

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

IN THE MATTER OF:

OSPI CAUSE NO. 2020-SE-0041

OAH DOCKET NO. 02-2020-OSPI-01016

SULTAN SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Dana Diederich by video conference on October 16, 2020, and October 19 through 22, 2020. The Parent of the Student whose education is at issue¹ appeared pro se. The Sultan School District (District) was represented by Carlos Chavez, attorney at law. Paul Douglas, Executive Director of Special Programs and School Supports, also appeared for the District. The following is hereby entered:

STATEMENT OF THE CASE

Procedural History

The Parent filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on February 21, 2020. The Complaint was assigned Cause No. 2020-SE-0041 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered February 24, 2020, which assigned the matter to ALJ Janice Shave. The District filed its Response to the Complaint on February 28, 2020. The Parent was initially represented by counsel; however, her attorney submitted a notice of withdrawal on August 11, 2020. The Parent continued the case pro se.

The Fifth Prehearing Order was entered August 27, 2020, setting the hearing for October 16, 19, 20, 21, and 22, 2020. The Sixth Prehearing Order, entered September 9, 2020, included the statement of the issues for hearing.

On September 3, 2020, a Notice of Reassignment of ALJ was issued reassigning the case to ALJ Dana Diederich.

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

Due Date for Written Decision

As set forth in the First Prehearing Order dated April 14, 2020, the due date for a written decision in this matter was continued to thirty days after the record of the hearing closes. The record of the hearing closed on December 14, 2020, with the filing of the parties post-hearing briefs. Therefore, the decision due date is January 13, 2021.

EVIDENCE RELIED UPON

Exhibits Admitted:

District's Exhibits: D2, D3, D5 – D7.

Parent's Exhibits: P1 – P5, P7 – P16, P18 – P30, P32, P35 – P44, P49 – P58, P62, P64, P66, P68 – P69, P74, P76 – P79, P87, P89, P92 – P93, P96 – P97, P99, P100 (pages 1 – 9 only), P101 - 110, P117, P119 - P127.

Witnesses Heard (in order of appearance):

Ruth Shapovalov, Youth Program Coordinator at Volunteers of America
Ann Uherek, Psy. D.
Sarah Harkins, District general education mathematics teacher
Zoe Miller, District general education English language arts teacher
Allison Brooks, Ph.D., co-founder of Brooks Powers Group
Lisa Barnhill, District special education teacher
Parent of the Student
Anthony (AJ) Sevier, District paraeducator
Amy Mudrovich, special education teacher
Paul Douglas, Executive Director for Special Programs and School Supports
Nicholas Hakiel, former District School Psychologist
Sarita Whitmire-Skeith, District Principal at Sultan High School

Post-Hearing Briefs

The parties' post-hearing briefs were timely filed on December 14, 2020.

ISSUES

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

Whether the School District violated the Individuals with Disabilities Education Act (IDEA) and State regulations implementing the IDEA and failed to offer the Student a free appropriate public education (FAPE) from June 20, 2019, to the date of filing of this due process hearing request as follows:

- (1) The School District denied extended school year (ESY) services on June 20, 2019, based on resources available in the School District and not on the individual needs of the Student;
- (2) The School District failed to evaluate the Student in executive functioning;
- (3) The School District failed to provide specially designed instruction in the area of executive functioning;
- (4) The School District failed to evaluate the Student in communication in order to determine appropriate related services and/or specially designed instruction (SDI) in communication;
- (5) The School District excluded the Parent from the educational process by failing to provide IEP progress data to the Parent before her meeting, in violation of WAC 392-172A-05190;
- (6) The School District failed to implement the August 22, 2019, IEP by failing to provide the Student's IEP accommodations and modifications in general education classes;
- (7) The School District proposed to remove the Student from general education in its offered February 11, 2020 IEP, because of needed modifications in the general education curriculum, in violation of WAC 392-172A-02060(4);
- (8) The School District failed to consider the potential harmful effect on the child in selection of placement for the Student in the offered February 11, 2020, IEP, in violation of WAC 392-172A-02060(2)(d);
- (9) The School District predetermined the Student's placement in the offered February 11, 2020, IEP, by making a decision on the Student's placement based on its own consideration of the Student's 1:1 paraeducator data, work samples, teacher feedback, observations in general education, or any other classroom data, without reviewing them in the IEP meeting with the Parent present, and in addition failing to consider whether accommodations and modifications had been implemented, in violation of WAC 392-172A-02060(1) and 392-172A-03115;
- (10) The School District failed to implement the August 22, 2019, IEP by failing to provide all of the speech - language pathology (SLP) and occupational therapy (OT) service minutes set forth in the IEP, and serving them concurrently.

The Parent seeks the following:

- (1) Declaratory relief that the School District has denied the Student a FAPE during the 2019-2020 school year;
- (2) Declaratory relief that the IEP dated on or about February 11, 2020, is inappropriate and not reasonably calculated to meet the Student's educational needs;
- (3) Declaratory relief that the IEP dated on or about February 11, 2020, violates the least restrictive environment mandate of IDEA;

(4) Declaratory relief that the School District has significantly excluded the Parent from the educational process by disregarding her input and the input of the Student's private providers;

(5) An order that the School District design an IEP placing the Student in the general education setting at Sultan High School, providing the Student with appropriate supportive aids and services, and specially designed instruction in executive functioning, to allow the Student to make progress in the general education environment at Sultan High School. Should the District claim it is unable to support the Student within the general education environment (Math and English) at Sultan High School, the Parent requests an order for partial placement at Dartmoor School to allow Student to make progress within those general education curriculums, without being placed in more restrictive special education classes in the Sultan School District. The Parent's request for placement at Dartmoor is only for the specific general education classes which the District seeks to remove the Student from at Sultan High School.

(6) An order that School District staff working with the Student receive training in the inclusion of students with disabilities in general education;

(7) Such other relief as the Court deems equitable and just;

(8) Compensatory education in an amount to be proven at hearing, to include placement at Dartmoor School.

FINDINGS OF FACT

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

Background Information

1. The Student has received special education services throughout his entire educational history, beginning with his enrollment in a birth-to-three program. P41p5-6.² The Student is eligible for special education under the eligibility category of Autism. P41p6. The Student also meets the diagnostic criteria for dyslexia and dysgraphia. P68p14.

2. During the 2018-2019 school year, the Student attended Sultan Middle School. P44p1. Anthony (AJ) Sevier³ was the Student's 1:1 paraeducator during this school year. T832.⁴

² Citation to the exhibits of record is by exhibit number and page number, e.g. P41p5 is a citation to the Parent exhibit 41 at page 5.

³ Mr. Sevier has a bachelor's degree in graphic design and has attended paraeducator trainings in the District. T831; T833. He started working sporadically with the Student during the 2016-2017 school year and gradually increased his time with the Student until he became the Student's full-time 1:1 aide during the 2018-2019 school year. T832.

⁴ Citation to the transcript is by the letter "T" followed by the transcript page number.

3. The Student was in special education classes during grade school and middle school. T842; T922. During the 2018-2019 school year, when the Student was in eighth grade, the Student started objecting to these classes. T842. He would stall and be intentionally late to these classes and would try to distract other students during class. *Id.*

4. During the 2018-2019 and 2019-2020 school years, the Student attended an after-school program at the Volunteers of America one to three times per week. T237. Ruth Shapovalov, the Youth Program Coordinator at the Volunteers of America, worked with the Student. T186. The Student attended field trips and community service activities as part of this program. T187-88. He also did school work and completed his driver's training. *Id.*

5. During the spring of 2019, the District initiated an evaluation of the Student to be performed by school psychologist Nicholas Hakiel.⁵ T993. Some testing was completed; however, no reports were created and results of the tests were not maintained by the District. T1013. The evaluation was not completed.

6. In the spring of 2019, the Student took the Smarter Balanced Assessment in Mathematics, which is a state-wide test. P52p1. The Student scored 2343, which placed him in Level 1. *Id.* Level 1 indicated the Student did "not yet meet the grade level expectations in mathematics." *Id.* The Student's scores indicated he "did not yet show an ability to apply mathematical concepts and interpret and carry out mathematical procedures with precision and fluency." *Id.* It also indicated the Student "did not yet show an ability to clearly and precisely construct arguments to support their own reasoning and to critique the reasoning of others." *Id.* The Student "showed some ability to solve well-posed problems, analyze real-world scenarios, and construct and use mathematical models to interpret and solve problems." *Id.*

7. On May 29, 2019, the Student underwent a speech and language examination with speech language pathologist, Kevin Johnson. P44; T729. This examination was procured privately by the Parent. T773. Mr. Johnson noted that, in addition to the Student's previous diagnoses of dyslexia, dysgraphia, and autism, he also demonstrated a language-learning disorder, which would affect him across different modalities. P44p10. He noted the Student would have "significant difficulty on test items that required 'holding on to' information for processing," that he would have trouble comprehending idiomatic language, and that, while his spoken language was age appropriate, the Student would have "difficulty on items assessing knowledge of grammar." *Id.* Mr. Johnson noted the Student would have "difficulty on assessment tasks requiring relating a narrative or a description," and "[s]ignificant difficulty in abstraction related to deriving meaning of a word based on the context and identifying two possible meanings of ambiguous sentences." *Id.* The Student was found to have "[d]ifficulty providing appropriate verbal responses to hypothetical social situations," and "significant difficulty in recalling information from a middle school-level text." Finally, Mr. Johnson noted the Student had significant impairment of writing skills for encoding and formulation of sentences and paragraphs." *Id.* Mr. Johnson provided a significant number of educational recommendations including multiple accommodations to address the Student's reading and writing difficulties as well as accommodations related to classroom activities, assignments, and testing. *Id.* at 11-16.

