the past 40 years which disputes the research demonstrating that students with intellectual disabilities make greater academic and social gains if educated in the general education classroom. (Tr. III, 125:6-19.)

66. [Director of Special Services] is not aware of the many studies which have compared Special Education classrooms with general education classrooms. This includes a

study which established that students with moderate to profound disabilities, educated for the majority of the day in the general education classroom, made significant gains in adaptive behavior and social competence over those students educated in a self-contained Special Education classroom. (Tr. III, 129:16-21; 130:21-25; 131:2-8.)

67. [Director of Special Services'] opinion that a self-contained or Life Skills classroom is less restrictive than the provision of an aide in a regular setting is not persuasive.

68. A paraprofessional can be a valuable tool in assisting children to be in the regular education classroom. The key is that the individual must be appropriately trained and supervised to assist in the provision of Special Education-related services. (Tr. III, 134:23-24; 135:7-11.)

69. It is not necessary to use a paraprofessional in such a way that he or she is with a student all day every day so as to interfere with the student's opportunity to develop relationships with other students. This can be accomplished through thoughtful planning, training, and adherence to best practices. (Tr. III, 136:7-10, 15-19, 23-25; 137:1.)

70. Meaningful educational progress for [Student] can be based on adaptive skills, social skills, and functional skills. (Tr. III, 162:11-25; 162:1-3.)

71. An aide in the classroom was not attempted by [School District] because even if the IEP team made that determination, there was not one to hire and so [School District] would look at other ways to meet [Student's] needs which, in this case, [School District] determined was a self-contained classroom. Tr. III, 168:13-23; 169:17-21.)

72. [First Grade Teacher] was not trained in how to implement [Student's] IEP or how to modify the general education curriculum for [Student] (Tr. I, 75:15-25; 76:1-9;

78:8-10.) She was trying very hard and working without much support from [School District] administration on how to include a child like [Student]. (Tr. II, 232:17-22.)

73. The collaboration between [Special Education Teacher], [First Grade Teacher], and [Principal] on teaching strategies or activities for [Student] were based solely on research by [First Grade Teacher and Special Education Teacher]. (Tr. III, 182:19-25; 183:10-19.)

74. [First Grade Teacher] was alone in the planning, prepping, and providing the instruction to [Student]. (Tr. III, 193:15-17.) [First Grade Teacher] estimated she was spending 1,000 minutes per week one- on-one with [Student], which is slightly over three hours a day. (Tr. I, 99:20-25.) [First Grade Teacher] initially believed a paraprofessional would have been beneficial for her and [Student]. (Tr. I, 101:14- 18.) When she asked why she could not have an aide, she was told that it would impede learning. (Tr. I, 101:24-25; 102:1-3.) A paraprofessional who was trained on how to appropriately support her in the classroom and support [Student's] learning would have been help. (Tr. I, 103:3-9.)

75. [Student] made progress in every academic area based on his IEP goals. (Tr. I, 108:17-25.)

76. In the first trimester of [Student's] first-grade year, [First Grade Teacher] noted he "continues to make progress in each of his IEP goals." (Ex. SD-1 at [School District]25.) During the second trimester, he continued to make progress on his IEP goals, and his teacher recognized him for his hard work. (Ex. SD-1 at [School District] 25.) By the end of the school year, [First Grade Teacher] concluded [Student] had demonstrated "tremendous growth in his [IEP] goals." (Tr. I, 68:3-20.)

77. [Student] also earned an average or above average mark on every measure of work habits and social development. (Ex. SDI at [School District] 24.) His social skills improved because he modeled his nondisabled peers in the regular classroom. He looked to them for "guidance and social cues for appropriate behavior." (Ex. SDI at [School District] 25.) [First Grade Teacher] noticed this modeling immediately, reporting in the first trimester that [Student] "loves being around his peers and observing others." (Ex. SDI at [School District] 25.) He even had "really good friends" that would help him take out materials if he was having trouble. (Tr. I, 93:21-94:6.) All in all, [Student] "made tremendous progress this year in every area!" and his confidence increased " both academically and socially." (Ex. SD-1 at [School District] 25.) [Parents] also had observed and were pleased with his substantial growth in academics and in his social, communication, behavioral, and other functional skills. (Tr. III, 201:14-203:23.) At \*\*\*, [Student] was modeling his peers and started to want to work on spelling, counting, and writing his name at home. (Tr. III 203:4-8, 16- 19.)

78. It is undisputed that [School District] did not provide a paraprofessional (aide) to assist in the regular classroom, either in instructing [Student] directly or to assist the teacher with instruction for the whole class.

79. [Student] blossomed in the regular education setting. (Tr. III, 203:4-19.) His motivation for academics increased. He came in every day ready to learn, and at home, he began wanting to work on spelling, writing, and counting. (SDI at [School District] 25; Tr. III, 203:7-23.) [Student] also became more independent over the course of first grade, particularly in following the class and his own routines. (Tr. I, 74:11-75:15.)

80. [Student] made progress with letters and, according to [First Grade Teacher],

did very well from the beginning of the year to the end. He could recognize most of his sounds and lowercase letters. By September or October, he was paying attention more and would follow the example of what his peers were doing. He would want to do the same thing. (Tr. I, 93:12-18; 93:7-12; 96:18-22.) By mid-September, he had stopped sucking his thumb and had greatly reduced the times he had to be reminded to take his hands out of his pants. (Tr. I, 117:5; 118:16-19; 119:6- 9.)

81. Although [First Grade Teacher] found it challenging at the beginning of the year to modify the curriculum, she found [Student] to be "a joy to have in class!" (SDI at [School District] 25.) She loves his "kind heart and everything he brings to the classroom." (SDI at [School District] 25; Tr. I, 60:7-9, 108:17- 114:5.)

82. After [School District] proposed and insisted upon placement in a self-contained Special Education classroom, as described more fully below, [Student] moved to [Private School] for his second-grade year. (Tr. IV, 27:3-28:18.)

83. At [Private School], [Student] was educated in the regular education classroom with other second-graders most of the school day. (Tr. IV, 27:3-28:18; Tr. I, 138:4-15.) His regular education teacher was \*\*\*. (Tr. I, 130:4-10.)

84. [Second Grade Regular Education Teacher] approach to teaching [Student] was to involve him in the regular classroom activities in every way that he was capable of participating. (Tr. I, 130:14-24.) Each day started with a morning greeting, followed by individual work, then morning sharing, and then an academic game. (Tr. I, 131:2-22.) [Student] participated with the group in these morning activities. (Tr. I, 131:2-132:13.) During the group activities, [Student] listened, paid attention, and followed directions. (Tr. II, 172:16-176:7.)

85. When other students did their individual morning work, [Student] did also, but he worked on individual assignments [Second Grade Regular Education Teacher] had created for him. For example, she set up drawers with learning activities at his instructional level that he could work on independently. (Tr. I, 131:9-17, 134:18-136:11; Tr. II, 172:16-176:7.) [Student's] individual work was slightly different, but he followed the rhythm and schedule of the regular classroom in doing independent work. (Tr. I, 131:9-17; Tr. II, 172:16-176:7.) He knew how to do things on his own without direction when [Second Grade Regular Education Teacher] was working with other students. (Tr. I, 163:24-164:15.)

86. [Second Grade Regular Education Teacher] worked with [Student] one-on-one in the classroom as others did their work, but it was limited to 10-12 minutes at a time. (Tr. II, 172:18-174:16.)

87. [Student] received individualized instruction in a Special Education setting 300 minutes (5 hours) per week. Typically, he went to work with the Special Education teacher, \*\*\*, for two half-hour periods a day. (Tr. I, 133:14-19, 147:19-148:1.) Occasionally the Special Education teacher would work with [Student] in the regular education classroom. (Tr. II, 173:13-19.) Additionally, there were times when [Student] worked with a paraprofessional or a volunteer. (Tr. I, 137:18-22, 138:24-143:4.)

88. The only time [Student] was not in the classroom with his nondisabled peers was when he worked with the Special Education teacher, an aide, or a volunteer. (Tr. I, 137:18-22, 138:4-14.) Although he attended music, library, P.E., and recess out of the classroom, he did so with his second-grade classmates. (Tr. I, 137:23-138:6.)

89. Even when [Student] worked with a volunteer or paraprofessional, he was not singled out as the only student to do so. (Tr. I, 140:6-8.) Working with the

paraprofessionals did not limit, infringe, or inhibit [Student's] ability to learn. (Tr. I, 140:9-21.) Rather, the volunteers and paraprofessionals were beneficial to [Student]. (Tr. I, 140:9-21.)

90. [Second Grade Special Education Teacher], who had an involved Special Education teacher and assistance from paraprofessionals and volunteers, spent about 20-30 minutes a day modifying curriculum or preparing individualized instruction for [Student]. (Tr. I, 150:5-152:2.) She could not say how much time she spent giving one-on-one instruction to [Student]. (Tr. I, 149:6-150:4.) However, she did not find it overwhelming, nor does she believe it took away from her ability to teach other students. (Tr. I, 149:2-5, 152:3-153:1.) Spending some 1:1 instructional time with [Student] did not distract the other students, and [Student] was not disruptive in class. (Tr. I, 148:9-149:5.) To the contrary, [Second Grade Special Education Teacher] believes [Student's] presence in the classroom benefitted both him and other students. (Tr. I, 172:8-173:17.)

