

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

IN THE MATTER OF:

OSPI CAUSE NOS. 2020-SE-0118
2020-SE-0166

OAH DOCKET NOS. 08-2020-OSPI-01124
10-2020-OSPI-01194

ENUMCLAW SCHOOL DISTRICT

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

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker via remote video conference over 5 days on April 5 – 8 and 27, 2021. The Parents of the Student whose education is at issue¹ appeared and were represented by Shannon McMinimee and Alex Hagel, attorneys at law. The Enumclaw School District (the District) was represented by Carlos Chavez, attorney at law. Also appearing for the District was Gerrie Garton, director of student support services, and Courtney Bowie, assistant director of student support services. A certified court reporter was present at the due process hearing.

STATEMENT OF THE CASE

*Procedural History*²

The District filed a Request for Due Process Hearing (District Complaint) on August 25, 2020. The District Complaint requested a due process hearing to demonstrate that the District's January 27, 2020 reevaluation of the Student, and the "related" April 30, 2020 reevaluation of the Student were appropriate pursuant to the Individuals with Disabilities Act (IDEA). On August 28, 2020, a Scheduling Notice was entered, assigning ALJ Anne Senter as the presiding ALJ for the District Complaint. On September 8, 2020, the Parents filed their Response to the District Complaint. On October 6, 2020, ALJ Senter entered a Prehearing Order, in part granting the Parents' motion to extend the due date for a written decision on the District Complaint to the close of record plus thirty days.

The Parents filed a Request for a Due Process Hearing (Parents Complaint) on October 28, 2020. The Parents Complaint raised multiple issues and requested remedies regarding the

¹ In the interest of preserving the family's privacy, this decision does not use the actual names of the parents or the student. Instead, they are identified as the "Mother," "Father," or "Parents," and the "Student." Where the transcript or an exhibit identifies the singular "Parent," it is understood to be identifying the Mother unless otherwise noted herein.

² This procedural history is not intended to detail every event. Rather, it is intended to provide a brief history of the most relevant matters for the reader.

District's alleged failure to provide the Student with a Free Appropriate Public Education (FAPE) pursuant to the IDEA. See Parents Complaint, pp.10-12. On October 30, 2020, a Scheduling Notice was entered, assigning the Parents Complaint to ALJ Senter.

On March 18, 2021, ALJ Senter entered the Third Prehearing Order. That Order consolidated the Parents Complaint with the District Complaint for hearing at the parties' agreed request. The consolidated due process hearing was set for April 5-9, 2021, by remote video conference. The Third Prehearing Order also set the statement of issues and remedies for the consolidated due process hearing. On March 29, 2021, ALJ Senter, exercising her authority as the Senior ALJ for all due process hearings under the IDEA, entered a Notice of Reassignment of Administrative Law Judge, reassigning the consolidated due process hearing to ALJ Matthew D. Wacker.

At the conclusion of the due process hearing on April 27, 2021,³ the parties agreed to file written closing briefs on June 10, 2021.

Due Date for Written Decision

The due date for a written decision in the above matter is the close of record plus thirty (30) calendar days. See October 6, 2020 Prehearing Order. The record of the hearing closed with the filing of post-hearing briefs on June 10, 2021. Thirty calendar days from June 10, 2021, is July 10, 2021. Therefore, the due date for a written decision in the above matter is **July 10, 2021**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents Exhibits: P1-P4, Amended P5, P6-P8;

District Exhibits: D1-D9, D11-D20, D22-D24, D26-D33, D35-D43.

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

Brady Van Hoof, Enumclaw High School (EHS) resource room math teacher;
Raeann Webb, EHS environmental science teacher;
Chad Davidson, EHS assistant principal;
Mark Gunderson, EHS physical education/health teacher;
Lindsay Ryan, EHS English/language arts resource room teacher;
Casey Anderson, Enumclaw Middle School (EMS) English/language arts teacher, IEP case manager;
Jeri Freeburg, EMS English/language arts resource room teacher;
Renee Woods, EMS science teacher;

³ The consolidated due process hearing was ultimately held on April 5-8, 2021, with the last day reset and held on April 27, 2021, by agreement of the parties.

Maurine Terry, EMS U.S. History teacher;
Doug Van Hulse, EMS resource room math teacher, IEP case manager;
Jerry Henderson, Ph.D., Clinical Psychologist and District contract school psychologist;
Marianna Manzano-Moudy, District speech-language pathologist (SLP);
Jeanne Richmond, former District SLP and assistive technology coordinator;
Elyssa Greene, EHS resource room English/language arts teacher, IEP case manager;
Sarah Fish, private academic tutor;
The Mother;
Courtney Bowie, District assistant director of student support services.

ISSUES AND REMEDIES

The consolidated statement of the issues and requested remedies for the due process hearing is:

- A. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) as follows:
 1. Whether the District has failed to provide the Student with FAPE since October 27, 2018 by failing to provide him specially designed instruction in reading and writing that was sufficient and appropriate based on his unique needs to allow him to make meaningful educational progress.
 2. Whether the District has failed to provide the Student with FAPE since October 27, 2018 by failing to provide him specially designed instruction in communication focused on building his language and literacy skills.
 3. Whether the District failed to provide the Student with FAPE from March 16, 2020 to June 3, 2020 by not fully implementing the Student's then in place individualized education program (IEP).
 4. Whether the District failed to provide the Student with FAPE from June 3, 2020 to present by not fully implementing the Student's June 3, 2020 IEP.
 5. Whether the District has failed to provide the Student with FAPE from March 16, 2020 by changing his educational placement to a home-based educational placement, which is not in his least restrictive environment.
 6. Whether the District failed to comply with procedural requirements of the IDEA and in turn failed to provide the Student with FAPE by unilaterally materially and substantially changing the Student's educational placement on March 16, 2020:
 - a. outside of the IEP team setting;
 - b. without meaningful parental participation;
 - c. absent the existence of any evaluative data to support the same; and

- d. without proper prior written notice to the Parents.
7. Whether the District failed to comply with procedural requirements of the IDEA and in turn failed to provide the Student with FAPE by predetermining that it would offer the Student with no in-person educational services after March 16, 2020.
 8. Whether the District has failed to provide the Student with FAPE since March 16, 2020 by eliminating the Student's receipt of related services in communication rather than adjusting how the Student was served by an SLP to make his related services in communication meaningful and targeted at his unique needs.
 9. Whether the District denied the Student with FAPE from January of 2020 to April 30, 2020 because the District's January 2020 Reevaluation failed to determine the nature and extent of the Student's disabilities as well as the special education and related services that the Student needed.
 10. Whether the District failed to comply with procedural requirements of the IDEA and in turn failed to provide the Student with FAPE by the way it conducted its January 2020 reevaluation.
 11. Whether the District failed to comply with procedural requirements of the IDEA and in turn failed to provide the Student with FAPE by the way it conducted its April 30, 2020 "Assessment Correction" Reevaluation.
 12. Whether the District denied the Student with FAPE from April 30, 2020 to present because its "Assessment Correction" Reevaluation failed to determine the nature and extent of the Student's disabilities as well as the special education and related services that the Student needed.
- B. Whether the District's evaluation on January 20, 2020, and its "Assessment Correction" Reevaluation on April 30, 2020, were appropriate and, if not, whether the Parents are entitled to an independent educational evaluation (IEE) at public expense in the form of reimbursement for an IEE obtained by the Parents and/or a new IEE.
- C. Whether the Parents are entitled to their requested remedies:
1. Declaratory relief finding that the District violated the IDEA.
 2. Declaratory relief finding that the Student was denied FAPE by the District's actions.
 3. Compensatory special education and related services for the Student to allow him to obtain the educational benefit that he would have received but not for the District's violations of the IDEA and denial of FAPE consistent with 20 U.S.C. 1415(i)(2)(c)(iii).

4. Reimbursement to the Parents for being required to obtain services for the Student because of the District's failure to provide FAPE from October 27, 2018, to present, including the costs associated with procuring private reading and writing instruction with Sarah Fish and assessments conducted by Dr. Leafar Espinoza of the Center for Child Development.
5. An educational placement for the Student moving forward that provides him with the scientifically based, multi-modal, one-on-one targeted specially designed instruction in reading and writing that he is in need of to make educational progress.
6. An order that includes whatever additional relief the court may find just and equitable.

See March 18, 2021 Third Prehearing Order.

PRELIMINARY ISSUES

The Parents filed their Complaint on October 28, 2020. On the first day of the consolidated due process hearing, the District objected to the introduction or submission of evidence that postdates the allegations at issue in the Parents Complaint on the basis of relevance. Chavez T37, T38, T42.⁴ Parents' counsel responded that because the relief requested by the Parents includes a "prospective placement," were the District's objection sustained it would require the Parents to "continually amend their complaint every week," or even "every day," because they would be "frozen in time as (of) the filing of the complaint, when they are raising concerns related to the appropriateness of [the Student's] current receipt of services." McMinimee T37; Parents' Post-Hearing Brief, pp.6-7. In an abundance of caution and to provide opportunity for further consideration, the District's motion was overruled, and the Parents were permitted to introduce evidence of actions and events that postdate the filing of their Complaint during the hearing. However, counsel were informed that a final ruling on the District's objection would be made post-hearing. ALJ T44-T45.