⁵ Mr. Hakiel was placed on administrative leave from the District in the spring of 2019. T1009. He retired shortly after going on administrative leave. *Id.*

8. On June 18, 2019, the Student's paraeducator, Mr. Sevier, wrote an email to District staff stating that it was his opinion the Student should be placed in general education for all classes. P1p2. He noted that, based on his observations, the Student would resist any placement that he considers "special ed." He further opined that the Student would show increased defiant behaviors if placed in a special education setting. *Id.*

June 2019 IEP and ESY

9. On June 20, 2019, an IEP was created for the Student. P79p3. The service matrix indicated the Student would be receiving specially designed instruction (SDI) in the areas of occupational therapy (OT), speech language therapy (SLP), social/emotional, adaptive, math, written expression, and reading. *Id.* at 34-35. It indicated that all of his SDI, other than his social emotional, would be delivered in the special education setting. *Id.* Despite this, it listed the Student's time in general education at 94.72 percent. *Id.* The IEP also stated that the Student would "participate with non-disabled peers [sic] classes for reading, writing, math, and social and adaptive skills in the general education setting." *Id.* at 36. The box indicating whether extended school year (ESY) were recommended for the Student was checked "no." *Id.* at 37.

10. On June 21, 2019, a prior written notice (PWN) was issued addressing multiple topics, including ESY services. The PWN noted that the "district does not currently offer ESY beyond K-5. Student can attend summer school with his 1:1 para. Parent has decided student will not attend summer school during the summer, 2019." P18p1.

11. The Parent testified that her understanding after the June 2019 IEP meeting was that the Student was eligible for ESY services. T717. As such, she emailed the District on June 27, 2019, to request that they amend the IEP to confirm that the Student continued to qualify for ESY. P80p1. The IEP was not amended and no response from the District is included in the records. T784-85.

12. The Student did not participate in the summer school program offered by the District because the Student was already scheduled to attend an out of state boot camp during that time period. T718. The Student signed up and paid for the boot camp at the end of the summer of 2018. T787. The Parent's other child, who is a middle school student, attended the District summer school program. *Id.* Summer school is available to all students. T770.

Brooks Powers Evaluation

13. On August 6 and 8, 2019, the Student underwent a comprehensive psychoeducational evaluation⁶ at Brooks Powers Group.⁷ D3p1. The Student was evaluated by Dr. Davin Holland and Dr. Allison Brooks.⁸ *Id.* As part of the evaluation, the clinicians reviewed the Student's school

⁶ At some point prior to August 2019 the Parent requested an independent evaluation for the Student. The District and Parent agreed to have Brooks Powers Group perform the requested evaluation. P41p3.

⁷ Brooks Powers Group provides educational and psychological interventions, evaluations, and supports. T468.

⁸ Dr. Brooks has a Ph.D. and a master's degree in school psychology. T532. She is currently a licensed psychologist in the State of Washington. T468.

records, including the reevaluation done in 2016, the Student's June 2019 IEP, as well as assessment revisions and prior written notices dating back to 2017. *Id.* The clinicians also interviewed the Parent and the Student's private provider, Dr. Ann Uherek. *Id.*; T475; T478. Further, the clinicians observed the Student at school on June 11, 2019, for an hour and a half. D3p7. The clinicians interviewed the Student and performed a battery of tests including the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V); Kaufman Test of Educational Achievement – Third Edition (KTEA-III); Delis-Kaplan Executive Function System (D-KEFS); NEPSY Developmental Neuropsychological Assessment – Second Edition (NEPSY-II); Rey Complex Figure Test (RCFT); Autism Diagnostic Observation Schedule, Second Edition (ADOS-2); Motivation Menu, Short Sensory Profile (SSP); Achenbach System of Empirically Based Assessment, Child Behavior Checklist (CBCL); and the Adaptive Behavior Assessment Scales – Third Edition (ABAS-3). *Id.* at 1-2.

14. To evaluate the Student in the area of cognitive functioning, the Student was given the WISC-V. The Student's WISC-V scores showed a Full Scale Intelligence Quotient (FSIQ) in the extremely low average range. D3p8-9. However, because the Student's scores in other areas varied from the extremely low to low average range, it was determined that the Student's processing speed likely impacted his overall cognitive performance. *Id.* For this reason, it was recommended the General Ability Index (GAI) was a better estimate of the Student's general intellectual abilities. The Student's GAI fell in the very low range compared to same age peers. *Id.* at 10. Overall, the test found that the Student's "cognitive skills are less developed than expected for his chronological age." *Id.* It was opined that this would lead the Student to "struggle to learn and accumulate information, formulate concepts, apply logic and reason, recognize patterns, and solve problems." *Id.* Further, it was opined that the Student's strength in verbal skills may cause people who interact with him verbally to overestimate his overall cognitive skills. *Id.*

15. The Student's scores on the KTEA-III, which tests academic skills in reading, mathematics, and written language, indicated the Student had academic challenges in most areas measured. D3p10-12. The Student's mathematics scores indicated the Student had some knowledge of basic addition and subtraction facts, but had difficulty applying that knowledge in abstract applications such as word problems. D3p12. The Student's reading and reading fluency scores indicated he had significant challenges with the basic processes of reading. D3p11. The Student's written language scores reflected serious difficulties in the areas of organization of writing, translating ideas into written format, and mechanics and grammar of the writing process. *Id.* at 12.

16. The Student was given four different assessments to measure his executive functioning. First was the D-KEFS which involved four subtests. Dep12. The first subtest was the Trail Making Test, which assesses "planning, organization, sequencing, motor speed, and flexible thinking skills." *Id.* The Student's scores on this subtest showed he has stronger skills in quickly sequencing numbers as opposed to letters. *Id.* The Student's scores on the second subtest, the Design Fluency Test, showed the Student had "difficulty with visual-motor skills when combined with processing speed." *Id.* at 13. The third subtest was the Color-Word Interference Test. The Student's performance on this test demonstrated he had challenges shifting his focus and attention. *Id.* The final subtest, the D-KEFS Tower Test, was challenging for the Student and his scores were in the very low range. *Id.* at 14. The evaluators opined that the Student's difficulty on this subtest may be because the subtest involves the integration of many different skills,

including motor, visual, and executive functioning. The evaluators noted the Student's "performance decreases when tasks require him to use several skills simultaneously." *Id.*

17. Another assessment to look at the Student's executive functioning was the RCFT. The RCFT measures visual-spatial construction skills, visual motor planning, storage and retrieval of visual information, and speed of processing. D3p14. The Student's scores indicated he was unable to recall information and he likely had an "encoding' deficit, meaning it is likely that the information was not encoded or processed in his memory in a meaningful way or at all." *Id.*

18. The NEPSY-II was also administered to assess the Student's executive functioning. The Student was given the Affect Recognition subtest of the NEPSY-II to assess his ability to recognize affect from photographs of faces. D3p15. The scores from this test showed the Student's ability to recognize emotions from others' expressions was below the expected level for his age. The Student had a bigger tendency to erroneously believe someone was happy or neutral. This indicates the Student may struggle to read social situations and understand other people's thoughts or feelings. It may also indicate the Student has difficulty with social cues and may not always respond to situations in socially acceptable ways. *Id.*

19. Finally, the Student was given the GNST-3 to further assess his executive functioning. The GNST-3 was used to measure the Student's neurological maturation and quantify the degree of difficulty the Student may have with planning and/or execution of motor movements. D3p16. The Student's scores indicated moderate to severe difficulties with sensory processing and with motor and planning control. *Id.* This indicates the Student, in relation to same-age peers, is "experiencing difficulty in the day-to-day efficiency of his sensorimotor-related neurological functioning." *Id.*

20. Dr. Brooks testified that measuring the Student's executive functioning skills was difficult because, in order to measure executive functioning, a person is required to perform some sort of underlying task. T490. If the person has difficulty performing the underlying task for other reasons, it is difficult to separate what difficulty is caused by executive functioning deficits and what is caused by other deficits. *Id.* For that reason, measuring executive functioning involves other aspects beyond assessment tools, such as observations and reports from individuals who provide support for the Student. T491.

21. The Student was given the Beery-Buktenica Developmental Test – Sixth Edition (VMI) to assess his visual-motor coordination. D3p16. Results from this assessment suggested the Student had serious difficulties with fine motor coordination that may cause the Student to have trouble with everyday tasks such as writing, using scissors, eating, or buttoning clothes. *Id.*

22. The Brooks Powers evaluators diagnosed the Student with intellectual disability, mild, and Autism Spectrum Disorder requiring level 1 supports for deficits in social communication and for restricted, repetitive patterns of behavior. D3p22. The Student was also diagnosed with Developmental Coordination Disorder and Post-Traumatic Stress Disorder. *Id.* at 23. The evaluators made several recommendations for the Student. They recommended the expectations placed on the Student be flexible to accommodate his strengths in specific areas and that his expectations not be set too low. *Id.* at 23. They also recommended positive behavior interventions and supports and trauma-informed intervention based on his diagnosis of PTSD. *Id.* at 24. It was recommended the Student be given several accommodations including additional

time and visual supports and instructions. *Id.* The evaluators recommended specific teaching strategies to be used by the District in how to give appropriate directions to the Student and how to support the Student in completing assignments. *Id.*

23. In Dr. Brooks's opinion, the Student's lack of ESY services during the summer of 2019 would not have made a substantial difference in the Student's scores on the assessments administered. T546. Dr. Brooks also opined that these tests provided an appropriately comprehensive evaluation of the Student's executive functioning, and she does not believe that any further executive functioning assessments would be helpful in understanding the Student's needs. T493; T548. Dr. Brooks performed an extensive evaluation of the Student including observations and review of school records. As such, her opinions are accorded significant weight.