91. [Student] made considerable academic and social progress in the regular second-grade classroom. (Tr. I, 153:2-166:3, 168:23-176:21.) In math, he improved his skills in adding and subtracting, comparing numbers with greater and less than, telling time, completing patterns, matching fractions, graphing data, measuring, and sequencing numbers. (Ex. P37 at MSWD 512; Tr. I, 157:6-158:18; Tr. IV, 32:18-34:17.) In language arts, he improved in his knowledge of the alphabet, identification of sight words, and ability to write his name and numbers, copy sentences, read words and sentences, match upper and lowercase letters, and sequence letters. (Ex. P37 at MSWD 512; Tr. I, 153:2-22.)

92. Standardized testing conducted by [Private School], i.e. the Measure of Academic

Progress (MAPs), also documents [Student's] improved mathematic and reading skills. (Ex. P38; Tr. I,153:23-154:25, 155:20-156:17.) Between testing in the winter and at the end of second grade, [Student's] growth in math was comparable to the normal growth of a typical child, and his growth in reading was significantly more than the normal growth of a nondisabled child. (Tr. I, 153:23- 156:l 7; Ex. P38.)

93. In addition to academic achievement, [Student] gained functional life skills, many of which were included as educational goals in [School District's] proposed IEP. (Tr. I, 159:7-164:25.) For example, in the area of communication, [Student] exceeded IEP goals proposed by [School District]. As of March 2018, he was using on average only 1-word utterances, so [School District] developed a goal for him to use four- to five-word oral statements when asking or answering questions, with one prompt. (Ex. J- H at [School District] 120.) [Student] progressed further, to speaking in full sentences, answering questions and expressing himself with complete thoughts and great detail. (Tr. I, 159:7-160:23, 241:19-23.)

The second communication goal was for [Student] to increase greeting others at school by saying "hi" or "good morning" from just 20% of the time to 50% of the time. (Ex. J- H at [School District] 120.) During second grade, [Student] would greet and give high fives to everyone when they arrived at school. (Tr. I, 165:1-166:3.) His social communication skills developed so much that, even after becoming more proficient at eating his lunch in a timely manner, he liked to stay in the lunchroom to socialize with numerous friends - including 7<sup>th</sup> and 8<sup>th</sup> graders. (Tr. I, 165:4-166:3.)

94. [Student] increased his ability to complete tasks, such as delivering things

by himself to the office or other places in the school. (Tr. I, 160:24-162:3; Tr. IV, 33:13-24.) He would pass out papers, put things in mailboxes, sort papers, take lunch counts to the lunchroom, and run other errands. (Tr. I, 160:24-162:3.) He also improved his fine motor skills. (Tr. I, 162:9- 164:25.)

95. [Student] achieved proficiency in several academic readiness skills, such as respecting others' rights, organizing himself and materials, using time effectively, and participating in group discussions. (Ex. P37.) By the end of the year, he was nearing proficiency or proficient in almost every category graded. (Ex. P37.)

96. From [Second Grade Special Education Teacher's] perspective, [Student] benefitted from being included in regular second-grade classes. (Tr. I, 173:21-174:9.) One of the major benefits was that [Student] observed and modeled his peers. He learned even when not being directly instructed. He actively participated and raised his hand to answer questions, and he was socially appropriate with his peers. (Tr. I, 173:21-175:20.)

97. At the time of the hearing in November 2019, [Student] was a few months into his third- grade year at [Private School], and his teacher was \*\*\*. (Tr. I, 201:11-17.) [Student] had a similar schedule as he did in second grade. (Tr. I, 201:18-206:17.) He would spend most of his time in the regular education classroom or participating with regular education classmates, and he received instruction from the Special Education teacher, \*\*\* , for an hour a day. (Tr. I, 201:18-206:17.)

98. In the few months [Student] has been in third grade, he has made academic progress. (Tr. I, 206:18-209:20.) He is learning more sight words, reciting nursery rhymes, is continuing to work on addition and subtraction, and uses manipulatives independently to solve math problems. (Tr. I, 206:18-209:20, 246:8-14.) His fine motor skills have

continued to improve. (Tr. I, 212:5- 213:3.) His speech articulation has improved as well, so it is becoming easier to understand him when he speaks. (Tr. I, 246:8-247:5.)

99. [Third Grade Regular Education Teacher] spends about an hour a week preparing [Student's] weekly lesson plan in third grade. (Tr. I, 214:21-215:11.) Her time preparing lesson plans and teaching [Student] does not take away from teaching other students. (Tr. I, 215:18-216:4.) She testified [Student] is not a distraction, not disruptive, and does not have behavioral issues in her classroom. (Tr. I, 215:18-216:4.)

100. [Student] has continued to increase his social, emotional, behavioral, and communication skills. He has learned to use tools to address his frustration and has increased his ability to communicate his feelings. (Tr. I, 209:21-211:1.) When other students try to help him and he wants to do it himself, he is learning to say "Break, please," instead of getting frustrated and telling the students to go away. (Tr. I, 211:10-212:5, 242:2-243:1.) He demonstrates emotional intelligence in his ability to show empathy towards others. By way of example, when a fellow student's hamster died, [Student] was the first person to comfort the student. (Tr. I, 218:9-219:4.) He continues to expand upon social communication goals that were part of [School District's] proposed IEP. Not only does he say "hi" or "good morning," he tells everyone "bye" as he is leaving school. (Tr. I, 219:7-24.)

101. Since attending [Private School], [Student] has substantially achieved or exceeded several IEP goals proposed by [School District]. (Ex. J-H at [School District] 120-126.) For example, an academic goal called for [Student] to increase his ability to identify sight words. At the end of first grade, he could consistently identify only about 5 sight words, and now he is able to identify up to 15 sight words. (Ex. J-H at [School

District] 122; Tr. IV, 22:5-23:12, 32:18-22.) Another goal was for [Student] to increase his attending skills to a 10-minute period with no more than two prompts. (Ex. J-H at [School District] 123.) At [Private School], he is able to attend for 10 to 15 minutes at a time. (Tr. I, 244:17-23; Tr. II, 176:5-7, 179:1-4.) [Student] has surpassed IEP objectives in the area of written expression. Instead of just tracing or copying his first and last name, as [School District] proposed in its IEP, [Student] is able to write his first name from memory, without tracing or copying it. (Ex. J-H at [School District] 126; Tr. I, 241:4-18; Tr. IV, 32:18-24.)

102. [Third Grade Regular Education Teacher] has observed him modeling other third-grade students' behavior - to good effect. (Tr. I, 216:22-217:5.) For example, just like the other third-graders, he goes directly to his desk to work and promptly gets ready for recess with his peers - getting his coat, lining up quietly, and going straight outside without getting distracted. (Tr. I, 217:4-21.)

103. [Student] has developed and maintained numerous social relationships, not just with children in his class, but with his whole grade level and students in different grades (Tr. I, 252:2- 13); and his peers, of all grade levels, do not talk down to him. (Tr. I, 242:14-18.) He has been invited to birthday parties outside of school, to the movies, and out for ice cream. (Tr. I, 217:22- 218:6; Tr. III, 212:9-213:16.)

104. [Student's] experiences in the regular education setting have given him a sense of belonging. (Tr. I, 218:7-8.) He knows the "flow" or rhythms of the school. (Tr. II, 179:18- 180:12.) Between January 2019 and November 2019, he increased his participation in school routines, such as raising his hand in class and independently walking on the correct side with other kids without multiple prompts to stay with the class. (Tr. II, 179:18- 180:12.) He transitions from activity to activity without trouble. (Tr. II, 178:22-25.) He is

excited to go to school every day, excited to see his friends of all ages. (Tr. IV, 33:8-11; Tr. I, 219:13-20.) Being with nondisabled peers inspires [Student] to work harder. [Student] "would cooperate mostly" when working one-on-one with his teacher, but when his peers are present, he is more engaged and fully participates. (Tr. II, 175:18-176:7.)

105. [Student] receives assistance from a paraprofessional and volunteers. The paraprofessional provides some 1:1 instruction for [Student], but she and the volunteers also assist other students. (Tr. I, 219:25-220:21.) This supplementary service has had a positive impact on [Student's] education. (Tr. I, 220:22-221:4.)

106. Carol Quirk, Ed.D., testified as an expert about inclusive educational practices and the appropriate educational placement for [Student] Dr. Quirk has an Ed.D. in Severe Disabilities and Communications Disorders, extensive professional experience in training teachers and assisting schools in implementing inclusive educational practices, has published on this topic in peer-reviewed journals, and has been recognized as an educational expert in due process and court proceedings. (P51; Tr. II, 150:11-162:22.)

107. Dr. Quirk was not allowed to see the self-contained classroom, which [School District] was recommending for [Student], while instruction was being delivered. Under the circumstances presented, where there is disagreement of opinion on whether [Student] can be included in general education with his nondisabled peers as a primary placement versus a self-contained classroom with a few peers that have either similar abilities or more limited cognitive abilities, it would have been helpful to see the classroom in operation. (Tr. II, 165:17-25; 166:20-25.)

108. Though she was unable to view the room with students in it, the self-contained classroom at \*\*\* Elementary School appeared to Dr. Quirk to be typical of Life Skills

classrooms she has seen which focus on a limited academic content and does not include subject matter made available to nondisabled peers. (Tr. II, 169:13-18.)

109. Based on her familiarity with the nature of self-contained Life Skills classes, her observation of the classroom, and her knowledge of [Student], Dr. Quirk was able to form an expert opinion as to its appropriateness for [Student]. (Tr. II, 168:1-25,169:19-22.)