The Parents' position is unpersuasive for multiple reasons. First, while the Parents Complaint requests an "educational placement moving forward," the Parents' Post-Hearing Brief makes clear this means "an (Individualized Education Program) IEP should be developed" that is appropriate and provides the Student FAPE going forward. See Requested Remedy C(5), above; Parents Post-Hearing Brief, p.36. It is routine for parents to challenge the appropriateness of a student's IEP in a due process hearing under the IDEA and propose that a new, appropriate IEP be developed as a remedy should they prevail. This typically does not require the introduction of evidence that postdates a parent's complaint because the appropriateness of an IEP is determined based upon what was known at the time an IEP is developed. *Adams v. Oregon*, 195 F.3d 1141 (9th Cir. 1999).

⁴ Citation to "Chavez T37, T38, T42" is a reference to the argument of District's counsel's at pages 37, 38, and 42 of the transcript.

Second, due to the operation of “stay-put” (See Washington Administrative Code 392-172A-05125: Student’s status during proceedings) a student must remain in their “current educational placement” during the pendency of any complaint resolution. Parent’s counsel confirmed that the Student’s educational placement has not changed since the Parents Complaint was filed. McMinimee T38. The practical effect of stay-put is to maintain the status quo vis-à-vis the educational services a student is receiving in the student’s Least Restrictive Environment (LRE) at the time a parent complaint is filed through a final determination of the issues raised in that parent complaint. Given the Student’s educational placement has not changed since the Parents Complaint was filed, there is no need to examine or consider actions or events that postdate the Parents Complaint to resolve the Parents’ issues. If the District violated the IDEA and denied the Student FAPE, any such violations would continue during stay-put, and could be resolved based upon actions and events which occurred with the filing of the Parents Complaint.

Finally, the District is correct that if the Parents wished to raise issues regarding the Student’s education *after* their Complaint was filed, they have at least two options. First, the Parents could have moved to amend their Complaint to add to the time period at issue, and/or add new issues. And this would not require, as Parents argue, that they move to amend their complaint every week or every day. For example, Parents Complaint was filed October 28, 2020. The Third Prehearing Order entered March 18, 2021 set the hearing to begin April 5, 2021. If the Parents wished to raise matters that occurred between October 29, 2020, and commencement of the hearing on April 5, 2021, they had ample opportunity to seek amendment of their Complaint up until only five days before the hearing was set to begin. WAC 392-172A-05085(6)(b). Second, the Parents also could have filed a new complaint(s) any time after October 28, 2020, and sought consolidation with their Complaint.

The Parents also argue that Issue A(4), above, “specifically challenges the district’s implementation of the June 2020 IEP,” and that issue “necessarily encompasses the time period between June 11, 2020 and February 25, 2021,” when the IEP will expire.⁵ Parents’ Post-Hearing Brief, p.6. This argument is also unpersuasive. While the *appropriateness of the plan to implement* a year-long IEP may be challenged *before* expiration of the one-year period, an alleged *failure to implement* an IEP can only be challenged once the alleged failure actually occurs in time. Accordingly, while the Parents may challenge the appropriateness of the plan to implement the Student’s June 9, 2020 IEP (i.e. may challenge the appropriateness of the IEP) any time after June 9, 2020, they cannot challenge any alleged failure to implement that IEP until the failure actually occurs. Issue A(4) is clearly an alleged failure to implement issue, not a challenge to the appropriateness of the plan to implement the June 2020 IEP. And again, given the effect of stay-put, all the Parents need prove is that the District failed to implement the June 2020 IEP as of October 28, 2020 to prevail on that issue through the period of time until entry of this Final Order, or any final appeal is exhausted.

After further consideration and analysis, it is concluded that the District’s objection will be **SUSTAINED**, and evidence of events and actions that postdate filing of the Parents Complaint

⁵ The June 9, 2020 IEP (D32) was an amendment to an earlier February 25, 2020 IEP (D19).

will not be considered in resolving the issues raised in the Parents Complaint under the facts in this case.

The second preliminary issue concerns that of trial of issues by express or implied consent of the parties. See *M.C. v. Antelope Valley Union Sch. Dist.*, 858 F.3d 1189 (9th Cir. 2017). Any argument that, by allowing the Parents to offer evidence at hearing regarding actions and events that postdate filing of the Parents Complaint, issues were tried by express or implied consent of the parties must fail. The District timely objected to such evidence, only to have the ALJ overrule the objection at that time. It is concluded the District did not expressly or impliedly consent to trial of any issues outside of those raised in the Parents Complaint.

The third preliminary issue concerns the Consolidated Statement of Issues and Requested Remedies, above, specifically the issues and remedies from the Parents Complaint. The then-presiding ALJ adopted the Parents' issues and requested remedies *verbatim* as the Parents' issues and requested remedies for this due process hearing. The Parents Complaint was signed by Parents' counsel, who is a very experienced special education attorney, having appeared before this ALJ many times over a period in excess of ten years, representing both school districts and parents: this was not a complaint written by a *pro se* parent. However, during the hearing Parents' counsel argued for a very broad reading of those issues. See, e.g., T519-T520 (math instruction), T531 (IEP team composition). This ALJ agrees with District's counsel that the broad reading of the issues advocated by Parents' counsel is not warranted. There is no question that had Parents' counsel intended to raise an IEP-team composition issue rather than an implementation issue, counsel has the knowledge and experience to do so. This ALJ has long held, and both parties' counsel in this case are well aware that, it is critical in IDEA hearings to have a very well defined and specific statement of the issues in order to ensure a just and correct resolution for students, parents, and school districts. Accordingly, any ambiguity in the Parents' issues will be interpreted narrowly, and this ALJ will hold the Parents to the clear and express language of the issues.

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.

General Background

1. The Parents first had concerns regarding the Student's speech when he was about [REDACTED] Mother T948-T949.⁶ Testing confirmed the Student had a "moderate speech delay," and he started receiving preschool speech services with the District shortly thereafter. *Id.* T949. He continued to receive speech services with the District through fifth grade. *Id.*

⁶ Citation to the testimony of a witness is by last name and page number of the Transcript. For example, citation to "Mother T948-T949" is a citation to the testimony of the Mother at pages 948-949 of the transcript.

2. In January 2009, the District determined the Student was eligible as a child with a disability to receive special education and related services under the IDEA. D15p1.⁷ He was determined eligible under the Developmental Delay eligibility category. *Id.*
3. The Student was reevaluated by the District in June 2011, and again determined eligible under the Developmental Delay category. *Id.*
4. The Student entered kindergarten in the District for the 2011-2012 school year (SY). Beginning in kindergarten and continuing through fifth grade, the Student received speech services from Jeanne Richmond, a District Speech-Language Pathologist (SLP). Richmond T766; Mother 956. She worked with the Student on “his sounds and language skills. Those are fundamental pieces to support reading.” *Id.* T768. Ms. Richmond’s services helped to support the Student’s reading and “early literacy acquisition.” *Id.* T768.
5. The Parents began to have concerns regarding development of the Student’s academic skills, and requested an early reevaluation of the Student. D15p1. The District conducted an early reevaluation of the Student in 2013. *Id.* The Student’s eligibility was continued under the Developmental Delay category, and he received specially designed instruction (SDI) in communication and cognitive/preacademics. *Id.*
6. The District conducted another reevaluation in 2014, and determined the Student was now eligible under the Specific Learning Disability (SLD) eligibility category. *Id.* He received SDI in communication, reading, writing, and math. *Id.*
7. During the summer before he entered third grade for the 2014-2015 SY, the Parents obtained a reading tutor for the Student. Mother T954. The Student continued with the same reading tutor through fifth grade. *Id.* T956-T957. Although the Parents began looking for a new reading tutor after fifth grade, it would take them until January 2019 during seventh grade to find a new tutor for the Student. *Id.* T957.
8. The Parents had the Student evaluated at the University of Washington, Center on Human Development (UW Evaluation), just as he started fourth grade in 2015. D5p1; Mother T952.
9. The UW Evaluation suggested the Student had significant cognitive processing delays that were greater than the findings from the prior District evaluations of the Student, and that he had a full-scale IQ score of 59. D15p1. The Parents “shared” the UW Evaluation with the District during fourth grade, but there was no “follow-up” by the District. Mother T953, T954.
10. During fifth grade, Ms. Richmond focused her work with the Student on his articulation. Richmond T766.

⁷ Citation to the exhibits are by party (Parents, District) and by page number. For example, citation to “D15p1” is a citation to District Exhibit 15 at page 1.