August 2019 IEP

24. On August 20, 2019, the Parent contacted the District by email with a concern about the Student's class schedule. P77p19. She noticed that it included special education classes, and her understanding of the IEP was that he would be in general education classes. *Id.* On August 22, 2019, Sarita Whitmire-Skeith, the principal of Sultan High School, emailed the Parent letting her know she was aware of the discrepancy between the service matrix and the statement in the IEP regarding participation in classes with nondisabled peers. *Id.* at 7. She stated the IEP would need to be amended in order to change the Student's schedule to general education classes. *Id.* The Parent agreed by email to allow the District to amend the IEP without holding an IEP meeting. P77p4; P78p6.

25. On August 22, 2019, the Student's IEP was amended. P78p5. The IEP provided that all SDI in the areas of social/emotional, adaptive, math, written expression, and reading to be delivered in the general education setting rather than the special education setting. P78p34-35. The IEP included SLP services for thirty minutes per week in a special education setting, and OT services for thirty minutes, twice a week, in a special education setting. *Id.* The IEP noted that progress on his goals would be provided in a written progress report at the end of each semester.

26. The August 2019 IEP noted in the communication section of the present levels of performance area that the Student continued to struggle with his executive function skills and with completing tasks. P78p23. It included two communication goals focused on the skill of executive functioning. *Id.* The first goal stated:

By 06/05/2020, when given 1-2 step directions and a classroom assignment [Student] will complete classroom assignment by the established due date, given visuals, models or prompts improving improving [sic] his executive function skills including ability to organize, process and complete specific information and assignments from approximately 50% to 80% accuracy as measured by SLP data/teacher report/observation.

Id. The second goal stated:

By 06/05/2020, when given models, prompts, and visual organizers [Student] will organize materials/supplies for school based assignments and/or projects designated by Speech Therapist and student's Case Manager improving

improving [sic] executive function skills from approximately less than 60% to 80% accuracy (4 of 5 trials) as measured by therapy data/teacher/staff reporting.

Id. The Student also had a third communication goal focused on the skill of expressive language. *Id.* at 23-24.

27. The IEP included a significant number of accommodations and modifications for the Student. The accommodations included were:

Accommodations	Frequency	Location	Duration m/d/y to m/d/y
Access to headphones	Sensory purposes	Across all settings	08/22/2019 to 06/05/2020
Accessories and Equipment: access to handheld fidgets, thera putty, sensory items	Daily	Across all settings	08/22/2019 to 06/05/2020
Accessories and Equipment: access to text to speech software	Daily	Across all settings	08/22/2019 to 06/05/2020
Accessories and Equipment: access to word prediction software	Daily	Across all settings	08/22/2019 to 06/05/2020
Accessories and Equipment: copy of class notes or nearpoint copy	Daily	Across all settings	08/22/2019 to 06/05/2020
Accessories and Equipment: opportunity to word process	Daily	Across all settings	08/22/2019 to 06/05/2020
Accessories and Equipment: visual supports for learning (graphic organizers, visual timer, task sequencing cues, planner, models of finished products	Daily	Across all settings	08/22/2019 to 06/05/2020
Accessories and Equipment: use of calculator, numberline, and multiplication table as needed	Daily	Across all settings	08/22/2019 to 06/05/2020
Allow snack during class	Daily	All settings	08/22/2019 to 06/05/2020
Environment/Setting: Option to bring work to the Resource Room	Daily	Across all settings	08/22/2019 to 06/05/2020
Environment/Setting: Preferential seating	Daily	Across all settings	08/22/2019 to 06/05/2020
Environment/Setting: provided para support in gen-ed classroom settings and unstructured time	Daily	Across all settings	08/22/2019 to 06/05/2020

Accommodations	Frequency	Location	Duration m/d/y to m/d/y
Environment/Setting: small group or individual setting for test taking	Daily	Across all settings	08/22/2019 to 06/05/2020
Environment/Setting: Social Stories for novel events	Daily	Across all settings	08/22/2019 to 06/05/2020
Management/Reinforcement: access to "heavy work" (weight room, carry Books, rearrange chairs, etc)	Daily	Across all settings	08/22/2019 to 06/05/2020
Management/Reinforcement: Access to frequent breaks	Daily	Across all settings	08/22/2019 to 06/05/2020
Management/Reinforcement: Allowed to stand during work	Daily	Across all settings	08/22/2019 to 06/05/2020
Management/Reinforcement: Actual red slip not permitted, Loss of recess, lunch, NOT used as consequence	Daily	Across all settings	08/22/2019 to 06/05/2020
Modified Grading	Daily	Across all settings	08/22/2019 to 06/05/2020
Not required to suit up. Shoes are still a requirement	Daily	P.E.	08/22/2019 to 06/05/2020
Preferential Seating	Daily	Across all settings	08/22/2019 to 06/05/2020
Presentation/Grading: Assist with brainstorming and organization for writing	Daily	Across all settings	08/22/2019 to 06/05/2020
Presentation/Grading: Cover part of work to show only a few problems	Daily	Across all settings	08/22/2019 to 06/05/2020
Presentation/Grading: Directions repeated 1:1	Daily	Across all settings	08/22/2019 to 06/05/2020
Presentation/Grading: Visual instructions and support for task completion	Daily	Across all settings	08/22/2019 to 06/05/2020
Presentation/Grading: Weekly collaborative (two-way) communication between IEP case manager and parent.	Daily	Across all settings	08/22/2019 to 06/05/2020
Scheduling/Timeline: prepare student for transitions with timer	Daily	Across all settings	08/22/2019 to 06/05/2020

Accommodations	Frequency	Location	Duration m/d/y to m/d/y
Snap assignment photo to computer app	Worksheets that are handed out.	Across all settings	08/22/2019 to 06/05/2020
Student Response: extra time on assignments/tests or can finish work at home	Daily	Across all settings	08/22/2019 to 06/05/2020
Student Response: Scribe	Daily	Across all settings	08/22/2019 to 06/05/2020
Text-to-Speech	During State Testing Windows	General Education	08/22/2019 to 06/05/2020

P78p29-31 (highlighting included in exhibit). The IEP also included the following modifications:

Modification(s)	Frequency	Location	Duration m/d/y to m/d/y
Presentation:Shortened assignments	Daily	Across	08/22/2019 to 06/05/2020
Presentation:Rephrase test questions and/or directions: Formative Assessments	Daily	All settings	08/22/2019 to 06/05/2020
Presentation:Presentation and Grading: Alternative methods of demonstration of content knowledge (e.g. oral reporting and drawing in lieu of writing)	Daily	All Settings	08/22/2019 to 06/05/2020
Presentation:Presentation/Grading: Modified assignments with less reading and writing with tasks broken down	Daily	Across all settings	08/22/2019 to 06/05/2020
Presentation:Presentation: exposed to general education math lessons but has an individualized lesson plan	Daily	Across all settings	08/22/2019 to 06/05/2020
Presentation:Alter format of materials (highlight, type, spacing, color-code etc.)	Daily	Across all settings	08/22/2019 to 06/05/2020
Testing - Presentation:Students can mark, underline, or highlight key words	Daily	Across all settings	08/22/2019 to 06/05/2020
Testing - Presentation:Grading: Grading on Content Knowledge of individualized math program	Daily	Across all setting	08/22/2019 to 06/05/2020

P78p31.

28. On August 22, 2019, a PWN was issued proposing to change the Student's educational placement from special education to general education. D2p1. It noted this action was initiated at the Parent's request. *Id.* The PWN indicated the Student's IEP would be amended so that the service matrix listed the location of the Student's SDI would be in "general education" rather than "special education." *Id.* The PWN also indicated the Parent had confirmed by email that the change to the IEP could be done without holding an IEP team meeting. *Id.*

2019-2020 School Year

29. During the last week of August 2019, the Student attended a field trip to Jetty Island as part of his after-school program. T265. During this trip the Student expressed his concern to Ms. Shapovalov that the District wanted to place him in special education classes and made a gesture to indicate the District felt he was severely physically and mentally disabled. T194. The Student also expressed these concerns to the other children attending the field trip. Ms. Shapovalov was concerned about this interaction, so she shared it with the Student's Parent. T266.

30. During the 2019-2020 school year, the Student was in ninth grade at Sultan High School. P41p5-6. Lisa Barnhill⁹ was the Student's IEP case manager. T589. She also acted as the Student's teacher for advisory class. T590. Advisory is a class that meets roughly twice a month and is intended to help guide students through high school and prepare them for graduation and future career plans. T700-01. Ms. Barnhill did not interact regularly with the Student outside of advisory class, but she communicated with Mr. Sevier on an almost daily basis. T712. They discussed the accommodations and modifications needed for the Student. T705.

31. Mr. Sevier was the Student's 1:1 aide during the 2019-2020 school year. T832. Mr. Sevier allowed the Student to determine how his assistance was given. T833. He would work with the Student's teachers to determine the best way to assist the Student. *Id.* He checked in with the Student at the beginning of every assignment and often sat with him and talked him through the assignment. *Id.* If the Student wanted to work on his own, Mr. Sevier would allow him to do so. *Id.* Occasionally, Mr. Sevier would take the Student to the library to work on assignments in a space with less distractions. T138; T436; T837. Mr. Sevier attempted to provide visual graphics and other assistance to the Student to help him work through and complete assignments; however, the Student generally was not interested in using such tools. T845-46.

32. Every classroom in the high school has a station with laptops available for students to use during the class. T733; T832. The Student had access to these laptops during the first semester of the 2019-2020 school year. T657; T733. These laptops could not be taken home. *Id.* A laptop or iPad specifically assigned to the Student was not available at the beginning of the school year. T660; T733.