110. Dr. Quirk is of the opinion that the nature of the self-contained classroom does not enable a student of any kind to access grade-level curriculum. Frequently the students in Life Skills classes have different skills and different IEP goals. The instruction is not a grade level, the reading material, the conversation, or the communication. It is not possible to teach social studies, math, science, reading, and writing in a classroom where everybody is three to five grade levels below their actual age. (Tr. II, 169:7-25.)

111. Dr. Quirk testified to her opinion that the IEP dated April 12, 2018 (which recommends a primarily Special Education placement with 15 minutes a day of service once a week from the OT, but no other services in general education) is not the LRE for [Student] and would not have provided him with educational benefit. A regular education setting with nondisabled peers would be the least restrictive environment for [Student]. (Tr. II, 167:10-172:15.)

112. Dr. Quirk based her conclusion on the fact that goals and objectives stated in the IEP could be delivered in a general educational classroom within the activities that are developed for every other student. The supplementary aids and services are the kinds of things that could happen in any classroom. (Tr. II, 171:11-22.)

113. Dr. Quirk's opinion is persuasive.

114. Dr. Quirk observed [Student] in January 2019, as well as prior to the hearing in November 2019. She stated [Student] has no trouble transitioning from activity to activity. While he gets tired, he is able to stay engaged when he is able to take a break for a minute or two. (Tr. II, 178:22-25; 179:1-3, 14-17.) There is progress in his understanding of expectations of the classroom without the need for constant prompting. (Tr. II, 179:20-25; 180:1-2.) Though [Student] learns slowly, he achieves academic progress. (Tr. II, 180:16-17.)

115. Dr. Quirk observed [Student] as an active participant in his now third-grade class. He works on activities in the classroom as well as in the Resource Room, which he goes to two 30 minute periods a day. The majority of the day is with nondisabled peers in the regular education setting which, Dr. Quirk testified, validated her opinion that he should not need to be placed primarily in a separate class. (Tr. II, 172:1-13.)

116. Dr. Quirk is familiar with research in the field of inclusive education. (Tr. II, 180:23-24.) Research on the outcomes for students with intellectual disabilities placed either in the inclusive setting versus a separate self-contained setting is consistent. Not a single study shows that being in a self-contained setting is better academically or socially. (Tr. II, 182:19- 25.)

117. Research on postsecondary outcomes has shown that students who are included in the general education setting are more likely to have paid employment after high school. (Tr. II, 183:17-22.)

118. [Student] is very social and models his peers. (FOF, ¶¶ 96, 100, 103-104.) In the general education classroom, [Student] has a lot of opportunity to have natural social exchanges that are communicative and age-appropriate. He would not have that

opportunity in a self-contained classroom with peers who also have limited communication. (Tr. II, 184:17-21.)

119. Though there are fewer studies, the studies that look at students with intellectual disabilities being included in a classroom with kids without disabilities, across the board, show there is no negative impact on either instructional time or academic outcomes, and that there are some positive benefits in relation to more social and emotional measures like empathy and tolerance of diversity. 'Included' means active participation though planning and engagement and not just classroom placement. (Tr. II, 184:23-25; 185:4-17.) Membership and meaningful participation are key to inclusion. (Tr. II, 186:16-17.)

120. The placement proposed by [School District] would limit [Student's] opportunities for academic and social development and development of communication skills just by the nature of the classroom and the amount of time he would be in the self-contained classroom. (Tr. II, 186:23-25; 187:1- 3.)

121. 'Generalization' is an evidence-based methodology. While students with significant intellectual disability may learn a skill in the setting in which they were taught it, they are probably not going to generalize that skill to a setting that is less familiar or where they have not practiced it. The research shows that to teach something usable, it had to be taught where it was going to be used. (Tr. II, 187:4-22.) This is especially true in relation to social and communication skills. Adults in self-contained settings tend to talk to each other more than they do to the children who are not particularly responsive vocally. Placement of [Student] in a self- contained setting for 1400 minutes a week would, by the nature of the classroom, limit his ability to apply

independent living skills or other functional skills to real life settings. (Tr. II, 188:5-23.)

122. Placement of [Student] in the self-contained classroom would limit his opportunities for both academic and social development and development of communication skills. (Tr. II, 186:19-187 :4.) Based on the research, there should be very few students removed from the general education environment, and primarily it would be those students who are disrupting the learning of others. (Tr. II, 244:15-23.)

123. In the general education classroom, a student with limited intellectual abilities has opportunities for incidental learning through exposure to vocabulary and how to work, cooperate, and collaborate with kids -- things that are not academic or specifically taught. (Tr. II, 189:1-4, 11-18; 190:1-4.)

124. Dr. Quirk's opinion is that [Student] can be successfully included in the general education classroom for the majority of the day. [Student] is successful in his third-grade classroom. He is learning slowly, but he is learning. He is making progress. He is socially engaged and learning the rhythms and routines of being a member of the class community and school community -- what is appropriate and what is not appropriate. He has friends. (Tr. II, 211:16- 25.)

125. [Student] is learning skills which will translate into adult skills but, more importantly, the social, communication, and behavioral skills that will make him an accepted part of whatever community he is in and skills that will keep him employed. Research has determined that those are the skills that students with disabilities need for employment, and not reading, writing, and math which, though important, are not the

skills that will assist a student with disabilities in employment. (Tr. II, 212:8-19.)

126. If the IEP proposed by [School District] were implemented, Dr. Quirk does not believe [Student] would acquire the skills he needs academically and socially but would likely regress. (Tr. II, 212:24:35; 213:1-2.) Dr. Quirk's testimony is persuasive.

127. All of the supplementary aids and services reflected on [School District] could be delivered in the general setting. (Tr. II, 224:23-24.)

128. If a student is not making meaningful progress in the regular education setting with supplementary services, the first thing to look at is whether the instruction being provided is actually the right instruction in order for the student to meet the goals identified. It is not necessarily the setting which needs to change. (Tr. II, 268:15-25.)

129. The service plan provided by the [\*\*\* Private Schools] (Exhibits J, K, and L) are not a lot different than what [School District] offered in relation to the measurable goals. (Tr. III, 58:21-25; 107:18-23; 108:3-11.)

130. The benefits [Student] received while placed in the regular education classroom are consistent with the research regarding inclusive education. Multiple studies over the past 40 years show students with intellectual disabilities make greater academic and social gains if educated in the general education classroom. This is particularly true for students with Down Syndrome. In fact, there is not a single study showing that students with disabilities do better academically or socially when provided instruction in a self-contained classroom, a fact that [School District] does not dispute. (Tr. II, 182:12-183:14; Tr. III, 125:11-19, 128:23-131:8.) [School

District's] Special Education Director was generally unfamiliar with the research; she also lacked knowledge of effective practices for including children with intellectual disabilities in regular classes. (Tr. III, 125:6-10, 128:23-131:8.)

131. Research on postsecondary outcomes shows that students who are included in regular education classrooms are more likely to have paid employment after high school. (Tr. II, 183:15-22.) Overall, the skills [Student] has been learning in the regular education setting translate into important adult skills - communication, social, and behavioral skills that will enable him to be part of the community and obtain and maintain employment. (Tr. II, 212:7-19.)

132. In her observations in January and November 2019, Dr. Quirk observed that both [Student] and other students benefited from the peer-to-peer learning that took place at [Private School]. (Tr. II, 207:1-21.) [Student] communicates more with his peers, which gives a lot of opportunities for natural age-appropriate, back-and-forth social exchanges. (Tr. II, 184:1-16.) He would not have the same opportunities if he were in a self-contained classroom with other students possessing limited communication abilities. (Tr. II, 207:1-21.)

133. Dr. Quirk also observed that [Student's] presence in the regular classroom did not inhibit his teachers' ability to instruct any other children. (Tr. II, 174:17-24.) He did not disrupt other students and it was not a problem at all. (Tr. II, 174:17-24.)

134. The experience of the teachers at [Private School] is consistent with the research. (Tr. II, 184:22-185:17.) Across the board, studies show "there is no negative impact on instructional time or academic outcomes" as a result of including a cognitively disabled student in the classroom. (Tr. II, 184:22-185:17; *FOF*, ¶ 119.) Rather, there are

social and emotional benefits to teachers and students, like empathy and tolerance of diversity. (Tr. II, 184:22-185: 17.) At [Private School], [Student] is a bundle of joy who is well loved and part of the community. (Tr. I, 256:16- 257:1.)

135. In all, every one of [Student's] regular education teachers considered him a "joy" to work with and have in their classrooms. (Ex. SDI at [School District] 20 (kindergarten); Ex. SDI at [School District] 25 (first grade); Tr. I, 172:8:173:17 (second grade); Tr. I, 256:16-257:1 (third grade).)

### **[SCHOOL DISTRICT'S] IEPS AND PROPOSED CHANGE IN EDUCATIONAL PLACEMENT**

136. [School District's] first IEP meeting for [Student] occurred in May 2016, as he was transferring from pre-kindergarten to kindergarten at \*\*\*. (Tr. III, 228:1-229:11; SD2 at [School District] 255-264.) [Parents] ultimately signed an IEP in October 2016. (SD2 at [School District] 238-253.)