11. The District reevaluated the Student on May 23, 2017. See D1p1 (Most Recent Evaluation Date). However, the reevaluation report does not appear in the record.

2017-2018 SY: Student Enters Enumclaw Middle School (EMS) for Sixth Grade

12. The Student entered EMS and began sixth grade for the 2017-2018 SY. D1p1.

13. The Student was going into “supported” English and math classes for sixth grade. Mother T955. However, “[the Student] was not going to continue in a formal speech program into middle school.” *Id.* T955-T956. This was a “big change” for the Student. *Id.* It was the Mother’s understanding that, per Ms. Richmond, the Student would benefit more from remaining in his general and special education classes during sixth grade than being pulled-out to continue receiving SLP services. *Id.* T956.

14. As the Student was “transitioning” to middle school, Ms. Richmond recalls a conversation with the Mother about “whether it would be best to continue with direct services, speech language therapy, or not.” Richmond T770. Ms. Richmond believed that the Student’s language skills would continue to grow if he was in a language-rich environment. *Id.* T769.

15. During middle school, Ms. Richmond supported the Student in her new role as an Assistive Technology (AT) coordinator. *Id.* T769. In that role, Ms. Richmond wanted to continue to support the Student and his teachers with assistive technology, especially text-to-speech technology. *Id.* T769.

16. Casey Anderson was the Student’s special education English/language arts teacher and IEP case manager during sixth and seventh grades. Anderson T241, T242, T304.

17. Ms. Anderson is a certificated K-8 general education and a K-12 special education teacher. *Id.* T240. She has taught at EMS for 17 years. *Id.* She completed a two-year program to obtain her special education endorsement in 2004. *Id.* T240-T241.

18. As the Student’s IEP case manager, Ms. Anderson was responsible for “monitoring his individual education plan, collaborating with teachers to help modify and implement accommodations that are listed in his IEP, and work with the Parents and the team to develop an education plan that fits the needs of the student.” *Id.* T242. She also scheduled IEP meetings, generated drafts of documents, and monitored IEP goal progress. *Id.*

19. Doug Van Hulse was the Student’s special education math teacher for grades six through eight at EMS. Van Hulse T516-T517. He was also the Student’s IEP case manager for eighth grade. *Id.* T517.

20. Mr. Van Hulse has been a special education teacher for 25 years, 22 of those years with the District. *Id.* T516. He holds a master’s degree in Learning Disabilities from Georgia College. *Id.* T535. He is certificated and holds endorsements to teach special education in Washington State. *Id.*

21. Both Ms. Anderson and Mr. Van Hulse were aware that the Student's academic performance at EMS varied considerably over time. Ms. Anderson agreed that the Student struggled to retain skills during sixth and seventh grades. Anderson T255. She described it as:

“(I)nconsistency in [the Student's] demonstration of being able to show proficiency. There was one day that we would work with him and he would show mastery and then two weeks later, if we did not continue to work on those same skills on a daily basis, it was almost as if it was completely forgotten and...we would have to start over. So we were continuously changing up our instruction...He truly had...something going on with his processing skills, remembering certain things.”

Id. T256-T257. She opined there was “regression,” or “day-to day variances in [the Student's] ability to remember.” *Id.* T259. However, there is no record of Ms. Anderson ever referring the Student for a reevaluation.

22. Mr. Van Hulse perceived that the Student “struggled quite a bit” academically, “needed reminders to engage,” and “his performance was somewhat up and down.” Van Hulse T537. His general observation of the Student was that “his abilities fluctuated greatly.” *Id.* T520. Mr. Van Hulse knew “[the Student's] retention was not strong...And so it might appear that he mastered something, but to come back to it and practice it again...would not be an effective use of time.” *Id.* T569. However, Mr. Van Hulse never made a referral to have the Student reevaluated. *Id.* T571.

23. During the Student's attendance at EMS (sixth through eighth grades), his reading comprehension assessments varied from a grade equivalent (GE) of 1.1 (1/22/18) to a GE of 1.4 (1/07/20), exceeding a GE of 2.0 on only one occasion (GE 2.2; 1/01/19). P8p1.

24. An IEP meeting was held and a new annual IEP was developed for the Student on May 22, 2018. D1. The Mother attended the meeting as one of the IEP team members. D1p1. At that time, the Student was in sixth grade, and [REDACTED] D1p1. Ms. Anderson was the Student's IEP case manager, and drafted this IEP. D1p1; Anderson T242.

25. The IEP noted that, “[the Student] requires redirection or guidance daily to get started on a task and completes work with some support by teacher or para...[The Student] will need para support in science for 7th grade.” D1p5.

26. The IEP also noted that the Student “rarely completes work even with support and modifications to curriculum,” and that if he is in a general education language arts class next school year he needs to have a para. *Id.* “He cannot read material in class so needs a reader and can not (sic) write (spell) so someone to scribe for him would be helpful.” *Id.*

27. The IEP went on to note that the Student cannot read fluently or comprehend grade-level text, solve problems involving fractions, use basic algebra, or use critical thinking to solve story problems with SDI, and he “struggles tremendously in math, even with tasks such as counting objects.” *Id.* pp5-6.

28. The IEP confirmed that the Student's “past (IEP) goal is still what we are working on to increase his reading level.” *Id.* p6. The Student's prior annual IEP from approximately May 2017

is not in the record, so it cannot be determined with certainty which reading goal is being referenced.

29. The Student's May 2018 IEP includes two reading goals, one writing goal, and 1 math goal. *Id.* pp7-8. The IEP provided the Student with 150 minutes per week of reading skills SDI, 100 minutes per week of writing skills SDI, and 225 minutes per week of math skills SDI. *Id.* p13. The IEP also provided the Student with 20 minutes per month of SLP consultation. *Id.*

2018-2019 SY: Student Attends EMS for Seventh Grade

30. The Student continued to attend EMS for seventh grade during the 2018-2019 SY.

31. Ms. Anderson continued as the Student's English/language arts teacher and IEP case manager during seventh grade. Anderson T241, T304, T242. The Student was supported by either a paraeducator and/or a special education teacher in all his academic classes. *Id.* T249, T252.

32. It is unclear whether the Student's SLP providing IEP consultative services during seventh grade was Stan Mead, or Janet Hammond. *Compare* Anderson T253 (Stan Mead) with Manzano-Moudy T706, T752 (Janet Hammond).

33. Although the precise date is unclear, during the Parents' examination of Ms. Anderson at the due process hearing regarding the time period after October 27, 2018, Ms. Anderson recalled "having a conversation with mom and (the) rest of the team, that it would be more disruptive to pull [the Student] out on a regular basis for speech therapy than to consult with him one time monthly for 20 minutes." Anderson T253.

Student's Private Tutoring With Sarah Fish

34. In January 2019, the Student began private tutoring focusing on phonemic awareness and reading skills with Sarah Fish. He continues through the present time with Ms. Fish. Fish T908, T909, T918.

35. Ms. Fish identifies herself as an "academic interventionist or tutor at the therapeutic level." *Id.* T907. She holds a bachelor's degree in K-12 elementary and special education from Central Washington University. *Id.* T907. She took graduate-level courses in "structured literacy" at Seattle Pacific University in 2002 through the Slingerland Institute, but does not hold a graduate degree. *Id.* T907, T930, T931. She has attended "trainings" through the International Dyslexia Association. *Id.* T908. She was certificated as a special education teacher in Washington State in 1999 or 2000, but that certification lapsed at some point in the past. *Id.* T931. She has no experience as a public-school teacher, and last taught at a private school circa 2005. *Id.* T932. After leaving private school, she started her own company, Pinnacle Education Services, providing private tutoring. *Id.* T908, T932.

36. Since January 2019, Ms. Fish has provided the Student tutoring twice a week, for 40 minutes each time. *Id.* T908, T918. She tutors the Student one-on-one to reduce auditory distractions. *Id.* T923. She has not provided tutoring for the Student's writing or spelling due to

the limitation of seeing the Student only twice per week. *Id.* T915. Ms. Fish uses the Slingerland methodology or program to provide the Student's tutoring. *Id.* T916. The Slingerland program is one version of the Orton-Gillingham program. *Id.* The Orton-Gillingham program is a "structured sequential literacy" program. *Id.* The International Dyslexia Association has identified such programs as the primary methodology for teaching individuals with dyslexia how to read. *Id.* Ms. Fish opined that training in how to employ the Slingerland program is "vitaly important." *Id.* T921.

37. Ms. Fish conducted an "initial academic assessment" of the Student's skills when she began to tutor him. *Id.* T908. However, her initial assessment utilized only "informal, nonstandardized" assessment tools. *Id.* These were either tools that she "created" or that she used in the past with other programs. *Id.* Ms. Fish cannot recall which specific assessment tools she used for the Student's initial assessment. *Id.* In her opinion, norm-referenced, standardized assessments are no more "reliable" than her informal, non-standardized assessment tools. *Id.* T934-T935. All of her grade-level estimates of the Student's reading skills are based on her "experience" as a classroom teacher. *Id.* T935. Ms. Fish provided a copy of her initial academic assessment to the Parents. *Id.* T934. However, a copy of that assessment was not offered as an exhibit at the hearing.