33. During the first semester of the 2019-2020 school year, the Student was enrolled in Algebra 1 with teacher Sarah Harkins.¹⁰ T333. Mr. Sevier attended the class with the Student every day. He also attended on days the Student was absent to help the Student with makeup work. T378-79. The curriculum used for the class was called Agile Minds and involved an online portion as well as a physical workbook. T333. The online portion of the curriculum involved visual representations of the lessons. T383. The Student had access to a personal laptop during Algebra 1 on some days, but always had access to classroom laptops. T334; T378. The online lessons were meant to be completed during class time, so there was no expectation that the Student have access to a computer and internet at home. T343. The Student generally performed better on online assignments than he did on paper assignments. T343; P11p3-4.

⁹ Ms. Barnhill has a bachelor's degree in social work and special education. She has been a teacher for four years and received her special education certification in March 2020. T592; T693-94.

¹⁰ Ms. Harkins has a bachelor's degree in mathematics and education and a master's degree in teaching. T377. She has been a teacher at Sultan High School for twenty-three or twenty-four years. *Id.*

34. Ms. Harkins spoke with Mr. Sevier about the curriculum and how he could help the Student with the material. T383. Ms. Harkins modified the way she graded the Student's work. For assignments completed by the Student, Mr. Sevier would inform her how much the Student completed and she would grade according to the amount of work completed rather than the total work assigned. T341. This resulted in shortened assignments. *Id.* She also provided extra time and extended deadlines for assignments. *Id.* The Student was able to use a calculator¹¹ on his course work. T385. Ms. Harkins also met with the Student once a week after school to help him with any outstanding online work. T343-44.

35. Ms. Harkins noted that, during class time, the Student would do his work if she or Mr. Sevier was working directly with him. However, as soon as they walked away, the Student would stop working and socialize for the remainder of class. T345. Attempts from Ms. Harkins and Mr. Sevier to redirect the Student were only effective some of the time. *Id.* The Student often lost paperwork and failed to turn in assignments. T346. However, Ms. Harkins noted that the Student also turned in work that was blank. T351. The Student's grade in Algebra 1 was affected by the fact that he did not turn in many assignments. T366. The Student earned an F for Algebra 1 during the first semester of the 2019-2020 school year. T387; P7p1.

36. During the 2019-2020 school year, the Student's English language arts teacher was Zoe Miller.¹² T405. Mr. Sevier attended this class with the Student. However, at the Student's insistence, Mr. Sevier would sit away from the Student and would only come over to ask if the Student needed help. T434. Ms. Miller noted the Student had access to a classroom laptop during class, and was often distracted by this device. T406; T421. Even when not distracted, the Student often did not use his class time to work on assignments. T436. She noted that the Student often forgot to turn in his assignments, which negatively affected his grade. T406, T418. Ms. Miller also noted the Student had difficulty engaging with the class material and with his classmates, and he would refuse to participate in group activities. T424-25; T437.

37. Ms. Miller broke down the instructions for assignments on the board for the whole class and would generally check in directly with the Student to see if it needed to be broken down further for him. T418. As part of the class, the Student was expected to do daily writing assignments. Ms. Miller would write a prompt on the board and students were expected to respond to it in whatever way they chose. T420. Students could write a story, write a poem, draw a picture, or whatever they felt helped them connect with the material. T420. The Student did not engage in many of these writings despite prompting from Ms. Miller and Mr. Sevier. T420. Ms. Miller also assigned something called "articles of the week," where she would bring in an article related to a current event and ask students to read it and write a response to the article. T407. The Student had difficulty completing these assignments, but showed some improvement when he started using a table to organize his answers. T407-08, T414; P99. The Student was allowed to turn in articles of the week later in the semester, past their due dates, for full credit. T433. Had these articles of the week not been accepted late, the Student would not have passed the class. T439.

¹¹ One math assignment in the hearing record read "No Calculators!" P9. This was an optional, extra credit assignment, and was not part of the curriculum. T384. The Student was not prohibited from using a calculator for curriculum-based work. T385.

¹² Ms. Miller has a bachelor's degree in English literature. T431.

The Student earned a D+ during the first semester of the 2019-2020 school year in English language arts. T419; P5.

38. None of the Student's assignments in any of his classes were modified prior to being given to the Student because the Student would refuse assignments that appeared different from what was being given to his classmates. T846.

39. During the 2019-2020 school year, the Student received his speech and language SDI from SLP Rachel Roberts. P76p1, 22-23. The Student generally met with the SLP once per week and the notes from Ms. Roberts indicate which of the two executive functioning goals was worked on during that session. D6. Ms. Roberts also provided observations from each session indicating how the Student behaved during the session and what skills were worked on. *Id.* Ms. Roberts also consulted with Mr. Sevier on several occasions during which he would provide feedback on how the Student was doing regarding assignment completion and class participation. *Id.* Services delivered between September 19, 2019, and November 21, 2019, were listed as "cotreat with OT," indicating the service was provided concurrently with Student's OT services. D6p1.

40. The Student received his OT services during the first semester of the 2019-2020 school year from Kaitlin Thompson. D5. Ms. Thompson kept a detailed log of each day she treated the Student and documented when service minutes were missed so they could be made up at a different time. D5p1. She also documented when makeup minutes were delivered. *Id.* She created a daily progress note for each session indicating which areas were addressed that day. D5p2-12. Less than half of the Student's sessions between September 19, 2019, and November 21, 2019, were listed as co-treatment sessions with the Student's SLP. *Id.* at 1.

41. On September 16, 2019, Dr. Brooks met with the Parent and Dr. Uherek to discuss the Brooks Powers evaluation prior to holding a meeting with the entire evaluation team. T535-36. Dr. Brooks initiated this meeting because she felt the diagnosis of intellectual disability was a new diagnosis for the Student. *Id.* They also discussed the overall results of the evaluation and recommendations. *Id.* Dr. Brooks spoke with Dr. Uherek during this meeting and incorporated information provided into her final evaluation report. *Id.*

42. On September 18, 2019, the Parent emailed Ms. Thompson and Ms. Roberts and suggested the two providers connect to discuss the Student's needs and share strategies to successfully support him. P13p3. Ms. Thompson emailed back the same day stating she would connect with Ms. Roberts to share ideas. *Id.* at 2. The Parent responded the same day suggesting the providers work together for a session with the Student. *Id.* at 1. Ms. Thompson emailed back stating that co-treating was a "great idea." *Id.*

43. The Student's evaluation team met on September 18, 2019, to complete the Student's triennial reevaluation. P41p5. The team recommended the Student receive SDI in the academic areas of reading, written expression, and math, as well as in the areas of social/emotional and adaptive. *Id.* at 11-12. The team recommended related services in occupational therapy and speech-language therapy. *Id.* The Student's reevaluation was based almost entirely on the results of the Brooks Powers evaluation.

44. On October 2, 2019, Dr. Brooks met with the Parent and the District staff to review the Brooks Powers evaluation. T554. During the meeting, the team discussed how and in what

environment the Student's needs could be met. T555. Dr. Brooks expressed concerns about the Student's ability to benefit from a general education classroom, even if that was where the Student wanted to be placed. T555. She noted his processing speed may make it difficult to keep up with the pace of a general education class. *Id.* Dr. Brooks also expressed specific concern for math because of the Student's scores on the KTEA-III test, which indicated he was missing some of the basic math skills necessary to do higher levels of math. T556.

45. On October 2, 2019, Gayle Wilson, the Executive Director of Special Education in the District, emailed the Parent stating that she was not to meet with any District staff members without a District administrator present. P35p8. Ms. Wilson indicated this was a reaction to an interaction the Parent had with Ms. Barnhill earlier that same day. *Id.* The Parent responded to the email expressing her concern that this would prevent her from properly participating in the Student's education process. *Id.* at 6-7. Ms. Wilson responded indicating the Parent was not prohibited from meeting with District staff, just that a District administrator would need to be present. *Id.* at 4.

46. On October 4, 2019, the Student's math teacher, Ms. Harkins, emailed the Parent letting her know the Student had lost his math notebook and asked the Parent to look for the notebook at home. P10p3. The Parent responded on October 5, 2019, asking if she could replace the notebook and inquiring whether the Student should work with his paraeducator or his speech language therapist to improve his organization skills. *Id.* at 2. Ms. Harkins emailed the Parent back on October 7, 2019, agreeing that a replacement notebook would be good for the Student but expressed concern about having the Student make up the work he missed in his previous notebook. *Id.* at 1. Ms. Harkins was concerned that too much makeup work would overwhelm the Student. She also agreed that it would be helpful for the Student to have more organizational support. *Id.*

47. The District contacted the IEP team on October 8, 2019, to schedule an IEP team meeting on October 18, 2019. P76p3. The meeting was set to review the Student's IEP in light of the Brooks Powers Evaluation. *Id.* The IEP meeting was not held due to the Parent being ill. T696; T807. An IEP draft that included placing the Student in special education classes for math and English was sent to the Parent at this time. T696. The IEP meeting was not able to be rescheduled until February 2020. P76p3.

48. On October 29, 2019, Ms. Whitmire-Skeith, the school principal, emailed the high school staff stating that the District was requesting that the Parent not speak directly with District staff unless a District administrator could participate in the conversation. P29p1. Staff was directed to tell the Parent to speak with an administrator if she wished to schedule such a meeting. *Id.*

49. On November 7, 2019, the Student was provided an iPad as an assistive technology device. P22p1-2. The Student reacted negatively to this device and told his paraeducator that it was not something he would use as he viewed it as something for students in special education. *Id.* The Parent told the District to remove the "iPad immediately so that he can focus on his schoolwork." *Id.* Mr. Sevier carried the iPad with him and regularly offered it to the Student. T864. The iPad was equipped with the Snap assignment photo app, which was listed as an accommodation in his IEP. *Id.*; P78p31. The Student never opted to use the device and reacted negatively to any offer to do so from Mr. Sevier. T864.