137. At the end of [Student's] kindergarten year, [Parents]: signed another IEP dated April 27, 2017. (Ex. J-C.; Tr. III, 234:23-235:5.) That IEP had [Student] spending 300 minutes a week in a Special Education setting to work on his math, reading, written expression, as well as social, emotional, and behavioral skills. (Ex. J-C at [School District] 199.) It was to be in effect until April 28, 2018. (Ex. J-C at [School District] 199.)

138. Almost immediately after [Student] started first grade, [School District] began trying to move [Student] into a self-contained classroom, known as the "Life Skills" classroom. (FOF, ¶ 26, 31; Tr. III, 237:4-238:23.) The Special Education department directed [First Grade Teacher] to log everything that happened with [Student], apparently to demonstrate how challenging it was to serve him in the regular education setting. (Tr.

I, 115:25-116:17.)

139. [School District] convened a team meeting on November 16, 2017. (Tr. III, 242:14-17.) [Parents] initially believed the meeting was simply to review the evaluation that had been conducted. (Tr. III, 247:21-248:16.) [School District] did not provide them a draft IEP to review prior to the meeting. (Tr. III, 199:11-24; 243: 22-24.) Two days prior to the meeting, the school psychologist notified [Student's mother] she thought [School District] was going propose removing [Student] from the regular education setting. (Tr. III, 248:18-249:4.)

140. At the November 16, 2017 meeting, [School District] proposed amending [Student's] IEP to change his educational placement. [School District] proposed placing [Student] in a self-contained classroom for almost the entire school day -- for 1360 minutes (over 22 ½ hours per week/4 ½ hours per day). (Ex. J- E at [School District] 155.) Because there was no Life Skills class at \*\*\*, the change would have required [Student] to change schools within [School District], most likely to \*\*\* Elementary School. (Tr. III, 25:2-26:9.)

141. [School District] would not provide a paraprofessional to assist in the regular education classroom, though [Director of Student Services] agreed it is considered a supplementary service under IDEA and can be a valuable tool in assisting children to be educated in the regular classroom. (Tr. III, 132:24-135:2.)

142. The next IEP meeting took place on December 14, 2017. (Tr. IV, 9:8-11; Ex. J-F.) At that meeting, and in subsequent emails to the Superintendent, [Parents] reiterated their desire for an aide or paraprofessional, but [School District] continued in its refusal to provide one. (Tr. IV, 11:7-12:25; Ex. P20; Ex. J-F at [School District] 176.)

143. In response to request by [Parents] for an aide, [School District] sent a "prior written notice" (PWN) dated January 15, 2018. (Ex. J-A.) [School District's] PWN asserts that "[p]roviding a paraeducator in the regular education classroom does not meet [Student's] needs nor provide him with meaningful educational benefit." (Ex. J-A at [School District] 1934.)

144. [School District] had school personnel answer four questions that recited the four-part legal test established in *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & through Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994) for determination of LRE. Although [First Grade Teacher's] responses were referenced in the PWN, they were not attached. (Ex. J-A at [School District] 1934.) However, they were submitted separately as Exhibit J-D.

- a. *Educational benefits in regular education:* [First Grade Teacher] responds that [Student] is exposed to grade level academics that are reinforced, but he is significantly below his peers academically and needs small group or individualized instruction. (Ex. J-D at [School District] 968.) She excludes her conclusions that he progressed in "every area" academically and socially. (Ex. SDI at [School District] 24-25.)
- b. *Non-academic benefits that outweigh academic benefits:* [First Grade Teacher] notes that [Student] learns from his peers in the classroom, both socially and academically. But, she opines that while peer socialization is important, the goal in the regular education classroom is "academic achievement." She further opines that using his peers to learn social cues and academic content is not beneficial, in large part because he has been able to achieve at grade level. Ex. J-D at 968.) She also claims he is talked down to by his peers, although she acknowledged in her testimony that as the year progressed, this occurred much less often. (Ex. J-D at 968; Tr. vol. 1, 55:11-56:23.)
- c. *Effect on teacher and students having [Student] in regular class:* [First Grade Teacher] responds that it is a challenge because of the significant modifications and prompts he needed and the additional planning that was involved. (Ex. J-D at 968-969.) She acknowledges that with parent volunteers, her burden was lightened as they could give more direct instruction. (Ex. J-D at 969.) [First Grade Teacher] also believes the

presence of [Student] resulted in a slower learning pace for the class as a whole. (Ex. J-D at 969.) She does not describe how the situation would have been different if she had had assistance from [School District] administration. (Tr. vol. 3, 202:18-203:2; Tr. vol. 4, 9:16-10:2.)

- d. *Costs of regular education placement:* [First Grade Teacher] answers this question by stating her opinion about the perceived harm to [Student]. She does not identify any monetary costs. (Ex. J-D at 969.)

145. [School District] held three more IEP meetings on February 1, 2018, March 15, 2018, and April 12, 2018. (Exs. J-G, J-H, J-1.) At the March IEP meeting, [School District] proposed a new annual IEP, rather than seeking to amend the 2017 IEP. However, the substance of [School District's] proposal remained the same - [School District] still sought to change [Student's] educational placement from the regular classroom to a self-contained classroom. (Ex. J-H.)

146. Prior to the final IEP meeting in April, [School District] provided [Parents] another PWN reiterating its position that placement in a self-contained classroom at a different school in the district was appropriate for [Student]. (Ex. J-B.)

147. [School District's] proposed IEP did not change when it was reviewed at the April 12, 2018 IEP meeting. (Ex. J-I.) [School District] continued to propose that [Student] be placed in a self-contained classroom with only disabled peers for 1360 minutes (22.5 hours) a week at a different school than he currently attended, plus related services of occupational therapy and speech therapy in a Special Education setting for a total of 45 minutes per week. (Ex. J-H at [School District] 126-127; Ex. J-I at [School District] 140-141.) The proposed IEP did not offer any instruction in the regular education classroom. (Ex. J-H at [School District] 126-127; Ex. J-1 at [School District] 140-141.) It represented a significant change - from 300 minutes (5 hours) a week in a Special Education classroom to 1360 minutes (22.5 hours) a week in a Special Education classroom, and to a different

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school entirely. (Tr. IV, 6:20-7:3; Ex. J-I at [School District] 140-141.)

148. At each of the three IEP meetings in 2018, the parties continued to disagree about the change in educational placement. (Ex. J-G at [School District] 191-192; Ex. J-H at [School District] 129-130; Ex. J-1 at [School District] 143-144.) [School District] believed placement in the self-contained Life Skills classroom at \*\*\* Elementary was the LRE for [Student] (Exs. J-A, J-B, P34.) [Parents] believed that continued placement in the regular education classroom with some pull-out to a Special Education setting for individualized instruction and with supplementary services, such as a paraprofessional in the regular classroom, would be the LRE for [Student]. (Ex. P32 at 1831-1834; Tr. III, 249:5-16.)

149. On April 25, 2018, [Parents] advised [School District] they planned to move [Student] to a private school and requested that [School District] reimburse them for the costs. (Ex. P32.) [School District] sent a PWN dated May 9, 2018 denying this request. (Ex. P34.) [School District] explained it was refusing the request because it believed its proposed IEP offered FAPE and that the [Private] School system would not provide [Student] FAPE. (Ex. P34 at [School District] 1855.)

150. The students in the Life Skills classroom all have intellectual disabilities of some type and are all performing significantly below grade level. (Tr. III, 158:3-21.)

151. The Life Skills classroom contained five chairs for five students, all of which were facing the front. (Tr. II, 167:10-22.) There were very few materials in the room, and there was no grade level curriculum content. (Tr. II, 167:17-25.) [Student] would not have been able to have access to grade-level curriculum if placed in the self-contained classroom. (Tr. II, 167:23- 168:25.)

152. In Life Skills, teaching is focused on specific skills at that child's level. The instruction, reading material, conversation and communication is significantly below grade level. (Tr. II, 167:23-168:25.) This would limit [Student's] ability to learn academics as well as communication skills. (Tr. II, 167:23-168:25.) The academic content is more limited, and [Student] would not have access to subject matter that is made available to [Student's] non-disabled peers. (Tr. II, 169:10-18.)

153. Typically, students in self-contained classrooms have limited communication skills; many are nonverbal. (Tr. I, 254:9-18.) This limits exposure to typical speech and speech patterns, vocabulary, and conversational feedback. (Tr. I, 254:9-18.) Exposure to that kind of language is critical to [Student's] communication skills, social development, and ability to fit into a community. (Tr. I, 254:19-255:8.)

154. Placement in a segregated classroom with students who are cognitively disabled and have limited communication abilities would be detrimental to [Student's] development of communication skills. (Tr. II, 183:23-184:20.) Most of [Student's] communication is with his nondisabled peers. (Tr. II, 183:23-184:20.) While he does have simple exchanges with adults, it is with his peers that he has more natural social exchanges, with more back and forth, that are communicative and age appropriate. (Tr. II, 183:23-184:20.) Segregated placement would unnecessarily limit [Student's] opportunities to have these exchanges with peers or to form meaningful social relationships with nondisabled peers. He would not be invited to sleepovers, birthday parties, or other social events where he can grow his social skills and feel included. (Tr. II, 184:17-21; Tr. IV, 38:25:39:23.)

155. [Student's] IEP content and goals do not necessitate placement in a self-contained classroom. (Tr. II, 171: 9-172:15.) Most of the goals and objectives could be

delivered in a general education setting by modifying content and providing supplementary aids and services. (Tr. II, 171:1-172:15.)