38. Ms. Fish has not taken or collected any "data" regarding her tutoring of the Student. *Id.* T944. This is her standard practice. Ms. Fish will only take or collect data regarding the tutoring services she provides if parents request and pay for it. *Id.* Ms. Fish opined that when a school district requests "data," it is a reference to "norm-referenced things," and "I don't do that." *Id.* T944.

39. Ms. Fish has not provided the Parents with any "testing data per se or anything...that would look like that." Mother T988. Ms. Fish provided "working samples" of what she was working on with the Student, and the Mother opined she could "compare that back to that same activity...at a much lower level when they started." *Id.* T987-T988. The Mother opined that it's "really obvious that [the Student is] making progress with Ms. Fish." *Id.* T1015. However, with respect to any initial progress he made with Ms. Fish's tutoring, the Mother believes that the Student made "pretty rapid progress" not with reading, but with feeling better about himself and reading. T958.

40. Ms. Fish attended one IEP meeting for the Student as a favor to the Mother to help communicate the Student's needs. *Id.* T925-T926. But she cannot recall when that meeting occurred. *Id.* T940-T942. At some point in the past, Ms. Fish has reviewed the "SDI" the District provided to the Student. *Id.* T926.

41. Based upon her initial assessment of the Student, Ms. Fish opined that the majority of the Student's reading skills at that time fell between a preschool "primer" and second-grade level. *Id.* T909, T918. She opined that the Student has "profound" dyslexia. *Id.* T915. Ms. Fish opined that she has seen "tremendous growth" with the Student, but he is still significantly behind his peers. *Id.* T918. She opined that presently the Student is reading at about mid-second grade level based upon another "informal" assessment she conducted the day before her testimony at the hearing. *Id.* T919. But her informal assessment was not standardized or norm-referenced to a group. *Id.*

42. Based upon her review of the SDI used by the District to address the Student's difficulty reading, Ms. Fish opined that the SDI "was completely inappropriate for [the Student's] needs"

because it was not “specifically tailored to a student with dyslexia or dysgraphia.” *Id.* T926. Ms. Fish could not recall which IEP she reviewed, or when she reviewed it.

43. Ms. Fish opined that at present, “ideally [the Student] would be at a school for children with dyslexia.” *Id.* T920, T921. If not at a school for children with dyslexia, then “two hours a day just for the literacy skills, Monday through Friday.” *Id.* T921.

44. The best objective evidence of any progress in reading for the Student since he began tutoring with Ms. Fish are the Student’s STAR reading assessments administered by the District. P8p1. From January 9, 2019, the same month the Student started tutoring with Ms. Fish, through November 17, 2020, almost two years later, the Student’s STAR assessments reflect that his reading skills declined from reading at a GE 2.2 to a GE 1.6. *Id.*

45. After very careful review and consideration of all the evidence, it is found that the opinions of Ms. Fish regarding her provision of tutoring services to the Student, any progress the Student may have made as a result of her tutoring, and her opinions for the Student’s education going forward merit no weight. The evidence does not establish Ms. Fish is qualified by education, training, or experience to be considered an expert on the matters to which she testified. Her apparent disdain for the use of standardized, norm-referenced assessment tools in favor of her experience as a classroom teacher many years ago, her “creation” of her own assessment tools, her lapsed certification as a teacher, her lack of any experience as a public school teacher, her lack of objective data to support her opinions, the objective data supporting no progress made by the Student during almost two years of her tutoring, and her very cursory opinion regarding the District’s provision of reading SDI to the Student all support finding her testimony is of little value in resolving the issues raised in the Parents Complaint.

46. Via email on January 3, 2019, the Mother informed Ms. Anderson that the Student “started tutoring yesterday,” twice each week. D3. The tutor the Mother referenced was Ms. Fish. Mother T986.

Dr. Espinoza’s February 2019 Psychological Evaluation & Educational Consultation of the Student

47. Concerned with the Student’s continuing difficulties at school, the Parents sought a referral for an evaluation of the Student. Fish T932. Ms. Fish provided the names of three individuals. *Id.* One of those three was Leafar Espinoza, Ph.D., a clinical psychologist. *Id.*; D12p2.

48. Dr. Espinoza’s *curriculum vitae* was not offered as an exhibit, and he did not appear as a witness at the hearing.

49. Dr. Espinoza conducted his evaluation of the Student on February 6 and 7, 2019. D12p2. The purpose of the evaluation was “to gain an accurate estimate and better understanding of [the Student’s] functioning and abilities, was well as to obtain diagnostic clarification and gather recommendations for specific treatment interventions and educational planning.” *Id.*

50. Dr. Espinoza used a variety of standardized, norm-referenced assessment tools to examine the Student’s cognitive abilities, academic functioning, verbal learning/memory and

language processing, fine motor and nonverbal processing skills, executive functioning and sustained attention, and social/emotional/behavioral functioning, *Id.* pp 4-15. Of particular note, Dr. Espinoza used three different assessment tools to fully explore the Student's reading and writing skills: the WIAT-III, the GORT-5, Form A, and the CTOPP-2. *Id.* pp6-9. Dr. Espinoza also had the Student complete the Behavior Assessment System for Children-3rd Edition (BASC-3) Self-Report Form. *Id.* p14. The Student did not express any significant concerns. *Id.*

51. Dr. Espinoza also had the Parents complete the Revised Children's Manifest Anxiety Scale-2nd Edition (RCMAS-2), the Mood and Feelings Questionnaire (MFQ), the Screen for Child Anxiety Related Disorders (SCARED), and the BASC-3 Parent Report Form.

52. Based on the results of his evaluation of the Student, Dr. Espinoza concluded that the best measure of the Student's cognitive functioning was his General Ability Index (GAI) score. *Id.* p5. The Student's GAI placed him in the "Low Average range" for cognitive functioning. *Id.* The Student's short-term memory and auditory processing abilities fell into the "Borderline range." *Id.* p6. His "processing speed skills" fell in the "Deficient range overall." *Id.* This represented a decrease in processing speed skills from the Student's UW evaluation in 2015. *Id.* Dr. Espinoza summarized the results of his assessment of the Student's cognitive functioning as follows:

Current cognitive performance demonstrated an increase since 2015, with the exception of processing speed. Overall, current cognitive skills clustered in the Low Average range, with the exception of working memory and processing speed.

Id.

53. With respect to his academic functioning, the Student's Composite scores on the WIAT-III for Basic Reading and Written Expression fell in the "Deficient range." *Id.* D7. With respect to the Student's Subtest scores on the WIAT-III, Dr. Espinoza determined the following Grade Equivalents:

Listening Comprehension GE 4.1
Sentence Composition GE 1.9
Word Reading GE <0.1
Essay Composition GE 3.0
Spelling GE <0.1

Id. p7.

54. On the GORT-5, Form A, Dr. Espinoza determined the following Grade Equivalents:

Reading Rate GE <1.0
Reading Accuracy GE 1.0
Reading Fluency GE < 1.0
Comprehension GE 1.2

Id. p8.

55. Using the CTOPP-2, which is a tool to assess the Student's skills with respect to the "foundational building blocks associated with reading," Dr. Espinoza determined the Student scores ranged from GE K.2 to GE 3.0. *Id.* pp8-9. Of all the Student's GE scores in that range, only one score, Rapid Digit Naming GE 3.0, exceeded a GE score of 2.2. *Id.*

56. The Student was [REDACTED] and in seventh grade at the time of Dr. Espinoza's evaluation. *Id.* p2.

57. Dr. Espinoza summarized the results of his assessment of the Student's academic functioning as follows:

"In aggregate, [the Student's] composite academic fluency score including his ability to quickly read short sentences, do simple math calculations, and write simple sentences illustrated functioning in the Deficient range, at <0.1st percentile."

Id. pp9-10.

58. Dr. Espinoza's diagnoses for the Student were:

Attention Deficit/Hyperactivity Disorder – Inattentive Type (Moderate to Severe);
Specific Learning Disability in Reading (with impairment in word reading accuracy, reading rate, and reading comprehension – Severe);
Specific Learning Disability in Written Expression (with impairment in spelling accuracy, grammar/punctuation accuracy, and clarity/organization of written expression – Severe);
Specific Learning Disability in Mathematics (with impairment in math calculations and math problem solving, also known as Dyscalculia);
Unspecified Anxiety Disorder (with symptoms of social anxiety).

Id. p15.