50. On November 25, 2019, the Parent emailed Ms. Roberts and Ms. Thompson expressing concern that all of the Student's OT and SLP services had been delivered as "co-treat" services rather than separate services. P14p3-4. She noted that her suggestion in a previous email was for them to do one session together, not deliver all of the Student's services together. *Id.* She asked that this be changed. She also asked that the Student's goals be worked on and that make-up services be provided for 90 minutes that the Student missed in October and November. *Id.*

51. Later the same day, Ms. Wilson emailed the Parent stating that OT and SLP sessions would no longer be delivered as a "co-treat" and that that had only been done at the Parent's request. P14p3. Ms. Wilson also listed out the Student's missed SLP services and make-up minutes already delivered and indicated the Student was still missing twenty minutes of services, which would be delivered as soon as possible. *Id.* The Parent responded requesting to set up a time to meet with the Student's SLP. *Id.* at 1. The Parent was able to meet with Ms. Roberts on December 5, 2019. P15.

52. During the winter holiday break, Amy Mudrovich,¹³ worked 1:1 with the Student in algebra for roughly five to six hours total. T918; T934-35. This was arranged and paid for by the Parent. T934. Ms. Mudrovich found that when she used strategies such as color coding and "chunking" of the material, the Student performed better. T918-19. Ms. Mudrovich previously taught the Student during first through third grade in a different school district. T936. The Student was in a self-contained classroom during that time. *Id.* Ms. Mudrovich has never taught at Sultan High School and did not observe the Student in school during the 2019-2020 school year. T937. Ms. Mudrovich opined that the Student is cognitively able to work through the Algebra 1 curriculum; however, "he would need assistance." T919. She also opined he would be successful in general education if provided the modifications and accommodations like she provided when she worked with the Student. T943. Ms. Mudrovich had only limited recent experience working with the Student academically and no recent experience teaching Algebra 1 in the high school setting. Further, her experience working with the Student in a 1:1 setting is not comparable to the environment of a general education classroom. As such, her opinion regarding the Student's ability to perform in a general education classroom is accorded limited weight.

53. On January 17, 2020, the Parent emailed the Student's teachers and asked if she could talk with the Student's math and science teachers about the Student's accommodations and modifications for his assignments and about how he could make up work that was not completed for the semester. P11p4. The Parent also noted that she believed the Student had trouble completing the work in these classes because they were primarily online and the Student did not have access to a computer or internet in the home. *Id.* Ms. Harkins emailed the Parent back on January 21, 2020, and noted that less than half of the Student's math work was done online, and that the Student was actually performing better on the online assignments than the paper assignments. She noted that she had worked along with the Student's paraeducator and SLP to get his paper assignments turned in, including shortening assignments and giving the Student additional time, but the Student still frequently did not turn in assignments. *Id.* at 3. She also noted the Student had not turned in his math notebook since October, and suggested that turning

¹³ Ms. Mudrovich has a bachelor's degree in psychology and a master's degree in education and special education. She is a special education teacher working primarily with kindergarten and first grade students. T913; P121. She was a special education teacher in the District from 2013-2017. P121. Ms. Mudrovich has not taught Algebra 1 or high school level students since at least 2008. P121; T929-33.

that in would be a good place to start. *Id.* at 4. The Parent responded to this email on January 27, 2020, noting that she thought the math notebook was kept at school and stated her concerns that the Student did not have access to lessons and work to do at home. *Id.* at 2.

54. John Hubbard, the Student's science teacher, also responded to the Parent's email on January 17, 2020. P23p9. Mr. Hubbard noted that the Student was in class with his paraeducator and that the Student has access to his personal laptop as well as computers in the classroom. He further stated that the late assignments were more than a month old, so the Student already had additional time to get them completed. *Id.* Mr. Hubbard stated that Mr. Sevier often acted as the Student's scribe and the Student had been given a decreased workload. Mr. Hubbard attached the missing assignments to the reply email. *Id.* at 10. He noted they were primarily paper assignments that had been given to the Student in class. *Id.* Mr. Hubbard agreed to give the Student until January 28, 2020, to submit late assignments. *Id.* at 6.

55. The Student scored a 14/17 on a math test labeled as the "Semester 1 Final." P8. The test was labeled as a final because it was the assessment taken on the last day of the semester. T386. It was not a final that covered the entirety of the content covered during the first semester of the Student's Algebra 1 class. *Id.*

56. The first semester of classes in the District ended on January 24, 2020. The second semester began on January 28, 2020. T1046.

57. In February 2020, as part of the after-school program, the Student volunteered to work at an annual volunteer appreciation banquet that was held at a school building. T192. The volunteers met before the banquet in a resource room that is used for special education students. Ms. Shapovalov observed that the Student was reluctant to enter the room and expressed worry that people would see him there, and assume that is where he should be placed during the school day. *Id.*

February 2020 IEP

58. On February 10, 2020, the Student's IEP team met and a new IEP was created for the Student after considering the Brooks Powers evaluation. D7p3; P76. The meeting was attended by many people, including Ms. Wilson, Ms. Whitmire-Skeith, Ms. Miller, Ms. Harkins, the Parent, Ms. Barnhill, Mr. Sevier, Ms. Shapovalov, and the Parent's private attorney. P76p4-5; T228-29. Work samples and progress reports were not provided during the meeting. T200; T336; T417; T731. The IEP team did not discuss the entire IEP, including the accommodations and modifications, because it ran out of time. T601; T608; T732. However, the team did discuss whether to the Student continued to need a 1:1 aide. D7p45-56; T858; T967; T1040.

59. Ms. Shapovalov shared during the IEP meeting that she felt putting the Student in special education classes would be harmful to the Student. T198-99, 209. The Student was also able to make a statement during the meeting and expressed that he did not want to be in any special education classes. T203; T697; T1034.

60. The Parent was able to speak at the IEP meeting and express that she did not think the proposed IEP was appropriate. T221; T776. She explained that she felt the Student's behavior

would decline if he were put in resource room classes, and that it would be harmful for the Student. T777; T814-16. The Parent brought binders to the meeting with data she felt would show the harm the new placement would cause the Student, but was not able to present all of the documentation to the IEP team. T813-14. These binders included information related to apprenticeship and preapprenticeship programs in which the Student wanted to participate. T949. However, the Parent felt she “was able to clearly explain the harm that would come to [the Student].” T949. The Parent also expressed during the IEP meeting that she wanted the Student’s social/emotional SDI to be delivered in the general education setting, rather than the special education setting. T963. She also wanted the Student to continue having access to his 1:1 aide. T967.

61. On February 13, 2020, Ms. Barnhill emailed the Student’s new IEP to the IEP team members, including the Parent. The IEP indicated that as of February 25, 2020, the Student’s SDI in the areas of math, written expression, and reading would be provided by a special education teacher, rather than by a general education teacher, and that the location of those services would be in the special education setting. P76p41-42. The IEP also decreased the Student’s OT minutes to thirty minutes, twice a month, based on the Brooks Powers Group evaluation and data from the Student’s OT provider. P78p41. The IEP did not include updated general education teacher input. T600. The IEP also removed the accommodation of “Weekly collaborative (two-way) communication between IEP case manager and parent.” P78p30; P76p37-39. In the present levels of performance section, the IEP noted that the Student’s “most significant communication needs are in the area of executive functioning.” *Id.* at 22. The Student’s SLP noted the Student made some progress on his communication goals and recommended the Student’s expressive language goal be eliminated and his two executive functioning goals be combined into one goal that could target the Student’s academic and life skills. *Id.*

62. Ms. Harkins agreed with the IEP team decision to move the Student to a resource room math class. T390. She noted that the resource room class has a higher teacher-to-student ratio and the class is individually paced for each student. T393. She felt it was the correct placement for the Student academically. *Id.* In her experience with the Student, she felt that while he could repeat steps that were demonstrated for him, he was not able to understand how to apply those steps in a novel situation. T391. She did not feel he would be able to apply or problem solve with algebra concepts. *Id.* She also felt that the Student’s performance in the Brooks Powers evaluation supported placing him in resource room math. *Id.*

63. Ms. Miller agreed with the IEP team decision to place the Student in a resource room English class. T425-26. She found that the Student required more support than she was able to provide in the general education setting. T425-26. In her opinion, the Student would be more successful in a class with a smaller teacher-to-student ratio and that had fewer students total, thus resulting in less distraction. T425-26; 446.

64. Mr. Sevier opined that the Student’s behaviors may decline if he was placed in a resource math class. T848. However, he noted it would greatly depend on who the teacher was. *Id.* In his experience, the Student’s opinion of the teacher played a big role in whether he liked the class. *Id.*

65. A PWN was issued on February 11, 2020, proposing to implement the new IEP effective February 25, 2020. D7p45. Despite the IEP team not completing its discussion of the IEP, namely the accommodations and modifications, during the team meeting, the District did intend to implement the IEP as written. T603, T605, T610. The PWN indicated the IEP would change the placement of the Student's math, written expression, and reading SDI from a general education setting to a special education resource room setting. D7p45. The PWN indicated the Student failed three classes during the first semester of the 2019-2020 school year and the data indicates the Student would benefit from the change to a resource room class for math, reading, and written expression SDI. *Id.* The PWN also indicated that his social/emotional SDI would be delivered in the general education setting and that, despite disagreement¹⁴ within the IEP team, the 1:1 paraeducator would continue for the Student. *Id.* at 45-46.

66. The Student's progress report for the first semester of the 2019-2020 school year was mailed to the Parent at the end of the semester along with the Student's final report card. T632-33. There is usually a two week lag between the end of the semester and the progress reports and report cards being mailed to parents. T639. The Parent received the Student's progress report by mail after the IEP meeting in February 2020. T731.

67. Mr. Sevier kept records of the Student's activities and behaviors that were emailed to the Parent at the end of each school day. T644. These reports included information related to each period of the school day and described any difficulty the Student had focusing or performing his school tasks as well as any assistance offered or provided by Mr. Sevier. P92; T803. These reports also included all of the assignments the Student had in each class. T804. These reports were the data used by Ms. Barnhill to monitor that the Student's accommodations and modifications in his IEP were implemented. T644, 663.