156. Placement in regular education also offers opportunities for incidental learning that [Student] would not receive in a self-contained setting, such as how people relate to and work with each other. (Tr. II, 188:25-190:5.) Even when he looks like he's not paying attention, he is absorbing what's being said, and he is observing the actions of those around him. (Tr. III, 239:7- 240:21.) [Student] learns by watching others, such as the time he gave [Private School Special Education Teacher] the sign for bathroom, something other students did but which she had not taught [Student] to do. (Tr. I, 176:3-21.)

157. [School District] could have adopted strategies that would enable [Student] to access grade level curriculum and be appropriately educated in the regular education classroom for most of his school day. (Tr. II, 190:6-207:18.) The materials and content could be modified so that he engages in individual learning at his level, while being exposed to higher level concepts as well. (Tr. II, 190:6-197:6.)

158. In general, [School District's] Special Education personnel lack knowledge for implementing inclusive practices for educating students with cognitive disabilities in regular classes. (*FOF*, ¶¶ 35, 39, 65-66.) [Director of Special Services] nevertheless agrees with Dr. Quirk's conclusions about the advantages of inclusive education and does not dispute the extensive research that concludes that education in regular classes produced better outcomes than education in Special Education settings outcomes were better for students who were educated in regular classes. (Tr. III, 52:13- 18.)

159. At \*\*\*, there was no systematic approach to collaborate and modify [Student's] curriculum. (Tr. II, 198:13-199:1.) Most of the burden fell on [First Grade

Teacher] and [Student's] mother. (*FOF*, ¶¶ 23, 34.)

160. Rather than adopting evidence-based strategies, [School District] claims [Student] needed a "fully replaced curriculum," which is not a phrase used in Special Education. (Tr. II, 201:5-202:8.) Merely because [Student] needs alternate standards and significant modifications of the content, method, or delivery of instruction, does not necessitate placement in a self-contained classroom. It requires the adults to do something different in their instructional planning. Tr. II, 202:9-17.)

161. [School District] refused to provide the assistance of a paraprofessional because personnel believed (or were instructed) that a paraprofessional would be more restrictive and hinder [Student's] academic and non-academic progress. (Tr. I, 101:19-102:24, 104:17-105:12.) This perception is inaccurate. (Tr. II, 205:13-206:6.) If properly trained and supervised, a paraprofessional or aide can be an effective tool in a regular education setting, as [Director of Student Services] acknowledged. (Tr. II, 202:22-204:10; Tr. III, 134:19-137:1.)

162. [School District] had differing reasons to justify its failure to provide a paraprofessional. [School District] also claimed it did not have "existing resources," as it had been unable to fill existing openings for aides in the District. (Tr. III, 74:24-78:16.) However, [School District] made no attempt to find an aide to assist [Student] and his teachers because [School District] did not believe it was an appropriate supplementary service. (Tr. I, 101:24-103:2, 104:17-105:1; Tr. II, 96:1-25, Tr. III, 74: 24-78:16; Tr. IV, 10:23- 11:14; Ex. J-A at [School District] 1934; Ex. J-B at [School District] 33-34; Ex. P34 at [School District] 1856.)

163. [Director of Student Services] testified that the financial cost of hiring a paraprofessional as a supplementary service did not factor into [School District's] refusal to do so. (Tr. III, 171:19-23.)

164. [Private School] has effectively used paraprofessionals and volunteers to assist [Student] without restricting his engagement with peers and teachers. (Tr. III, 204:10-12.) With the additional aides or paraprofessionals at [Private School], [Student] was not restricted in his engagement. (*Id.* at 205:18-206:6; Tr. I, 220:2-221:4.)

165. Ultimately, placement of [Student] in the self-contained classroom would limit his opportunities for academic achievement and development of functional skills, such as social and communication skills. (Tr. II, 186:19-188:23, 212:20-214:3.)

166. When [Student] is with people of similar intellectual abilities, his personality changes. He becomes more withdrawn, less engaged, and does not listen as well. (Tr. III, 206:8-207:19, 210:10-212:5.) Placement in a classroom with only students of similar intellectual abilities would curb his motivation and hurt his academic and social development. It would deprive him of direct and indirect learning experiences in a rich environment with exposure to higher level curriculum content and communication and the natural rhythms and interactions of an integrated setting. (*FOF ¶¶* 103-104.) Being around typical peers is "his lifesaver." (Tr. III, 211:24-212:4.)

167. [Parents] would not have removed [Student] from [School District] and placed him at [Private School] if [School District] had agreed to provide appropriate supplementary aids and services which would enable [Student] to be educated in regular classes.

168. [Student] has become a valued member of the school community at [Private

School]. He has established relationships with teachers and other students that facilitate his ability to learn academic, social, communicative and other functional skills, all of which have provided him with meaningful educational benefit. His Special Education and regular education teachers collaborate in modifying his curriculum and ensuring that their instruction complements and reinforces what each is teaching. [Student] receives 1:1 instruction in a Special Education setting with a certified Special Education teacher 300 minutes (5 hours) per week. He has made progress appropriate in light of his circumstances.

169. Under these individual circumstances, it would be disruptive and harmful to [Student] to remove him from [Private School]. Such disruption and harm cannot be eliminated entirely if [Student] transfers back to public school, but it can be mitigated some if [School District] is adequately trained, knowledgeable, and prepared to utilize evidence-based inclusive strategies for effectively educating [Student] in regular classes the majority of the school day, with only limited removal into a Special Education setting.

#### **D. PRIVATE SCHOOL PLACEMENT**

170. [Student] has attended [Private School] for two school years, 2018-19 and 2019-20. (*FOF*, ¶ 6.)

171. [Private School] did not develop IEPs for [Student] but did develop service plans. (Exs. J-J, J-K, J-L.) The service plans contained similar goals to [Student's] IEPs at [School District]. (Tr. II, 222:25-223:8, 239:10-23.) The service plans did not identify all the modifications and supplementary aids and services typically seen in an IEP, but [Private School] implemented those strategies and services. (Tr. II, 222:25-

223:8, 239:10-23.)

172. The most recent service plan for this school year had been approved by [Parent's] as of the date of the hearing. \*\*\*, [Student's] third grade Special Education teacher, drafted the proposed plan, reviewed it with [Parent's], amended it based on their input, and was expecting them to sign off on it. (Tr. I, 238:6-16.)

173. [Student] has received specialized instruction during his placement at [Private School], both in a Special Education setting with a Special Education teacher and in the regular education classroom. (FOF, ¶¶ 83-90.) His regular education and Special Education teachers have collaborated to design weekly lesson plans that modify grade level curriculum to meet [Student's] individual needs, while enabling him to be educated the majority of the day in the regular education classroom. (Tr. I, 247:6-249:2.) The Special Education and regular education teachers use different curriculums, but what they are teaching is complementary and reinforces the skills [Student] is learning from each of them. (Tr. I, 247:6-249:2.)

174. During his placement at [Private School], [Student] has received meaningful educational benefit and made substantial progress academically and functionally. (FOF, ¶¶ 91-105.)

175. For the school year 2018-2019, [Parents] paid a total of \$4,756.04 for [Student] to attend [Private School]. (Tr. III, 215:7-9; Ex. P40.)

176. For the school year 2019-2020, [Parents] paid a total of \$5,185.43 for [Student] to attend [Private School]. (Tr. III, 215:23-25; Ex. P40.)

177. Basic tuition for [Private School] is \$5,535 per year. (Tr. III, 216:1-15; Ex. P40.)

## CONCLUSIONS OF LAW

Based on the above Findings of Fact, the Conclusions of Law of this Hearing Officer are as follows:

1. Findings of Fact that also constitute Conclusions of Law are incorporated in the Conclusions of Law by reference. Likewise, Conclusions of Law that also constitute Findings of Fact are incorporated into the Findings of Fact by reference.

### **I. STIPULATIONS OF LAW**

2. 20 U.S.C. § 1412(A)(5)(A) of the IDEA requires as follows:

In General. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

### **II. CONCLUSIONS OF LAW**

#### **A. Overview of IDEA**

3. Since the date of the enactment of the Education for All Handicapped Children Act of 1975, Congress has passed amended versions of the Act. The current version is the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§ 1400 *et. seq.* The IDEA has been implemented on the federal level by the adoption of regulations found at 34 C.F.R. Part 300, and by the adoption of state regulations found at Title 10, Chapter 16 of the Administrative Rules of Montana.

4. The IDEA mandates that all eligible children with disabilities receive FAPE. 20 U.S.C. § 1412(a)(1)(A); 34 CFR § 300.101. A central purpose of the IDEA, 20 U.S.C. §§ 1400 *et seq.*, is "to ensure that all children with disabilities have available to them a free

appropriate public education that emphasizes Special Education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A).

5. IDEA provides federal funds to assist states in educating children with disabilities in exchange for the states' pledge to comply with the requirements of the IDEA. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 993; see also 20 U.S.C. § 1412.

6. FAPE requires - as an essential definitional component - Special Education and related services that ... are provided in conformity with the individualized education program [(IEP)] required under section [20 U.S.C. §] 1414(d) .... " 20 U.S.C. § 1401(9).

7. The IEP is a comprehensive statement of the educational needs of a student and the specially designed instruction and related services that will be employed to meet those needs. It is the means by which a FAPE is achieved. *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359,368 (1985). "It is through the IEP that the free appropriate public education required by the Act is tailored to the unique needs of a particular child." *Endrew F.*, 137 S. Ct. at 1000 (internal quotations and citations omitted).