59. Dr. Espinoza, in part, summarized his impressions of the Student's evaluation as follows:

In comparing the current evaluation to previous testing conducted, results are notable for an increased estimation of [the Student's] cognitive skills, continuing executive functioning deficits, and a growing disparity between his cognitive and academic abilities...the General Ability Index is a more accurate estimate of his cognitive functioning, which highlights the significant discrepancy between his intellectual functioning and what he is achieving academically. Results indicate that executive functioning deficits in the areas of sustained attention, planning, organization, processing speed, and memory are likely also contributing to academic challenges and may also be masking [the Student's] true cognitive capabilities in the academic setting, which may impact his educational planning...Given the totality of his profile, [the Student] is at considerable risk for a continued growing discrepancy between his cognitive and academic skills and potential emotional/behavioral deterioration. As such, it is necessary to review the current supports and accommodations that are in place.

Id. p16.

60. After discussion with the Parents and consultation with Ms. Fish (*Id.* p16), Dr. Espinoza recommended, in part, that the "following elements are felt necessary to be reviewed and included in [the Student's] IEP:

- Adaptation of Orton-Gillingham method, Slingerland approach, for reading, and increase to 60min/5 times/wk.
- Writing skills increased to 60min/5 times/wk.
- SLP consultation reviewed and increased appropriately.
- All services be delivered by sped teacher rather than staff.
- Delivery of Slingerland by a specialist trained in that modality.
- Provision of AT supports, including audiobooks, provide quiet place for instruction, C-Pen reader, preferential seating by teacher, access to class notes, earlier access to assignments, visual organizers, external prompting, direct 1:1 instruction targeting executive functioning.
- Continue SDI in math in a 1:1 pull-out setting by sped teacher.

Id. pp16-18.

61. Dr. Espinoza went on to recommend that “if [the Student] is unable to receive these above-mentioned services through his school, the school and family are advised to consider another educational placement, such as Hamlin Robinson School...where [the Student] would receive comprehensive services targeting his significant learning delays.” *Id.* P18.

62. Although Dr. Espinoza’s curriculum vitae was not offered as an exhibit and he did not appear as a witness for the due process hearing, and therefore could not be examined by either party or the ALJ, it was the District that offered his evaluation report. And the District has not argued at hearing or in its Post-Hearing Brief that Dr. Espinoza’s evaluation and recommendations for the Student should not be considered. It is found that Dr. Espinoza’s evaluation and opinions for the Student’s education merit some weight in resolving the issues in this matter.

63. Although Dr. Espinoza conducted his evaluation in February 2019, it “was very close to the end of the school year” by the time the Mother had Dr. Espinoza’s complete evaluation report and provided it to the District. Mother T966-T967, T990. When the Mother had the whole report, she asked for a meeting. *Id.* T967; D8 (June 28, 2019 Prior Written Notice: Mother “had the Student evaluated by an outside agency and provided a copy of the report to the school. Casy (Anderson)...passed this on to Jerry Henderson for review.”); D12pp2-22 (Evaluation Report).

The Student’s May 21, 2019 IEP

64. On May 21, 2019, an IEP meeting was held and a new IEP was developed for the Student. D6. The Mother attended the IEP meeting as a member of the IEP team. D6p1; Mother T990. Ms. Anderson attended as the Student’s IEP case manager. D6p1; Van Hulse T537. Ms. Anderson took notes during the meeting. D5: Anderson T273.

65. By the time of this IEP meeting, the Mother still did not have a complete copy of Dr. Espinoza's evaluation report. In its place, the Mother created and provided the District a "cheat sheet," a one-page document reflecting a few of Dr. Espinoza's assessment results and diagnoses. D12p1; Mother, T988, T989.⁸

66. It was the Mother's intent "to get as much of (Dr. Espinoza's evaluation) into [the Student's] IEP as possible so that his services could match what was recommended" in Dr. Espinoza's evaluation. *Id.* T991.

67. The IEP noted that in history the Student "needed one on one help for most assignments." D6p3. The IEP recommended that if the Student took history in eighth grade, he should be placed in a class with a paraeducator, and the reading and assignments would have to be modified for him. *Id.*

68. The IEP noted that in science the Student rarely asked for assistance unless he was prompted, and "rarely completes work even with support and modifications to curriculum." *Id.*

69. The IEP provided the Student with two reading goals, one writing goal, and one math goal. D6. pp5-6.

70. The IEP provided the Student with 15 minutes per month of SLP consultative services. *Id.* p10. However, the IEP identified the Student as not needing communication support. *Id.* p2. Neither Ms. Manzano-Moudy,⁹ who was not present at the IEP meeting, nor Ms. Anderson could explain this apparent error. Manzano-Moudy T708; Anderson T279. However, Ms. Manzano-Moudy confirmed the Student received the SLP consultative services in this IEP. Manzano-Moudy T708. Ms. Anderson did not know why the reference to "Snap&Read" was deleted from this IEP (D6p2), when it was identified in the prior IEP (D1p4). However, Ms. Anderson confirmed that she provided instruction on how to use Snap&Read to the students in her English/language arts classroom, and worked one-on-one with the Student to make sure he knew how to use it. Anderson T280.

⁸ Although the Mother identified her one-page "cheat sheet" as what she provided to the IEP team, Exhibit D12p1 is stamped "Received 12/16/19," months after the IEP meeting. Exhibit D12p1 was dated received by Rachel Johnson, a teacher Dr. Henderson worked with. Henderson T612, T617. The record is simply not clear whether the D12p1 is a second copy of the Mother's "cheat sheet," or something else.

⁹ Marianna Manzano-Moudy is a District SLP. She holds a Bachelor's Degree in Communication Sciences and Disorders, and a Master's Degree in Clinical Speech Pathology. Manzano-Moudy T701. After earning her Master's Degree, she completed a two-year clinical fellowship. *Id.* She holds a Certificate of Clinical Competence (CCC) through the American Speech and Hearing Association (ASHA). *Id.* She has maintained her ASHA membership by completing 30 hours of continuing education each year. *Id.* She holds an Educational Staff Associate Certificate from the Washington State Office of Superintendent of Public Instruction (OSPI), as well as licensure through the Washington State Department of Health. *Id.* pp701-T702

71. Based upon Ms. Anderson's notes from the IEP meeting (D5), and her testimony, it is clear the IEP team discussed information from Dr. Espinoza's evaluation of the Student. There are references to an "outside evaluation," "new testing," "the recent testing," and Dr. Espinoza's diagnoses of ADHD and anxiety, D5p1. Ms. Anderson also wrote, "Casy will check with Jerry (Henderson) about potentially accepting the new eval as [the Student's] 3 year, which is due next May. *Id.* Ms. Anderson also confirmed the IEP team discussed the Student's ADHD and anxiety. Anderson T277, T279. However, despite being made aware of and discussing at least some aspects of Dr. Espinoza's evaluation, Ms. Anderson did not refer the Student for a District reevaluation apart from his regular triennial reevaluation. *Id.* T283.

72. As the Student's IEP case manager, Ms. Anderson prepared a Prior Written Notice (PWN) to document the IEP meeting. D6pp13-14.

73. The last day of the 2018-2019 SY was June 20, 2019. D43p1.

74. On June 28, 2019, Ms. Anderson met with the Mother. Anderson T295. Ms. Anderson cannot recall if anyone other than the two of them were present at the meeting. *Id.* After the meeting, Ms. Anderson prepared a PWN dated June 28, 2019, because she wanted to "capture those meetings." *Id.*

75. The record is unclear regarding Ms. Anderson's reference to "those meetings." She had already produced a PWN for the May 21, 2019 IEP meeting. D6pp13-14. Ms. Anderson recalls having a meeting "at the end of the school year," and then "we had a meeting to discuss setting [the Student] up for...the following school year. And so, I wanted to capture those in the Prior Written Notice." Anderson T295. It is unclear if Ms. Anderson is referring to the May 21, 2019 IEP meeting and her meeting with the Mother on June 28, 2019, as "the meetings," or if she was referencing the June 28, 2019 meeting and some other, unidentified meeting.

76. The Mother never expressed at either the May 2019 IEP or her meeting with Ms. Anderson on June 28, 2019, that she wanted the District to conduct a new evaluation of the Student. *Id.* T304. Ms. Anderson understood that the Mother wanted the District to accept Dr. Espinoza's evaluation so the Student would not have to undergo further testing. *Id.* T304-T305.

77. In the June 28, 2019 PWN, Ms. Anderson wrote in part:

[The Mother] had [the Student] evaluated by an outside agency and provided a copy of the report to the school. Casy (case manager) passed this on to Jerry Henderson to review and discuss whether opening a new evaluation or waiting until the beginning of next year. [The Student's] 3 year eval for school is due May 2020.

With school ending, rushing the [Student's triennial evaluation] would not serve to benefit [the Student]. Setting up his schedule prior to school starting is best option. The new IEP reflects academic progress that matches the outside eval and is based on progress monitoring, classroom data, and teacher input. The services would not change at this point with the exception of speech- (sic) written into the new evaluation but mom felt that would be disruptive of [the Student] in a pull out model and may be too much.

D8p1.