68. Between February 25, 2020, and May 19, 2020, the Student received private SLP services from Mr. Johnson, who had evaluated the Student in May 2019. P45. The Student had four sixty-minute sessions with Mr. Johnson. The Parents paid \$114.00 per session. *Id.*

69. During the summer of 2020, the Student attended Dartmoor School, where he took a four week course in Foundations of Algebra. P124p1. Dartmoor is a school that provides instruction in a one-to-one setting. T285. His instructor noted that the Student was focused and worked diligently with his teacher. P124p1. The Student earned an A in this course. *Id.* It was noted that the Student "still needs time to hone the basics, but he showed mastery of the algebraic methods used to solve equations." *Id.* The course cost \$1,284.59. *Id.* at 3.

70. After graduation, the Student plans to attend an apprenticeship or trade program. T779. An algebra credit is required for him to attend the programs that are of interest to him. T214; T283; T779.

71. Ms. Shapovalov opined that placing the Student in special education classes rather than general education classes could cause the Student to want to give up and stop trying in school. She also opined it would result in negative behaviors. T211. Ms. Shapovalov does not have a background in education and has not observed the Student in the school setting. T192, 225.

¹⁴ District IEP team members wanted to remove the Student's 1:1 support, whereas, the Parent wanted it to remain part of the Student's IEP. T967.

However, based on her significant experience with the Student, her opinion is accorded some weight.

Dr. Ann Uherek

72. The Student began receiving private psychological services from Dr. Ann Uherek¹⁵ in July 2015. T277. The Student originally presented with symptoms of severe anxiety and panic disorder as well as symptoms related to experiences with trauma. *Id.* The Student had experienced traumatic situations in the school environment during his third-grade year in a different school district. *Id.* The Student was already diagnosed with autism when he began treatment with Dr. Uherek, but Dr. Uherek additionally diagnosed the Student with posttraumatic stress disorder. T303. Dr. Uherek was initially treating the Student weekly; however, that decreased over time. She is currently seeing the Student monthly. T304.

73. Dr. Uherek opined that the Student could be successful in a general education setting if someone is helping him “by repeating the language” and “by taking notes for him because he can’t take notes and listen at the same time.” T278-79. She expressed that the Student does not have a problem with “memory for language as much as tracking it in the moment.” T279. Specific to algebra, she opined the Student could learn and understand the concepts if there was “a lot of repetition and help.” T280. Dr. Uherek opined that Dartmoor was an appropriate setting for the Student and that the Student performed well in a one-to-one teaching environment. T286, T297.

74. Dr. Uherek also opined that if the Student was put into classes with only special education students, such as in a resource room, the Student would likely exhibit negative behaviors including shutting down and refusing to participate. T287, T301. She based this opinion on the Student’s past behaviors in that type of setting. *Id.* Dr. Uherek did not observe the Student during any of his high school classes and she has not observed the special education settings available at Sultan High School. T310, T321.

75. Regarding the Student’s executive functioning, Dr. Uherek noted that the Student had significant delays in his “ability to shift and integrate new information, [and] change his approach to things.” T290. She also noted he had problems with working memory and planning and organizing. *Id.*

76. Dr. Uherek has significant experience with the Student and knowledge of his impairments. However, she is not a licensed teacher, has not observed the Student in the educational setting, and does not have experience in delivering special education in a public school setting. As such, her opinions are accorded some weight.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States

¹⁵ Dr. Uherek is a clinical psychologist with a doctorate degree in psychology. P123; T276. She is licensed to practice in Washington State and has focused her training in child neuropsychology and developmental disabilities. *Id.*

Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education Act (IDEA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As the Parent is the party seeking relief in this case, the Parent has the burden of proof. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof to resolve a dispute in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981); *Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). Therefore, the Parents' burden of proof in this matter is preponderance of the evidence.

The IDEA

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

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

Id. at 206-07 (footnotes omitted). For a school district to provide a free appropriate public education (FAPE), it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Id.* at 200-01.

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

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

Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ____, 137 S. Ct. 988, 999-1000 (2017).

5. The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry that must focus on the unique needs of the student at issue. As the U.S.

Supreme Court has made clear, “A focus on the particular child is at the core of the IDEA,” and an IEP must meet a child’s “*unique needs*.” *Andrew F.*, 137 S. Ct. at 999 (emphasis in original). “An IEP is not a form document” and the “essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.* “Above all, an IEP team is charged with developing a ‘comprehensive plan’ that is ‘tailored to the unique needs of a particular child.’” *L.C. on behalf of A.S. v. Issaquah Sch. Dist.*, 2019 WL 2023567 at *21, 119 LRP 18751 (W.D. Wash. 2019) (quoting *Andrew F.*, 137 S. Ct. at 994).

6. Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

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

20 USC §1415(f)(3)(E)(ii); see WAC 392-172A-05105(2); 34 CFR §300.513.

7. Thus, not every procedural violation of the IDEA is sufficient to support a finding that the child in question was denied FAPE. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003)(quoting *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 887, 892 (9th Cir. 2001)).

Whether the School District denied extended school year (ESY) services on June 20, 2019, based on resources available in the School District and not on the individual needs of the Student.

8. The Parent argues the District violated the IDEA by denying the Student ESY services based on resources available to the District rather than on the Student’s individual needs. The evidence supports this contention.

9. ESY services are services provided to students eligible for special education beyond the normal school year and in accordance with a student’s IEP. WAC 392-172A-02020(1). The purpose of ESY services is the maintenance of a student’s learning skills or behavior, not the teaching of new skills or behaviors. *Id.* at (5). ESY is provided either based on a child’s regression without adequate recoupment following school breaks, or “based upon the professional judgment of the [IEP] team and consideration of factors including the nature and severity of the student’s disability, rate of progress, and emerging skills, with evidence to support the need.” *Id.* at (6).

10. In developing a student’s IEP, WAC 392-172A-03110 requires the IEP team to consider:

- (a) The strengths of the student;
- (b) The concerns of the parents for enhancing the education of their student;
- (c) The results of the initial or most recent evaluation of the student; and
- (d) The academic, developmental, and functional needs of the student.

11. Further, as the U.S. Supreme Court has made clear, “A focus on the particular child is at the core of the IDEA,” and an IEP must meet a child’s “*unique* needs.” *Endrew F.*, 137 S.Ct. at 999 (emphasis in original). “An IEP is not a form document,” and the “essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.* “Above all, an IEP team is charged with developing a ‘comprehensive plan’ that is ‘tailored to the unique needs of a particular child.’” *L.C. on behalf of A.S. v. Issaquah Sch. Dist.*, 2019 WL 2023567 at *21, 119 LRP 18751 (W.D. Wash. 2019)(quoting *Endrew F.*, 137 S.Ct. at 994).

12. The record is not clear on whether the Student was eligible for ESY services during the summer of 2019 based on regression or other considerations. The Parent testified that the IEP team found the Student eligible, but denied ESY because of District resources. The IEP states the Student was not eligible for ESY services, but provides no explanation. The PWN states that the Student was denied ESY because the District does not provide ESY beyond fifth grade. A preponderance of the evidence supports the finding that the IEP team did not properly consider whether the Student was eligible for ESY during the summer of 2019. Rather, the team denied ESY based on the fact that the District does not provide ESY for any students older than fifth grade. This clearly shows the decision was not based on the unique needs of the Student and is a procedural violation of the IDEA.

13. As stated previously, a procedural violation of the IDEA amounts to a FAPE denial and warrants a remedy if it “significantly impeded the parents’ opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents’ child...” WAC 392-172A-05105(2). A district violates a parent’s right to meaningfully participate in the IEP process if it predetermines a student’s placement, such as when it “independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). Predetermination may also occur when a District makes a placement determination prior to an IEP meeting and is unwilling to consider other alternatives. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

14. Here, the District’s policy predetermined the Student’s eligibility for ESY based solely on his age and prevented the Parent from participating in educational decisionmaking for her child. Thus, the IDEA violation amounted to a denial of FAPE and warrants a remedy.

Whether the School District failed to evaluate the Student in executive functioning.

15. The Parent argues the District violated the IDEA and denied the Student FAPE by failing to properly evaluate the Student in the area of executive functioning. She argues the Brooks Powers evaluation, which was the primary basis for the Student’s triennial reevaluation, was inappropriate because the evaluators were not provided necessary teacher and paraeducator feedback and the assessment tools used were unable to accurately measure the Student’s impairments.

16. School districts “must ensure that...[t]he student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.” WAC 392-172A-03020(3)(e). Further, a district must also ensure that “the evaluation is sufficiently comprehensive to identify all of the student’s special education and related services needs,

whether or not commonly linked to the disability category in which the student has been classified.” *Id.* at 3(g).

17. The Parent first argues that the Brooks Powers executive functioning evaluation was inappropriate because the evaluators were not provided teacher and paraeducator feedback. While the evaluators did not have teacher questionnaires or feedback forms, the evaluators did review the Student’s school records, including his previous special education reevaluation from 2016, his June 2017 IEP, and other IEP-related documentation. All of those documents generally include information related to the Student’s functioning in the classroom. Further, the evaluators observed the student for an hour and a half in a general education class in June 2019. The evaluators had access to ample evidence related to the Student’s performance in the school environment and the Parent has not shown how a teacher questionnaire or feedback form would have been necessary to properly assess the Student’s executive functioning.

18. The Parent also argues that the tests used by the evaluators to measure executive functioning were inappropriate because many of them required skills, such as writing, that are difficult for the Student, thus causing the results of the tests to be invalid. The evaluators noted that on one type of test the Student’s performance may have decreased because the test required the use of many different skills at the same time, which is challenging for the Student. However, the evaluators also administered three other tests to measure executive functioning.