8. Thus, FAPE requires both a substantively appropriate program and adherence to statutorily required procedures. *Endrew F.*, 137 S. Ct. at 993; *Board of Education of the Hendrick-Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

9. 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 Findings of Fact, Conclusions of Law and Order

child's circumstances." *Andrew F.*, 137 S.Ct. at 999. The IEP "must be appropriately ambitious in light of his circumstances." *Id.* at 1000. The goals for children who are not fully integrated into the regular classroom and unable to achieve on grade level "may differ," but "every child should have the chance to meet challenging objectives." *Id.*

10. Procedural compliance is essential to ensuring that every eligible child receives a FAPE. *Amanda J. v. Clark County School*, 267 F.3d 877, 891 (9th Cir. 2001). Congress placed "every bit as much emphasis upon compliance with [IDEA's] procedures ... as it did upon the measurement of the resulting IEP against a substantive standard." *Board of Education of the Hendrick-Hudson Central School District v. Rowley*, 458 U.S. 176, 205 (1982). Procedural inadequacies that result in the loss of educational opportunity or seriously infringe the parents' opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. *W.G. v. Board of Trustees of Target Range School District*, 960 F.2d 1479, 1484 (9<sup>th</sup> Cir. 1992); 20 U.S.C. § 1415(t)(3)(E) (2004).

11. A hearing officer must determine the appropriateness of the IEP at the time it is made. *Adams v. State of Oregon*, 195 F.3d 1141, 1149-1150 (9<sup>th</sup> Cir. 1999) ("actions of the school systems ... cannot be judged exclusively in hindsight."). However, the prohibition against the exclusive use of hindsight does not preclude some consideration of subsequent events. *Id.* at 1150. "The clear implication of permitting some hindsight is that additional data, discovered late in the evaluation process, may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date." *E.M. v. Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 1006 (9th Cir. 2011).

12. Whether a district's proposed IEP provides a "free appropriate public education" is a mixed question of law and fact. *Target Range*, 960 F.2d 1479, at 1483, *citing*

*Gregory K. v. Longview Sch. Dist.*, 811 F. 2d 1307, 1314 (9<sup>th</sup> Cir. 1987).

**B. Least Restrictive Environment**

13. Each public agency must ensure that, "to the maximum extent appropriate, children with disabilities . . . are *educated with children who are nondisabled*; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs *only if* the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114.

14. Section 1412(a)(5)(A) sets forth Congress' strong preference for educating children with disabilities in regular classrooms with their peers. *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & Through Holland*, 14 F.3d 1398, 1403 (9<sup>th</sup> Cir. 1994). Indeed, IDEA's preference for mainstreaming is so strong that it "rises to the level of a rebuttable presumption." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044-45 (5<sup>th</sup> Cir. 1989). The question, then, is not whether a child has earned the right to be in the regular classroom, but whether there is sufficient justification to remove him from that setting.

15. An IEP team must make educational placement decisions in conformity with this LRE requirement. 34 C.F.R. § 300.116(a). To implement the LRE mandate, a school "must ensure" a continuum of alternative placements." 34 C.F.R. § 300.115(a). The required continuum must "make provision for supplementary services ... to be provided in conjunction with regular class placement." 34 C.F.R. § 300.115(b)(2). The IEP must explain the extent to which the child is not going to participate with nondisabled children in the regular class. 34 C.F.R. § 300.320(b)(5).

16. Academic progress is not the determining factor in ascertaining whether a child

has received FAPE. 34 CFR § 300.101(c); *Rowley*, 458 U.S. at 203, n. 25 ("We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a 'free appropriate public education.'").

17. The LRE is a *non-academic* restriction or control on the IEP-separate and different from the measure of substantive educational benefits-that facilitates the IDEA's strong "preference for 'mainstreaming' handicapped children." *L.H. v. Hamilton Cty. Dep't of Educ.*, 900 F.3d 779, 789 (6th Cir. 2018). Whether the student "is meeting his IEP goals (or even capable of meeting them) is a separate question from whether he was 'making appropriate progress' or 'receiving a meaningful educational benefit.'" ' *Id.* at 793.

18. "[A] placement which may be considered better for academic reasons may not be appropriate because of the failure to provide for mainstreaming." *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.1983); see also *Bd. of Educ., Sacramento City Unified Sch. Dist. v. Holland*, 786 F.Supp. 874, 879 (E.D. Cal. 1992) (IDEA's LRE requirement is not overcome by a showing that the segregated placement may be academically superior), affirmed *Rachel H.*, 14 F.3d 1398 (citing *Roland v. Concord School Comm.*, 912 F.2d 983, 993 (1st Cir. 1990), *cert denied*, 111 S.Ct. 1122 (1991)).

19. In determining whether a school district's proposed placement provides mainstreaming to the maximum extent possible, or is in the least restrictive environment, a hearing officer must consider four factors: (1) the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared with the educational benefits of a Special Education classroom; (2) the non-academic benefits of

interaction with children who are not disabled; (3) the effect of the student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the student in the regular classroom. *Rachel H.*, 14 F.3d at 1404.

20. Applying these four factors, I conclude the IEP proposed by [School District] in March 2018 does not offer [Student] FAPE in the LRE.

21. The Ninth Circuit, in adopting the four-part LRE test, characterizes the first factor as requiring an analysis of "educational benefits" available in the regular classroom . *Rachel H.*, 14 F.3d at 1404. Subsequent cases sometimes use the term "educational benefits" interchangeably with the term "academic benefits." See, *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1137 (9th Cir. 2003). "Educational benefit," however, is not limited to academic benefit. Rather, "educational benefit" is broadly defined to include "academic, social, health, emotional, communicative, physical and vocational needs." *Seattle School District No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996); H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.

22. The IDEA's definition of an appropriate education expressly includes Special Education and related services designed to meet the child's academic *and* functional needs. 20 U.S.C. § 1414(d)(1)(A)(i)(II); 20 U.S.C. § 1401(9)(D). FAPE requires Special Education and related services "provided in conformity with the [IEP]." 20 U.S.C. § 1401(9)(D). An IEP, in tum, must include annual "academic *and functional* goals" designed to "enable the child to be involved in and make progress in the general education curriculum" *and* "meet each of the child's other educational needs that result from the child's disability." 20 U.S.C. § 1414(d)(1)(A)(i)(II).

23. The second factor adopted by the court in *Rachel H.* requires analysis of the "non-Findings of Fact, Conclusions of Law and Order

academic benefits" of placement, which indicates the court might have contemplated that "educational benefits" equate to "academic benefits." Regardless of how the two factors interact, the ultimate analysis is the same - it requires an analysis of *all* benefits -academic achievement, functional skill attainment, including social, emotional, communicative, physical, vocational, self-help and independent living skills, and any other non-academic benefits that may accrue, including quality of life issues.

24. The evidence establishes [Student] has garnered substantial educational benefits and non-academic benefits being educated in the regular education classroom these last four years.

25. By the time [School District] developed its final IEP proposing removal to a self-contained classroom, [Student] had already garnered substantial educational benefits from placement in the regular kindergarten and first grade classes. (Ex. J-1.) During both school years, he met some of his IEP goals and made progress on most remaining goals. His public-school kindergarten and first grade teachers reported academic growth as well. They also reported significant improvement in functional skills [Parents] also had observed and were pleased with his substantial growth in academics and in his social, communication, behavioral and other functional skills. (*FOF*, ¶¶ 17-20, 76-77, 79-80.)

26. [Student] has continued to make appropriate progress and receive meaningful educational benefit while being mainstreamed at [Private School] for second and third grade. He has continued to improve his functional skills and grow academically. Indeed, his level of academic growth during second grade was greater than the norm growth of students without disabilities. (*FOF*, ¶¶ 91-95.) This evidence of [Student's] continued growth and success in regular classes at [Private School] following [School District's]

proposed change in placement is relevant, as it provides additional insight into the inappropriateness of [School District's] proposal to remove [Student] to a self-contained classroom.

27. Although [Student] has reaped significant educational and non-academic benefits in the regular education setting over the past four years, he still performs below his grade-level peers academically. However, [Student] need not master, or even be capable of mastering, grade-level academic curriculum to be entitled to remain in the regular education classroom. Mastery of grade-level curriculum is *not* required for a child to avoid removal to a segregated placement. *L.H.*, 900 F.3d at 793. The appropriate analysis is whether the child can be educated satisfactorily. This can be demonstrated by showing [Student] has or could make progress on IEP goals in the regular classroom. *L.H.*, 900 F.3d at 793 ("the appropriate yardstick is whether the child, with appropriate supplemental aids and services, can make progress towards the IEP goals in the regular education setting"); *Rachel H.*, 14 F.3d at 1401 (upheld district court's finding that "Rachel received substantial benefits in regular education" based on evidence she "was making progress on her IEP goals").

28. Moreover, progress on IEP goals is not the only means of demonstrating appropriate educational progress or benefit. Whether a student is "meeting his IEP goals (or even capable of meeting them) is a separate question from whether he [is] making 'appropriate progress' or 'receiving meaningful educational benefit.'" *L.H.*, 900 F.3d at 793. [Student] made progress and received meaningful educational benefit during kindergarten and first grade at public school.