78. Jerry Henderson is a school psychologist who contracts with the District as a private provider through his company, Northwest Educational Specialist. Henderson T604. He holds a Ph.D. in clinical psychology from Washington State University, which he completed in 1974. *Id.* T606. He is licensed as a school psychologist with OSPI. *Id.* T605. He has been employed as a school psychologist with multiple school districts in Washington State. *Id.* T605. On contract with the District, he served EMS as a school psychologist, and conducted the Student's early triennial reevaluation in January 2020. *Id.* T607.

79. Dr. Henderson recalls speaking with Ms. Anderson about conducting the Student's reevaluation, but does not recall any such conversation before June 2019. *Id.* T608, T610. Referencing the language in the PWN (D8), he does not recall when before June 28 Ms. Anderson gave him Dr. Espinoza's evaluation report. T612.

80. After consideration of the evidence, it is found that the District did not receive Dr. Espinoza's full and complete evaluation report until June 28, 2019.

2019-2020 SY: Student Attends EMS for Eighth Grade

81. September 3, 2019, was the first day of the 2019-2020 SY at EMS. D43p2. The last day for any in-person instruction in the District was March 13, 2020, when the school buildings were closed due to the Covid-19 pandemic. Terry T498-T499; Mother T1003.

82. During eighth grade Maurine Terry was the Student's general education US History teacher. Terry T495. Jeri Freeburg was the Student's special education language arts teacher. Freeburg T321. Mr. Van Hulse remained the Student's resource room math teacher from sixth and seventh grades, and also assumed the role of the Student's IEP case manager from Ms. Anderson. Van Hulse T516-T517.

83. Ms. Terry did not provide the Student with any "special education" during eighth grade. Terry T506. She understood that the Student was reading between a first- and second-grade level. *Id.* T507. She modified her general education curriculum so the Student was able to access it. *Id.* T506. She provided the Student with what she characterized as "accommodated lessons." *Id.* However, she did not review the Student's IEP to determine what modifications it provided the Student. *Id.* T504-T505. In Ms. Terry's opinion, the Student would not have been able to pass her class before or after schools were closed due to the pandemic without her modifications to the curriculum and the support of a paraeducator. *Id.* T498, T507-T508.

84. Ms. Freeburg taught in a special education language arts classroom during eighth grade. Freeburg T321. Language arts "is reading and writing." *Id.* Ms. Freeburg provided the Student's SDI in reading and writing for his IEP goals. *Id.* T321, T323, T326; D5. She reported on the Student's progress towards his IEP goals each trimester. *Id.* T324. During eighth grade, she had two paraeducators with her in her classroom. *Id.* T335. One of those paraeducators was a certificated special education teacher. *Id.* T429. The Student was provided a scribe and graphic organizer in her class until schools closed in March 2020. *Id.* T335.

85. At the start of the school year, Ms. Manzano-Moudy supervised a Speech-Language Pathologist-Assistant (SLP-A). Manzano-Moudy T704. The SLP-A provided the consultative

speech-language service in the Student's IEP under her supervision until the SLP-A left in December 2019, and another SLP took over. *Id.* T712. Then in February 2020, Ms. Manzano-Moudy began providing the consultative service for the Student, and continued through the end of eighth grade. *Id.* T712, T713-T714.

86. Via email to the Mother and others on October 24, 2019, Ms. Richmond, in her role as AT coordinator, responded to an inquiry from the Mother concerning the Student's IEP services. D9. In part, Ms. Richmond wrote:

In September I touched base with [the Student's] resource teacher at EMS about the AT supports that [the Student] has access to in the classroom and have observed in his literacy class. Mrs. Freeburg and I are training her classes in the use of Snap & Ready, Bookshare and voice typing. [The Student] is already familiar with these supports but may feel more comfortable using them as he sees his peers use them too.

If you have time next week, let's talk to plan next steps regarding AT services and [the Student's] needs. Our services seem to be in line with recommendations from the Center for Child Development but I'd like to review the report with you to be sure we're not missing something that important for [the Student].

Id., See also Freeburg T430 (Richmond provided the Student with AT training in September or October 2020). The Mother received Ms. Richmond's email. Mother T991-T992. Ms. Richmond and the Mother did meet sometime "in the fall." Richmond T772. It was just an "informal" meeting to "chat about" the Student's needs looking ahead to the Student's reevaluation. *Id.*

87. The Mother, Ms. Terry, Ms. Freeburg, Mr. Van Hulse, and Ms. Fish participated in a meeting on October 30, 2019.¹⁰ However, Mr. Van Hulse was not able to speak with Ms. Fish because of a timing issue. Van Hulse T540.

88. This was a meeting to talk about the Student with his new teachers in eighth grade, and the IEP services he was receiving. Mother T993. It was not an IEP team meeting. *Id.*

89. The Mother wanted to discuss her desire to "meld" the Student's IEP with Dr. Espinoza's evaluation. Mother T970. Her "priority" was to see if the evaluation done by Dr. Espinoza was "acceptable." *Id.* T972. She "didn't want [the Student] to have duplicate testing" or "additional testing unless it was something that was helpful." *Id.*

90. Ms. Terry characterized this meeting as "an update on his IEP and the accommodations that he would need going forward...checking in to see how he was doing." Terry T497.

¹⁰ The specific date of the meeting is identified as October 30, 2019, in proposed Exhibit D10. However, proposed Exhibit 10 was not admitted at hearing, apparently due to an inadvertent oversight. Nevertheless, the testimony of the Mother (T970-T971), Ms. Terry (T496), Ms. Freeburg (T342), and Mr. Van Hulse (T540) concerning the meeting and proposed Exhibit D10 is found sufficient to find the meeting actually took place on October 30, 2019.

91. Ms. Freeburg recalls participating in this meeting with the Mother and Ms. Fish. Freeburg T342. But all Ms. Freeburg recalls concerning Ms. Fish is that she told them she was working with the Student. *Id.* She does not recall Ms. Fish asking her any questions about her language arts class. *Id.* T432-T433. She never saw any “data” of any kind concerning Ms. Fish’s tutoring of the Student. *Id.* T433.

92. Via email on November 12, 2019 to Ms. Freeburg, the Mother referenced having ““a lot of meetings in the last couple weeks regarding programs and accommodations for [the Student] (which is great!)” P3. She went on to state in part that:

Ms. Fish, his tutor, is primarily using the Slingerland Method, and has basically started from the beginning (last January), since he has been stuck in Grades 1 and 2 for his reading level. The good news is, he has made a lot of progress since starting with her...We anticipate continuing tutoring Mon/Wed through the school year and then will re-evaluate the schedule for his Summer lesson.

I met with Jeanne (Richmond) and went over the available technology options. His tutor and Psychologist that (sic) did the testing both prefer ‘Reading Ally’ to ‘Snap and Read’ as it is easier for kids with phonological challenges to follow, but we agreed to try Snap and Read...and see if we can make it work...[The Student] is very aware of appearing ‘different’ than his classmates so it is a challenge to get him to use the accommodations in class.

Id.

93. On or about November 13, 2019, Dr. Henderson, the school psychologist on contract with the District who was responsible for the Student’s reevaluation, prepared a two-page Reevaluation Notification/Consent form. D27p29/D15p20.¹¹

94. *The* Mother signed the consent for reevaluation on November 13, 2019. She wrote on the consent form that she suggested the following: “Review & adopt ‘report of Psychological Evaluation...’ done by Leafar Espinoza, Ph.D. on 2/6/19, 2/7/19 & 2/26/19 in lieu of duplicate testing.” D15p20. She went on to delete text and add additional handwritten notations as follows:

This ~~evaluation~~ *adoption of report* should be completed within 35 school days after the parent has given written consent for an evaluation.

I give consent for my child to be ~~evaluated~~ *adoption of report*.

Id. (Mother’s deletions are identified by text struck-through, and additions are identified by text in italics).

95. On the first page of the Reevaluation Notification/Consent form Dr. Henderson checked boxes to identify the following proposed areas for the Student’s reevaluation: Review of Existing

¹¹ There was an error in production of this two-page document from the District. Dr. Henderson confirmed that the correct first page of this document is D27p29, and the correct second page of this document is D15p20. Henderson T650. This is also supported by the “Note on Testing” under the “Assessment Summary” at D15p17 of the District’s reevaluation report.

Data; Classroom Performance & Observation; Speech & Language Communication Skills; Health & Developmental History; Cognitive Abilities; Academic Skills; Social/Emotional. D27p29.

96. The Mother wrote on the first page “No additional testing,” and crossed-out “Cognitive Abilities” and “Academic Skills” as areas for the reevaluation. She checked the box to add “Assistive Technology Services” as an area for the reevaluation. *Id.*

97. Dr. Henderson spoke with the Mother after the District received the Reevaluation Notification/Consent form from her on November 15, 2019. Henderson T649, T667; D15p17 (Under Assessment Summary – Note on Testing: Dr. Henderson spoke with [the Mother] to clarify notations on Consent.), D15p20 (Received 11/15/19).