19. Further, as Dr. Brooks testified, executive functioning is often difficult to measure because executive functioning is, by its nature, intertwined with other skills. That is why measuring executive functioning involves reviewing a combination of information from assessments to observations and reports from people who observe the student. Dr. Brooks interviewed the Student, the Parent, and Dr. Uherek and also had access to school records. This combined with the test results and classroom observation were all used to evaluate the Student’s executive functioning.

20. Dr. Brooks did not feel that any additional information or assessment tools were necessary to properly evaluate the Student’s executive functioning. Further, the evaluation found that the Student had significant executive functioning deficits and made many recommendations regarding how to support the Student in light of these deficits. The Parent has not proven that any additional assessments were necessary to properly evaluate the Student’s executive functioning needs.

21. As such, the Parent has not proven the District’s evaluation of the Student violated the IDEA.

Whether the School District failed to provide specially designed instruction in the area of executive functioning.

22. The Parent argues the District violated the IDEA and denied the Student FAPE by failing to provide SDI in the area of executive functioning. She argues that this is a result of the District’s failure to properly evaluate the Student’s executive functioning and the District’s failure to properly work toward the executive functioning goals in the August 2019 IEP.

23. In regards to the Parent’s first argument, as discussed above, the Parent has not shown

that the Brooks Powers evaluation failed to properly evaluate the Student's executive functioning. Accordingly, any argument that the failure to evaluate resulted in inappropriate executive functioning services also fails.

24. Further, the August 2019 IEP, which was in place during the first semester of the 2019-2020 school year, was created prior to the District receiving the Brooks Powers evaluation. Once the evaluation was received by the District, the IEP team attempted to meet and create a new IEP. However, that was not accomplished until February 2020. It is not clear how an evaluation performed after the drafting of the IEP could result in inappropriate services in the IEP.

25. The Parent's second argument is that the executive functioning goals in the August 2019 IEP were not properly worked on during the first semester of the 2019-2020 school year. The Student's executive functioning goals were addressed during his SLP services and measured by his SLP, Ms. Roberts. Ms. Roberts's treatment notes indicate which goal she worked on during each session with the Student and included detailed observations of the Student's performance and current difficulties. She also kept notes from consults she did with Mr. Sevier where they discussed specific executive functioning difficulties related to the Student, including assignment completion.

26. The Parent objects to some of the specific activities done during these SLP sessions, including a pill sorting activity, which she feels were not appropriate for the Student. However, the Parent is not an SLP and does not have experience delivering SDI. Further, Ms. Roberts did not testify at the hearing. As such, the evidence is insufficient to show that the Student's executive functioning goals were inappropriate or that they were not appropriately worked on as part of his SLP services.

27. The Parent has not proven that the District failed to deliver SDI in the area of executive functioning. Thus, the Parent has not established that the District violated the IDEA in this regard.

Whether the School District failed to evaluate the Student in communication in order to determine appropriate related services and/or specially designed instruction (SDI) in communication.

28. The Parent argues the District violated the IDEA by failing to conduct a speech language evaluation. She argues that this additional evaluation was necessary to determine what supports and services were needed related to the Student's executive functioning deficits.

29. As stated previously, Brooks Powers performed an extensive evaluation of the Student in August 2019, specifically focusing on the area of executive functioning. Further, the Student's August 2019 IEP and February 2020 IEP both note that the Student's primary communication needs are in relation to his executive functioning deficits and his difficulty completing tasks. This is further reflected in the communication goals specifically addressing the skill of executive functioning. The Parent has not explained how a separate evaluation performed by an SLP would provide necessary information beyond what has already been provided by the Brooks Powers evaluation.

30. The Parent has not shown that the District's failure to perform a separate communication evaluation violated the IDEA or denied the Student FAPE.

Whether the School District excluded the Parent from the educational process by failing to provide IEP progress data to the Parent before her meeting, in violation of WAC 392-172A-05190.

31. The Parent argues the District violated the IDEA by failing to provide her IEP progress data prior to the February 2020 IEP meeting. She argues that the failure to provide this data prevented her from meaningfully participating in the IEP meeting.

32. Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained or used by the district. WAC 392-172A-05190. "The school district shall comply with a request promptly and before any meeting regarding an individualized education program or resolution session relating to the identification, evaluation, educational placement of the student or provision of FAPE to the student." *Id.*

33. The Parent specifically argues the District should have provided her with the Student's IEP progress report prior to the February 2020 IEP meeting. However, the Parent provided no evidence showing she requested and was denied access to any educational records for the Student prior to the February 2020 IEP meeting. The Student's Progress Report was provided at the end of the semester, in compliance with his IEP. Accordingly, the Parent has not established a violation of WAC 392-172A-05190.

34. The Parent has not shown that the District's failure to provide the Student's IEP progress report prior to the February 2020 IEP meeting violated the IDEA or denied the Student FAPE.

Whether the School District failed to implement the August 22, 2019, IEP by failing to provide the Student's IEP accommodations and modifications in general education classes.

35. The Parent argues the District violated the IDEA by failing to implement all of the Student's modifications and accommodations as stated in the August 2019 IEP. She specifically notes the Student was not provided individualized lesson plans, access to a calculator, access to a personal laptop, weekly collaborative communication between the Parent and the case manager, and alternative methods for demonstrating content knowledge.

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

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

...

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

Van Duyn, 502 F.3d at 821 and 822 (italics in original).

37. The Student's August 2019 IEP included a significant number of accommodations and modifications. Mr. Sevier, Ms. Harkins, and Ms. Miller all testified to the extensive accommodations and modifications that were provided to the Student during the first semester of the 2019-2020 school year. Mr. Sevier worked 1:1 with the Student, broke down material, and helped the Student complete assignments and tests. He acted as the Student's scribe, provided visual graphics, and kept the Student on task. Ms. Harkins modified how she graded the Student, shortened assignments, allowed extended time for assignments and tests, allowed use of a calculator on required assignments, and worked with Student after school once a week. Ms. Miller provided additional check-ins with the Student to see if instructions needed to be broken down, allowed the Student additional time to turn in assignments, and allowed the Student to demonstrate his knowledge in different ways.

38. The Parent argues the District failed to implement the IEP because it did not provide the Student with a personal laptop. However, the IEP does not state that the Student needs a personal laptop. The IEP does call for access to many computer programs, including the Snap assignment photo application. The Student was provided access to a computer in all of his classes. Further, the District tried to provide the Student with a personal iPad that had the Snap application, but it was rejected by the Student. Mr. Sevier even carried the iPad with him in case the Student changed his mind, which did not occur.

39. The Parent argues use of the laptop at home would have allowed the Student the extra time needed to complete his work. However, Ms. Harkins testified that the online portion of the curriculum was meant to be completed during class time, and there was no expectation that a Student have access to a computer at home. Further, Ms. Harkins and Ms. Miller both testified that the Student often did not use the class time he had to work on his assignments and Ms. Miller noted that he was easily distracted by the laptop. The IEP did not require the Student to have access to a personal laptop at home, nor does the evidence support that access to one would have allowed the Student to be more successful in general education.

40. One accommodation that was not implemented during the 2019-2020 school year was the "Weekly collaborative (two-way) communication between IEP case manager and parent." Ms. Barnhill, the Student's case manager, admits that this was not happening during the relevant time period. However, the Parent did receive a daily report from Mr. Sevier that described the Student's behavior, participation in class, and assignments for each class period. Mr. Sevier spent every day with the Student and was the person primarily in charge of implementing the accommodations and modifications. Ms. Barnhill did not interact directly with the Student most days, but did meet almost daily with Mr. Sevier. The Parent was receiving significant communication from the District regarding the Student and any difficulties he experienced. While that communication came from Mr. Sevier, rather than Ms. Barnhill, it appears Mr. Sevier was actually in a better position to provide such information, and the information was provided even more frequently than required by the IEP. Further, the Parent was able to communicate with the District through email and there is no evidence that she was denied any requested information or

meetings with District staff. As such, the failure to implement this accommodation was not material.

41. The Parent has not proven that the District materially failed to implement the Student's IEP. As such, a violation of the IDEA has not been established.

Whether the School District proposed to remove the Student from general education in its offered February 11, 2020 IEP, because of needed modifications in the general education curriculum, in violation of Washington Administrative Code (WAC) 392-172A-02060(4).

42. The Parent argues the District violated the IDEA by removing the Student from general education math and English language arts classes when modifications would have allowed the Student to be successful in general education. She specifically noted the Student's lack of assistive technology and need for modified assignments and grading.

43. "A student shall not be removed from education in age-appropriate general classrooms solely because of needed modifications in the general education curriculum." WAC 392-172A-02060(4). However, the Parent has not shown that the District removed the Student from general education because of needed modifications, or that specific modifications would have resulted in the Student being successful in general education math and English classes.

44. In regards to assistive technology, the Student had access to classroom laptops which could be used during the school day. The District also acquired a personal iPad for the Student; however, the Student refused to use the device. As noted previously, the District was implementing the Student's IEP in regard to assistive technology. Further, multiple witnesses noted that while using the classroom laptops the Student was often distracted and accessing non-class related materials. The evidence does not support a finding that providing the student a personal laptop, different from the iPad and classroom laptops, would have allowed the Student to be successful in general education math and English.

45. The Parent also points to an individualized math program or modified assignments as what would be necessary for him to access general education. However, evidence shows the Student's teachers did modify the assignments given to the Student, namely by allowing him to complete fewer questions and allowing him to be graded on what was completed rather than on the total amount of work originally assigned. The Student also had Mr. Sevier with him during all of his classes, acting as a scribe and helping the Student work through his assignments, often in a one-on-one setting.