29. In addition to his academic growth, he has been developing the functional skills

necessary for long-term success as a member of the community, and is able to engage in productive work, maintain meaningful social relationships, and navigate unspoken social cues and rules. Placement in the regular classroom fosters his development of practical communication and social skills and his ability to learn and adapt to rhythms and routines of community living. As such, IDEA's central purpose is fulfilled- [Student] is preparing to become a productive, independent member of the community. 20 U.S.C. § 1400(d)(1)(A). [Student's] educational growth is being fostered, not hindered, by placement in the classroom with his typical peers.

30. Non-academic, but nonetheless educational, benefits to [Student] include his substantial growth in functional skills over the past four years. The development of functional skills is an essential component of his education under IDEA. [Student] has grown socially and emotionally each year in the regular education setting. He has gained new friends, learned the vernacular of his peers, improved his communication skills, and been invited to events outside the school like birthday parties. The non-academic benefits he is receiving not only teach important functional skills, they enrich his life and sense of being a valued member of the community. Being with typical peers has sparked [Student's] excitement for school and learning, causing him to be more engaged and participate more fully in the learning process. (*FOF*, ¶ 104.) [Student] has experienced many of the same non-academic benefits the court found important in determining that the regular education classroom was the LRE for Rachel H. *Rachel H.*, 14 F.3d at 1401.

31. In contrast, if [Student] were required to be educated most of the day in a self-contained classroom with only peers of similar intellect and limited communication skills, he would not thrive. His ability to improve his social and communication skills, as well as

develop other real-life skills, would be limited. He would not be exposed to grade level materials or higher level academic discussions and vocabulary. (FOF, ¶¶ 152-154.)

[Student] would become disconnected from his neurotypical peers, and it is likely [Student] would regress socially and emotionally and his motivation for learning would decrease.

32. Although some comparison may be made between the benefits a child can receive in a more restrictive placement as compared to those he can receive in a regular classroom, the decision whether to remove from the regular classroom cannot be based on a simple comparison of which is better. Placement in the LRE is a statutory mandate. Keeping children with disabilities in the regular classroom is the presumption; *only if* education in the regular classroom with the use of supplementary aids and services cannot be achieved satisfactorily may a child be removed. 20 U.S.C. § 1412(a)(5)(A).

33. [School District] has offered no persuasive evidence that [Student] would receive superior educational benefits in the self-contained classroom. Although staff opined that he needed instruction in a small, segregated setting with only similarly disabled students as his peers, they could not point to any research demonstrating their proposed placement would produce superior educational outcomes. Overall, [School District] staff lacked knowledge and training about effective practices for including children with intellectual disabilities in regular classes and the benefits that would ensue. (FOF, ¶¶ 35,39,65.)

34. The third factor to consider in determining the LRE for [Student] is the impact his presence has on the teacher and other students. By all accounts, [Student's] presence has had a positive impact on his teachers and those around him. He is not disruptive and does not have behavioral issues that impede the ability of other students to learn or teachers to teach. (FOF, ¶¶ 77,82 168.)

35. Although his first grade teacher expressed concern that students talked down to [Student], this diminished as the school year progressed - as students began to understand [Student] and treat him as an equal. This concern is not enough to outweigh the benefits that [Student], his peers, and his teachers received from having him in the classroom.

36. [School District] contends [Student's] presence in regular classes had a negative impact because it was too demanding and burdensome on his teacher - that she had to spend too much time and energy modifying his curriculum and providing one-on-one instruction. Consequently, [School District] claims, the teacher was unable to devote adequate attention to her other students and teach them at an appropriate pace. However, the excessive burden on [First Grade Teacher] is the result of [School District's] failure to provide appropriate supports for [Student] and his teacher.

37. [School District] failed to ensure adequate support for [Student] and his teacher in two respects. First, [School District] administration failed to provide opportunities for collaboration between the regular and Special Education teachers. [First Grade Teacher] consulted periodically with [First Grade Special Education Teacher], but not until after the November IEP meeting. Even then, [First Grade Teacher] was left mostly on her own to modify [Student's] curriculum and find ways of appropriately including [Student] in class activities. This led to her "guess and check" approach, as she characterized it.  
(FOF, ¶ 23.)

38. Second, [School District] failed to provide paraprofessional assistance as a supplementary service. [School District] refused to provide paraprofessional assistance based on a variety of reasons. [School District] has claimed that an aide in the regular classroom would be more restrictive and isolate [Student] from his peers. [School

District] has also claimed it was never given the chance to try using a paraprofessional, because there was no one to hire and [School District] members of the IEP team had not recommended use of a paraprofessional's services. (Tr. III, 168:9-28.) Yet those members of the team who thought the assistance of a paraprofessional could be beneficial ([First Grade Teacher] and [Principal]) were discouraged by [School District's] Special Education director from making that recommendation based on the false belief that an aide would be more restrictive and isolate [Student]. (FOF, ¶¶ 51, 59, 62, 64.) [School District] believes that providing [Student] paraprofessional assistance in regular classes would be more restrictive and isolating than educating [Student] in a segregated classroom where his only classmates are students with similar cognitive disabilities. (Tr. III, 168:3-8.) The [School District] viewpoint conflicts with the IDEA mandate to provide education in the regular education classroom to the maximum extent possible and it disregards the IDEA's definition of 'in the regular classroom' as necessary to enable the child to be educated in that environment.

39. The school district in *L.H* made a similar argument. LH had a personalized curriculum and a paraprofessional aide dedicated just to him. He was working at his own pace with frequent repetition, intense one-on-one instruction, and repeated prompting and reinforcement. *L.H.*, 900 F.3d at 797. The school district contended that because L.H. was so different from his classmates socially and intellectually and received 1:1 instruction at a table in the back of the classroom, he was necessarily "isolated" even though he was physically in the same room. *L.H.*, 900 F.3d at 794. The Sixth Circuit rejected that argument and held "[t]his is really an argument against mainstreaming as a concept, because HCDE believes it is impossible, impractical, or

counterproductive." *Id.*

40. The same is true here. [School District] essentially admits it simply disagrees with the IDEA's definition of LRE. [Director Student Services] testified:

We tend to focus - hyperfocus in on the fact that we - that the law states that students need to be educated to the maximum extent possible with nondisabled peers. But what we don't pay attention to is the incredibly important interaction that is going on between students of similar ability levels, at different ability levels, and isolating a child in my opinion is unethical and it is indefensible.

(*FOF 54*) The premise, that receiving 1:1 instruction from a paraprofessional in a mainstream placement is isolating to [Student], fundamentally leads to the outcome that [Student] is limited to a classroom of similarly disabled peers. (Tr. III, 48:11-19, 164:21-166:16.) Contrary to IDEA's mandate, [Director Student Services] suggests that it is more important for [Student] to interact with similarly disabled peers rather than to interact with neurotypical peers.

41. [School District] denies it proposes segregated placement based on [Student's] disability, but the evidence belies this contention. A student with a substantial intellectual disability will always need specialized instruction and some one-on-one instruction, repetition, and prompting. [Director Student Services] testified that the recommendation for 1360 minutes in the self-contained classroom was based on the number of minutes [Student] received specialized instruction. (Tr. III, 45:13-47:25, 139:2-24.) Thus, [School District] equates the delivery of specialized instruction with physical placement in a Special Education setting. Under IDEA, however, specially designed instruction may be delivered in a variety of settings ranging from regular classes to residential facilities or hospitals.

34 C.F.R. § 300.115. A child cannot be removed from "education in age-appropriate regular classrooms solely because of needed modifications in the general education

curriculum." 34 C.F.R. § 300.116(e).

42. [School District's] refusal to provide the services of an aide to assist in instructing [Student] is grounded in its mistaken belief that it would be more restrictive than the IDEA's definition of restrictive placement. The IDEA, however, identifies paraprofessional assistance as one of the tools to enable students with disabilities to be educated in regular classes. "Supplementary aids and services" are defined as "aids, services, and other supports that are provided ... to enable children with disabilities to be educated to the maximum extent appropriate." 20 U.S.C. § 1401(33); 34 C.F.R. § 300.42.

43. [School District] further acknowledges that its concerns about an aide being too intrusive, disrupting interactions between the student and classmates, causing the student to become prompt depending, or being viewed as the student's primary teacher could all be addressed with proper training and supervision. (Tr. III, 135:7-137:1.) Indeed, IDEA regulations require paraprofessionals who "assist in the provision of Special Education and related services" to be "appropriately trained and supervised." 34 C.F.R. § 300.156(b)(iii). Despite these protections and requirements, [School District] still refused to provide paraprofessional services for [Student] and his regular education teacher.

44. The evidence as a whole indicates [School District] rejects mainstreaming because its staff does not understand it and/or does not believe in it. [School District] has been unwilling or unable to engage in the process of mainstreaming, as they deemed it futile or useless in light of [Student's] disability. All in all, [School District's] approach "is the type of approach the IDEA was designed to remedy, not encourage or protect." *L.H.*, 900 F.3d at 795.

45. The last *Rachel H.* factor- cost - is not part of the analysis in this case. (*FOF* 163)

46. Moreover, cost is not the determinative factor for enforcement or not of IDEA's LRE mandate. Educational placement decisions must be based on each child's unique educational needs and circumstances. "Public agencies, therefore, must not make placement decisions based on a public agency's needs or available resources, including budgetary consideration and the ability of the public agency to hire and require qualified staff." Dept. of Education, *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540, 46587 (Aug. 14, 2006).