98. The Mother clarified that she wanted the areas of “phonemic awareness, pragmatic language, and understanding opposites” included in the communication assessment for the reevaluation. D15p17. “She requested the team review existing data, conduct a classroom observation, assistive technology, and review and adopt cognitive and academic data from Dr. Espinoza 2/20/19. She does not want further social/emotional testing.” *Id.*

99. In an email to District staff on December 8, 2019, Mr. Van Hulse thanked staff, including Courtney Bowie, the District’s assistant director of student support services, Dr. Henderson, Ms. Freeburg, Ms. Manzano-Moudy, and Ms. Richmond, for attending a meeting on Friday afternoon (December 6, 2019: D43p2) to “pre-plan” the Student’s reevaluation. D11. Mr. Van Hulse went on to write that he “called [the Mother] to suggest that our meeting this Tuesday (12/10/19: D43p2) be a ‘collaboration session’ rather than a true evaluation meeting, as we have outstanding needs for more/better information. She agrees. (It was a perfect phone call.)...She supports us and appreciates what we’re doing.” *Id.*

100. At that time, the reevaluation team was “trying to ascertain which evaluations give us what, we would consider, the best picture of [the Student’s] actual ability, functioning...And also, to try to identify what pieces of information were missing. We had different – vastly different reports, and we wanted to make sense of these.” Van Hulse T542. Mr. Van Hulse recalls the Mother saying that she wanted the outside evaluation to be accepted by the School District without any other testing. *Id.* T542.

101. The Mother attended the “collaboration session” on December 12, 2019. Van Hulse. T594.

The Student’s January 27, 2020 District Reevaluation

102. A reevaluation team meeting was held and the Student’s reevaluation was completed on January 27, 2020. D15. The Mother, Dr. Henderson, a general education teacher, Mr. Van Hulse, Ms. Manzano-Moudy, Ms. Freeburg, Ms. Richmond, and a representative for District administration all attended. *Id.* p4. Dr. Henderson prepared the reevaluation report. Henderson T618. In his opinion, Dr. Espinoza’s February 2019 evaluation of the Student was well done and “appropriate.” *Id.* T619-T620.

103. While Dr. Henderson would ordinarily try to have the Behavior Assessment System for Children (BASC) completed by a student undergoing an evaluation, along with the student’s

parents and teachers, the District did not administer the BASC as part of its reevaluation of the Student. *Id.* T652-T653. When questioned at the hearing by Parents' counsel about why the District did not use the BASC as part of the Student's reevaluation, Dr. Henderson responded that, "my impression...is that was an area...left standing as was done by Dr. Espinoza." *Id.* T653. Dr. Espinoza had the Parents complete the BASC-3 (Parent Report) as part of his evaluation of the Student. D12p3. The Student also completed the BASC-3 Self-Report form for Dr. Espinoza, and "did not express significant concerns." D12p14.

104. The team agreed to change the Student's eligibility category to Other Health Impairment (OHI) based on Dr. Espinoza diagnosing the Student with ADHD. *Id.* p2. The reevaluation recommended the Student receive SDI in reading, writing, and math. *Id.* p3. The reevaluation did not recommend any related services for the Student. *Id.* p3. The reevaluation recommended the Student receive supplemental aids and services for academic accommodations and assistive technology. *Id.*

105. The reevaluation noted that the Student's STAR Reading Assessment during fifth grade (March 2017) assessed him as reading at a GE 1.3, while his STAR assessment during eighth grade (January 2020) assessed him as reading at GE 1.4. *Id.* p7. During that almost three-year period, the Student's STAR Reading Assessment exceeded a GE of 1.7 on only one occasion: January 2019; GE 2.2. *Id.*

106. Ms. Manzano-Moudy completed a speech and language evaluation of the Student as part of his reevaluation. Manzano-Moudy T706; D15pp9-12. The purpose of her evaluation was "to determine continued eligibility and need for Communication/Speech Language services. *Id.* p9.

107. Her evaluation determined that the Student's "Core Language Score" placed him in the "very low range/severe range of language functioning." *Id.* p10. Ms. Manzano-Moudy opined that the Student's "academic core language skills are an area of weakness for him," and that she was "surprised to see that [the Student's] scores were so low." Manzano-Moudy T731, T734.

108. She went on to conclude that:

These results indicate that [the Student's] basic receptive and expressive language skills fall within low to very low average ranges."

...

The results indicate that [the Student] exhibits significant delays in the areas of language use...in comparison to his linguistic peers. *Deficits in these areas may have a negative impact on his educational performance.*

...

It is the examiner's opinion that the results of this evaluation are an accurate representation of [the Student's] speech and language skills.

D15p11 (Emphasis added).

109. Ms. Manzano-Moudy opined that the scores she obtained in her evaluation of the Student do not support exiting the Student from receipt of communication services. Manzano-Moudy T734. She opined that separate from the Student's "articulation" score, all of his remaining scores support a need for SDI. *Id.* After review of the evidence, Ms. Manzano-Moudy's opinions

regarding her evaluation of the Student and the likely impact of the Student's deficits on his educational performance are adopted as facts herein.

110. Ms. Manzano-Moudy recalled that at the reevaluation meeting, "[the Student's] mom reported that she would prefer that he not receive support services for speech because she did not want him to be pulled-out. She didn't believe that would be for (sic) the best interest of him (at) that time." *Id.* T731.

111. Mr. Van Hulse recalled that at the reevaluation meeting, "[the Mother] asked that we do not provide speech services. And the team agreed to keep speech in place as a consultative item, which would not take [the Student] out of class nor take him away from any instruction in class." Van Hulse T547.

112. Ms. Freeburg agreed that that the Student did not need to be pulled out of class for communication services. Freeburg T370. And based on her observations of the Student in her classroom, Ms. Freeburg opined that the Student "demonstrated...a higher level of reading than he is showing" on his STAR assessments. *Id.* T364. But she does agree that the Student had lower-level elementary skills sets in reading, writing, and math at the time of this reevaluation. *Id.* T380.

113. Ms. Richmond recalls it was the team's intent to keep the consultative communication services in place for the Student. Richmond T803. And the Mother recalls discussion at the meeting about keeping speech services on a consultative basis. Mother T997.

114. Rachel Johnson was taking notes during the meeting. Henderson T617; D14. Ms. Johnson's notes reflect that,

"While [the Student] could qualify in speech, there is (a) question as to whether or not pulling him for speech interventions is best for [the Student]." The Mother "is in agreement to wait and see if other services help him in this area. The team agrees. Keep consult (i.e. teacher check-ins); indirect services."

D14p1.¹² Ms. Johnson is a teacher in the District who will work with Dr. Henderson evaluating students. She is also the staff person who observed the Student in his classroom for the reevaluation. Henderson T673; D15p13. Ms. Johnson has 20+ years of classroom experience as both a general education English teacher and a special education teacher in a self-contained classroom. Henderson T674. She has also served as a behavior consultant with multiple school districts. *Id.* She possesses the training and experience to conduct classroom observations of students. *Id.*

¹² There are other notes that apparently were taken about what transpired at the reevaluation meeting. See D13. Neither Ms. Manzano-Moudy nor Ms. Freeburg authored the notes. Manzano-Moudy T746; Freeburg T353. However, despite careful review of the hearing transcript, it cannot be determined with certainty who authored D13. Accordingly, D13 will not be considered due to reliability concerns.

115. It is very apparent upon review that, aside from Ms. Manzano-Moudy's speech and language evaluation, Ms. Richmond's AT evaluation (D15pp15-17), and some observations of the Student in his classes at EMS (D15p13), the vast majority of the information and data in the District's reevaluation comes from Dr. Espinoza's February 2019 evaluation of the Student. See generally D15.

116. Dr. Henderson added a "Note on Testing" at the end of the reevaluation report. Henderson T668; D15p17. The Mother confirmed that the information in Dr. Henderson's "Note on Testing" attributed to her is accurate. Mother T996.

117. Dr. Henderson added the Note because the Mother raised "some very specific concerns, and we wanted to be sensitive with this so that we were meeting parent concerns and that we were respecting the outside report that was provided, which seemed to be sufficient to create eligibility. But again, we had to add a few things to put it within a special education framework that would pass audit." Henderson T668. Dr. Henderson went on to explain that the Mother "basically wanted the body of the report from Dr. Espinoza, you know...adopted for the mainframe of the eligibility." *Id.* T669. And pursuant to that, "Most of the stuff that we did was paraphrasing or putting in the results that we got from Dr. Espinoza." *Id.*

118. Ms. Richmond confirmed that the team was "relying quite heavily on the request of [the Student's] mother and Dr. Espinoza's report. T797.

119. Also on January 27, 2020, the Mother signed a "Request for Reevaluation Extension" form, agreeing to extend the time to complete the reevaluation from January 22, 2020, to January 27, 2020. Mother T997; D15p21

120. Dr. Henderson prepared a PWN dated January 27, 2020. D15p18. It reflected the reevaluation teams' decision to change the Student's eligibility category from SLD to OHI. D15p18.