46. Further, modifications were not the reason the District proposed changing the Student's placement. The Student's math and English teachers both agreed that, based on the Student's performance in his classes, they believed resource room classes were the appropriate placement for the Student. They believed this would provide the Student with the additional attention he needed and would allow the Student to work at his own pace.

47. The District IEP team members also found that the results of the Student's evaluation supported the decision to place the Student in special education for math and English. During the October 2019 meeting to discuss the Brooks Powers evaluation, Dr. Brooks expressed concern about the Student being able to keep up with the pace of general education classes,

especially in math, due to his scores on some of the tests administered as part of the Brooks Powers evaluation.

48. Further, while Dr. Uherek and Ms. Mudrovich both opined that the Student could be successful in general education, they both noted that he would need significant assistance to do so. Dr. Uherek noted the Student would need a significant amount of repetition and help. Ms. Mudrovich indicated the Student would be successful if given the accommodations and modifications she was providing during her one-to-one tutoring sessions. Neither Dr. Uherek nor Ms. Mudrovich observed the Student in his general education classes at the high school, nor did they perform any academic or cognitive testing like that done by Dr. Brooks. As such, their opinions are accorded less weight than Dr. Brooks.

49. The decision to move the Student from general education math and English to special education math and English was based on the Student's performance in those classes during the first semester of 2019-2020 school year and the results of the Brooks Powers evaluation. He was not removed from general education classes solely because of modifications needed. As such, the Parent has not proven the District violated the IDEA in regard to this issue.

Whether the School District failed to consider the potential harmful effect on the child in selection of placement for the Student in the offered February 11, 2020, IEP, in violation of WAC 392-172A-02060(2)(d).

50. The Parent argues the District violated the IDEA by failing to consider the harm to the Student that would result if he were placed in special education classes. The Parent argues this placement change would harm the Student emotionally and would hinder his ability to pursue his desired vocational goals.

51. Under WAC 392-172A-02060(2),

The selection of the appropriate placement for each student shall be based upon:

- (a) The student's IEP;
- (b) The least restrictive environment requirements contained in WAC [392-172A-02050](#) through [392-172A-02070](#), including this section;
- (c) The placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and
- (d) A consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

52. During the February 2020 IEP meeting, the IEP team heard and considered any potential harm to the Student that could result from changing the Student to special education classes for math and English. The Parent was able to explain that she disagreed with the decision and why she felt that change would harm the Student. Further, the Student attended the meeting and expressed his preference to stay in general education classes. Ms. Shapovalov was also able to speak at the meeting and express her opinion that the change would be detrimental to the Student.

53. The fact that the District IEP team members did not agree with the Parent, that the change would harm the Student, does not mean the team did not consider this when determining the

appropriate placement for the Student. Potential harm is only one aspect to be considered when determining the appropriate placement. The team must also consider which placement would best assist the Student in making progress on his annual goals. It is clear the District IEP team members, including the Student's math and English teachers, felt placement in special education math and English would allow the Student to be more successful academically.

54. The Parent has not proven that the District failed to consider potential harmful effects to the Student, and thus has not proven an IDEA violation.

Whether the School District predetermined the Student's placement in the offered February 11, 2020, IEP, by making a decision on the Student's placement based on its own consideration of the Student's 1:1 paraeducator data, work samples, teacher feedback, observations in general education, or any other classroom data, without reviewing them in the IEP meeting with the Parent present, and in addition failing to consider whether accommodations and modifications had been implemented, in violation of WAC 392-172A-02060(1) and 392-172A-03115.

55. The Parent argues the District violated the IDEA by predetermining the Student's placement prior to the February 2020 IEP meeting. She argues this prevented her from being able to participate in the decision making process for the Student.

56. Placement determinations for students eligible for special education, including preschool students, should be made by a group of individuals, including the parents, who are "knowledgeable about the student, evaluation data, and placement options." WAC 392-172A-02060(1). Districts must ensure that parents of eligible students are members of any group making decisions about the student's placement. WAC 392-172A-03115.

57. A district violates a parent's right to meaningfully participate in the IEP process if it predetermines a student's placement, such as when it "independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). Predetermination may also occur when a District makes a placement determination prior to an IEP meeting and is unwilling to consider other alternatives. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007). However, preparation by a district prior to an IEP meeting, including developing a draft IEP, does not itself establish predetermination. *Lee's Summit R-VII Sch. Dist.*, 112 LRP 14677 (SEA MO 2012). Also, parents do not have veto power over individual provisions or the right to dictate any particular educational program. *Ms. S.*, 337 F.3d at 1131.

58. Here, the District came to the February 2020 IEP meeting with a draft IEP. However, changes were made to the IEP after the meeting as a result of the discussions had by the team, including the Parent. The February 2020 IEP ended up continuing the Student's 1:1 aide, over the objection of some of the District team members. Further, the Student's social/emotional SDI was amended to be delivered in the general education setting, as was requested by the Parent. It is clear that the draft IEP was changed in response to team discussions at the meeting. While the Student's math and English class placement did not change, that does not prove that the District predetermined the Student's placement.

59. The Parent has not proven that the District predetermined the Student's placement. Therefore, no IDEA violation is established in regard to this issue.

The School District failed to implement the August 22, 2019, IEP by failing to provide all of the speech - language pathology (SLP) and occupational therapy (OT) service minutes set forth in the IEP, and serving them concurrently.

60. The Parent argues the District violated the IDEA by failing to deliver all required SLP and OT service minutes because some minutes were delivered concurrently.

61. The Student's SLP and OT minutes were delivered concurrently from September 19, 2019, through November 25, 2019. However, the Student's IEP called for those services to be delivered separately. This occurred due to a miscommunication between the Parent and the District. Regardless, the Student's IEP called for SLP and OT minutes to be delivered separately, and the District's failure to do that resulted in the Student receiving fewer services minutes during that time period. Thus, the District failed to implement the Student's IEP.

62. The Student's IEP called for thirty minutes of SLP services per week and sixty minutes of OT service minutes per week. During the ten week period in question, that would amount to 300 SLP minutes and 600 OT minutes, or 900 total service minutes. The delivery of concurrent services resulted in the Student losing out on 300 services minutes. This is more than a minor discrepancy, and was a material failure to implement the Student's IEP.

63. As such, the District's delivery of concurrent SLP and OT minutes violated the IDEA and resulted in a denial of FAPE.

Remedies

64. The Parent has proven that the District violated the IDEA and denied the Student FAPE when it predetermined the Student's eligibility for ESY services during the summer of 2019 and when it delivered concurrent SLP and OT services. Therefore, the Parent is entitled to a remedy.

65. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005), cited with approval in *R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia*, 401 F.3d at 523-524. Because compensatory education is an equitable remedy, the tribunal must consider the equities existing on both sides of the case. *Id.* at 524.

66. A hearing officer may fashion individualized relief for students seeking compensatory education, including reimbursement of appropriate services provided by the student's parents. As noted in *R.P. v. Prescott*:

Courts have been creative in fashioning the amount and type of compensatory education services to award. See, e.g., *Ferren C. v. Sch. Dist. of Phila.*, [612 F.3d 712](#), 718-19 (3d Cir. 2010) (court can order school to provide annual IEPs to student who had aged out of a statutory right to a FAPE); *M.S. ex rel. Simchick v. Fairfax Cnty. Sch. Bd.*, [553 F.3d 315](#), 324-26 (4th Cir. 2009) (court can order that private school tuition be reimbursed); *Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, [464 F.3d 1025](#), 1034 (9th Cir. 2006) (court can order additional training for a child's teachers).

631 F.3d at 1126.

67. In the present case, insufficient evidence was provided to determine whether the Student was eligible for ESY services during the summer of 2019, let alone what type of services would be appropriate. Regardless, the District's decision to deny the Student ESY services based on a District policy that ESY was not available for students beyond fifth grade is a clear violation of the IDEA and the Parent is entitled to a remedy.

68. The record is clear that the Student has significant difficulties in math, as evidenced by his evaluation scores, classroom grades, and District staff opinions that he should be placed in a resource room math class. During the summer of 2020, the Parent paid privately for the Student to attend an algebra course at Dartmoor academy. The Student did well in this program and earned an A. As such, as a remedy for the District's FAPE denial regarding ESY, the District shall reimburse the Parent for the cost of the course in the amount of **\$1,284.59**. The District shall provide this reimbursement within thirty days after issuance of this order.

69. Further, the District's failure to implement the Student's IEP and deliver the appropriate amount of SLP and OT services resulted in the Student missing out on 300 service minutes during the first semester of the 2019-2020 school year. The record is clear that the Student has significant deficits in the area of executive functioning, which was being addressed by his SLP. As such, as a remedy for the District's FAPE denial, the District shall also reimburse the Parent for the cost of the Student's private SLP services provided by Mr. Johnson between February and May of 2020 in the amount of **\$456.00**. The District shall provide this reimbursement within thirty days after issuance of this order.

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

ORDER

1. The Sultan School District violated the IDEA and denied the Student FAPE during the 2019-2020 school year by failing to make an individualized determination regarding ESY services and failing to deliver all SLP and OT service minutes.
2. The Parent is awarded the remedy at Conclusion of Law 68 and 69.
3. All other remedies requested by the Parent are denied.

SERVED on the date of mailing.



Dana Diederich
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that today I served this document on each of the parties listed below. I emailed via secure email or mailed a copy to the parties at their addresses of record using Consolidated Mail Services or U.S. Mail.

Parent



Paul Douglas
Sultan School District
514 4th St
Sultan, WA 98294

Carlos Chavez, Attorney at Law
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1191 Second Avenue, Suite 2000
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Dated January 12, 2021, at Seattle, Washington.

lan

Representative
Office of Administrative Hearings
600 University Street, Suite 1500
Seattle, WA 98101

cc: Administrative Resource Services, OSPI