47. [School District's] proposal to change [Student's] placement to a self-contained classroom with only disabled classmates for 1360 minutes (22 ½ hours) per week is not necessary to educate him satisfactorily and thus, does not comply with IDEA's LRE mandate. 20 U.S.C. §1412(a)(5)(A); 34 C.F.R. § 300.114.

48. [School District's] proposal to remove [Student] from the regular education classroom and place him in a self-contained classroom comprised only of students with intellectual disabilities for 22 ½ hours per week (1360 minutes) does not offer [Student] placement in the LRE, as required by the IDEA. If the segregated placement were to be implemented, it would violate [Student's] right to be educated to the maximum extent appropriate in the regular classroom. He has the right to remain in a regular education setting *unless* [School District] can demonstrate that education in regular classes *with the use of supplementary aids and services* cannot be achieved satisfactorily. [Student] has demonstrated that he can and has made satisfactory educational progress while receiving his education in the regular education classroom. He even made progress during his first grade year at \*\*\*, despite [School District's] failure to provide paraprofessional assistance. As

[School District's] Special Education director acknowledged, paraprofessional assistance is a supplementary service under IDEA and can be a valuable tool in facilitating education in the regular classroom. (*FOF*, ¶ 141.) Yet, for [Student's] entire first grade year, [School District] refused to provide paraprofessional assistance. [School District] cannot prove that even with the use of supplementary aids and services, it cannot educate [Student] in regular classes satisfactorily. [School District] cannot meet this threshold requirement for removing [Student] from regular classes. Thus, the proposed segregated placement is not the LRE for [Student] and cannot be justified. The evidence demonstrates [Student] thrives and learns in the current regular education setting. Removing him from that environment is not only unjustified, it would likely be harmful.

### **C. Reimbursement for Private Placement**

49. The IDEA has long been interpreted as authorizing a court or hearing officer to order reimbursement for the costs of a private placement when a school district fails to make FAPE available and a parent unilaterally enrolls the child in a private placement. *School Comm. of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359, 370 (1985) (Rehnquist, J., writing for a unanimous court). Reimbursement is an appropriate remedy if the hearing officer ultimately determines such placement is "proper" under the Act. The IDEA was amended in 1997 to explicitly authorize the right to reimbursement for the cost of private placement "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii).

50. I conclude that [School District] failed to develop an IEP that offered FAPE in the LRE. [School District] failed to provide necessary supplementary aids and services in the

regular classroom during first grade. When [School District] proposed a new IEP, that proposal failed to include necessary supplementary services and failed to offer FAPE in the LRE. [Parent's] decision to place [Student] at [Private School], where he is being educated in regular classes - with paraprofessional services - was warranted and necessary. [Parents] have been providing [Student] an appropriate education in the LRE at their own expense, as a result of [School District's] failure to do so.

51. To be entitled to reimbursement, the parents' private placement is not required to meet the same standards public schools must meet. *Florence County School Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). Rather, the standard is whether the private placement was "proper" under the Act. *Florence County*, 510 U.S. at 13. A private placement is proper, and reimbursement appropriate, if the placement "furthers the purposes of the Act." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230,238,242, n. 9 (2009), 129 S. Ct. at 2493, n. 9. The IDEA's requirements for FAPE, set forth in 20 U.S.C. §1401(a)(18), "cannot be read as applying to parental placements." *Florence County*, 510 U.S. at 13.

52. [Student] has received specialized instruction at [Private School]. His curriculum has been modified as a result of the collaborative efforts of the Special Education and regular education teachers. In addition, he has received 1:1 instruction in a Special Education classroom 5 hours per week. [Private School] has provided key supports and services for [Student]. As a result, he has made substantial progress academically and functionally. Subsequent evidence of progress in a private placement is a relevant factor in determining whether reimbursement is appropriate. *E.M.*, 652 F.3d at 1006; *Adams v. Oregon*, 195 F.3d at 1141 (9<sup>th</sup> Cir. 1999).

53. The fact that [Private School] provided regular and Special Education services

pursuant to a service plan, not an IEP developed in compliance with IDEA, does not preclude reimbursement. As noted, the private school need not meet IDEA requirements for [Parents] to be entitled to reimbursement. Reimbursement is available even if the alternative program does not provide a full range of services or has other shortcomings. *C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159-1160 (9th Cir. 2011); *S.L. v. Upland Unified Sch. Dist.*, 747 F.3d 1155, 1159-60 (9th Cir. 2014); *Ridgewood Bd. of Educ. v. NE.*, 172 F.3d 238,249 (3rd Cir. 1999); *R.L. v. Miami-Dade County Sch. Bd.*, 757 F.3d 1173, 1183 (11th Cir. 2014) (reimbursement ordered even though student regressed in some areas).

54. "Even if the alternative program has its shortcomings, the question remains whether the program is reasonably calculated to permit the child to obtain some educational benefit. Here, the parents' program met that standard." *Miami-Dade*, 757 F.3d at 1183. Likewise, [Parents'] placement of [Student] met that standard. The program is not only calculated to enable him to obtain an educational benefit; he is thriving.

55. In determining whether to award reimbursement, a hearing officer also weighs equitable factors. *Target Range*, 960 F.2d at 1486; *Anchorage School Dist. v. M.P.*, 689 F.3d 1047, 1059 (9th Cir. 2012). Here, the equities weigh strongly in favor of [Parents]. From November 2017 until they finally gave notice of their intention to place [Student] at a private school, they consistently rejected placing [Student] in a self-contained classroom. They repeatedly requested supplementary aids and services to facilitate placement in the regular classroom and lessen the burden on [Student's] regular education teacher. However, [School District] refused to listen to their concerns and issued PWNs in January, April and May, refusing to keep [Student] in a regular education classroom and refusing to reimburse

his private placement. Had [School District] offered to educate [Student] in a regular classroom with appropriate aids and supports, [Parents] would not have been forced to seek a private educational placement.

56. Because [Parents] gave ample notice of their rejection of the IEP, a reduction or denial of reimbursement is not justified under 20 U.S.C. §1412(a)(10)(C)(ii.)

57. [Parents] are entitled to reimbursement for the costs of placement at [Private School] for the 2018-19 and 2019-20 school years.

58. [Student] has attended [Private School] for two school years, where he is a valued member of the school community and has made progress appropriate in light of his circumstances. His placement at [Private School] is providing him with an appropriate education in the LRE.

59. [Student's] current educational placement for purposes of the "stay put" provision of the IDEA is at [Private School]. [Student] is entitled to remain at [Private School], and [School District] shall continue to pay the costs of placement at [Private School], until such time as any appeals have been exhausted and there is a final decision in this matter, or until parties agree on an IEP.

#### **D. Denial of FAPE During 2017-2018 School Year**

60. [School District] deprived [Student] of FAPE during the 2017-2018 school year by failing to provide appropriate supplementary aids and services to enable [Student] to make progress appropriate in light of his circumstances. Although he made progress, [School District's] failure to provide paraprofessional services inhibited the amount of progress he could have made and placed unnecessary stressors and burdens on his

regular education teacher.

**E. Denial of Relevant Information for Informed Parental Consent**

61. The IDEA requires parents to be informed of all information for which they have been asked to give informed consent. 34 C.F.R. § 300.09(a).

62. 23only from 300 minutes per week to almost 1,400 minutes (22.5 hours) per week, but from a Resource Room setting in which students of varying disabilities come and go, to a self-contained "Life Skills" classroom in which his only classmates would be students with similar intellectual disabilities who were performing significantly below grade level *and* from \*\*\* School to a different school entirely within [School District].

63. [School District] refused to allow [Parents] to observe the Life Skills class during the school day, while students were present and instruction being provided (Tr, II 80:20-23.) Thus, [School District] deprived them of essential information for deciding whether to give informed consent to the proposed change in placement. They were unable to observe whether other students had any verbal skills, whether the teacher was providing instruction aligned to the regular curriculum, the extent to which paraprofessionals provided instruction rather than teachers, the amount of time devoted to instruction, whether any students displayed disruptive behaviors, and much more.

64. [School District] based its refusal on concerns about confidentiality and unquantified past experiences with observers revealing information about students publicly. However, at the hearing, [School District] offered no written policy or procedure detailing the circumstances under which observations would be allowed and imposing methods for protecting against inappropriate publication information.

65. [School District] did not articulate any unifying principle about what information is "confidential" that cannot be revealed, nor has [School District] offered any legal basis for restricting [Parents'] access to information essential to informed decision making. [Parents] have a right to be informed of *all* relevant information.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law,

**IT IS HEREBY ORDERED:**

1. [School District] shall reimburse [Parents] for all costs of placement at [Private School], including but not limited to tuition and transportation for the 2018-19 and 2019-20 school years. The approximate of this reimbursement based on evidence presented is \$10,000. If the parties are unable to agree on the precise amount, within 10 days of this Order, they shall submit their disagreement to this Hearing Officer for resolution.
2. Prior to [Student's] return to [School District], the parties shall develop an IEP for placement of [Student] accordance with the findings and conclusions herein.
3. [School District] shall continue to pay the costs of [Student's] private placement at [Private School] until such time as any appeals have been exhausted and there is a final decision in this matter, or the parties agree on an IEP.
4. Nothing in this Order precludes either party from filing a new request for due process, pursuant to procedural rights set forth in the IDEA, 20 U.S.C. § 1415(0).

Dated this day \_\_\_\_\_, of \_\_\_\_\_, 2020.

\_\_\_\_\_  
DeeAnn Cooney  
HEARING OFFICER