121. After the reevaluation team determined to change the Student's eligibility category from SLP to OHI, the Mother was concerned that the Student might lose some services specific to academics. Mother T975-T976. She went back to Dr. Espinoza and he "redid the report or he revised the report to make it very clear at dyslexia/dyscalculia" was the primary disability. *Id.* T976.

122. Via email to the Mother on February 2, 2020 (D16), Mr. Van Hulse stated:

I'm working on [the Student's] IEP, and the first decision I want you to think about is his schedule...He will have a resource Language Arts class and a resource math class. Should he have a Resource Study Skills class as well, where he gets help completing assignments? This takes the place of an elective class, though we can give him another elective as well.

123. Mr. Van Hulse's reference to the Student's "schedule" was the class schedule the Student would have the following school year (2020-2021 SY) when he would enter Enumclaw High School (EHS). Van Hulse T548-T549. A resource room study skills class at EHS would be another class where the Student could receive instruction in reading and writing. *Id.* T595.

124. The Mother replied to Mr. Van Hulse's email on February 4, 2020, stating in part, "(W)ere we going to meet this week? I would like to talk to you about the Evaluation if possible...I know we need to get the IEP done, but I think it's important to make sure the Evaluation paints the right picture for his services/needs down the road." D16. The Mother was referencing wanting to change the Student's eligibility category from OHI back to SLD. Mother T998-T999. "(W)e were trying to do the new IEP, but we had to fix the category of the evaluation first." *Id.* T999.

125. Mr. Van Hulse replied to the Mother the same day, stating, "Please contact Jerry (Henderson) about the evaluation. Let's hold-off on the iep meeting til (sic) we're set on that. Maybe we can meet this Friday, maybe we hold off till next week." D16. The Mother agreed that they should hold off on the new IEP until the eligibility category could be changed. Mother T999.

126. On February 13, 2020, the District received Dr. Espinoza's "revised" evaluation report. D17. The only revision to his first report is the addition of the phrase, "also known as Dyslexia" in his diagnosis of the S's SLD in Reading. D17p14.

127. Mr. Van Hulse was becoming concerned about "running up to due dates" for the Student's new IEP, but the team was not able to meet because the Mother was busy. *Id.* T551.¹³

The Student's February 25, 2020 IEP

128. An IEP meeting was held and a new IEP was developed for the Student on February 25, 2020. D19. The Mother, Mr. Van Hulse, Ms. Freeburg, and an administrative designee all attended. D19p1.

129. This IEP was a so-called "two-part IEP," as it would cover the remainder of the Student's eighth grade at EMS, and then follow the Student into EHS for ninth grade the next school year. See, e.g. D19p10 (Special Education and Related Services matrix).

130. With respect to the Student's communication needs, the IEP states, "[The Student] has received speech services, but his recent evaluation team concluded that he will benefit most from *not discontinuing* these services." D19p2 (Emphasis added). However, the IEP also states that "[The Student] will no longer receive speech services as the team feels that he is better served by staying in his classrooms for academic instruction." *Id.* p3.

131. The IEP provided the Student two math goals, two reading goals, and two writing goals. *Id.* pp4-6. Ms. Freeburg understood that Ms. Fish had input into developing the goals for this new IEP. Freeburg T435.

¹³ It is unclear from the record what "due dates" were of concern to Mr. Van Hulse. The Student's prior IEP was not set to expire until May 21, 2020. D6. And the IEP under development was not an initial IEP, so there was no requirement to hold an IEP within 30 days of the January 27, 2020 reevaluation meeting. WAC 392-172A-03105(2)(a).

132. For the remainder of the 19-20 SY, the new IEP provided the Student with the same number of minutes of SDI for reading and writing as his prior IEP. *Compare*, D19p10 with D6p10. The new IEP increased the number of minutes of SDI for math by 25 minutes per week over his prior IEP. *Compare* D19p10 with D6p10. The new IEP provided the Student with no speech/language consultation. D19p10.

133. Once the Student would enter EHS the following school year, the new IEP increased the Student's SDI for reading and writing, and maintained the same number of minutes for math. The Student would continue to receive no speech/language consultation. *Id.*

134. The team discussed not providing the Student with any more speech services. Freeburg T386. The Mother was concerned about the emotional effect of the Student continuing to receive speech services. *Id.* The Mother felt that the Student was uncomfortable continuing speech services. *Id.* 3T387.

The Mother does not recall objecting at the IEP meeting to the new IEP providing the Student with no speech/language consultation. Mother T1000.

135. It was anticipated that the IEP team would continue to amend the IEP after the meeting. See D19p1 (Mr. Van Hulse writes: "The team agreed to continue working (amending the IEP) and will meet again soon to discuss."); Van Hulse T521, T553.

136. Ms. Freeburg recalls that the Mother was not ready to agree to all of the IEP, so the team decided to continue working on the IEP as a team. Freeburg T385.

137. Mr. Van Hulse characterized the development of this IEP as:

We sat down as a team and the IEP looked to be agreeable. And [the Mother] would then take the IEP to [the Student's] tutor. And we would have another meeting where [the Mother] would bring back pages of notes of revisions. And I would make the revisions. And I remember, one time, she came back with slightly fewer pages of revisions. And I would go through the IEP again. And at times I had made the revisions, but she overlooked it, but there were others. And if I'm not mistaken, this is when the tutor had rewritten the goals to the point where I was starting to lose comprehension of those goals. And so it was hard to agree upon language in this IEP that we could all agree upon.

T552-T553.

138. In a PWN dated February 24, 2020, but clearly associated with the IEP meeting a day later, Mr. Van Hulse wrote that "the team will agree to continue amending the IEP to meet goals of all team members and to meet at a later date...Current iep will soon expire. The team has been working to complete this iep but still needs to make further amendments." D19p13.

139. Rachel Johnson continued to work with the Mother after the January 27, 2020 reevaluation meeting about changing the Student's eligibility category. In an email to Ms. Johnson on March 12, 2020, the Mother wrote:

Just checking in to see how we are doing with the Evaluation update (category), IEP revisions/update and the status of History. History is not going well at this point...he continues to be embarrassed daily in class due to his inability to do the assignment and the Teacher's/Aid (sic) misunderstanding of his capabilities.

D22p3

140. Ms. Johnson replied via email the same day, stating:

We haven't reopened the evaluation yet, as I was waiting to hear the feedback you received from Sarah (Fish)...Jerry (Henderson) said he can generate the consent by the end of this week...Once we have consent, we will input the information into the new report and note the change of eligibility...After that, Doug will be able to generate a new IEP, based on the team recommendations, and we can get that signed and in place.

D22p2. Ms. Johnson went on to say that she has been working with the Student twice a week and really been enjoying it, and that at the end of eight weeks she will assess the Student's growth. *Id.*

141. The Mother was aware that Ms. Johnson had been pulling the Student out during "free period" to work with him on his reading. Mother T1000.

142. Via email on March 12, 2020, to Ms. Johnson, the Mother stated in part, "Thanks for the follow up. I think I confused myself (and possibly Sarah) in that I thought I was waiting for a revised IEP with all the notes/recommendations so far. D22p1.

143. Via email on March 13, 2020 to the Mother, Ms. Johnson stated in part:

I wanted to clarify your wishes in terms of the reevaluation. Do you want a simple file review and a change of eligibility OR a file review, new academic testing (since we talked about it having been over a year), and the cognitive Jerry (Henderson) and you discussed at the last meeting?

Id. The Mother replied via email the next day to Ms. Johnson, stating in part that:

I think with all the scheduling craziness, we should just go ahead and amend the eligibility category based on Dr. (Espinoza's) report/update. By the time school gets rolling again, there is just not that much time left, and I really want to get a solid IEP in place prior to the end of the school year. Thank you!

Id.

March 13, 2020: The District Closes all School Buildings due to the Covid-19 Pandemic

144. On March 13, 2020, the District closed all its school buildings because of the Covid-19 Pandemic. Terry T499; Freeburg T438. The District provided no instruction to any students during the following week (D30p1: March 16 – 20, 2020), during which the teachers prepared to start remote learning. Freeburg T449.

145. After school closed, Ms. Richmond emailed the Mother just to “check in.” Richmond T810. The Student’s reading level is not sufficient for him to independently read or comprehend an email in its entirety. *Id.* T810-T811.

146. When the District “switched to school at home, even though academically it was not ideal and it was really tough, emotionally...it was amazing. We hadn’t seen that kid in a while...for [The Student’s] psyche, school at home wasn’t a bad thing, speaking strictly for his emotional state.” Mother T1003-T1004.

147. Dr. Henderson prepared a Reevaluation Notification/Consent form and sent it to the Mother. D27p27. The form was to seek consent for a review of existing data and a file review only. *Id.* Dr. Henderson noted the Parent had requested an “Assessment Clarification,” and that “New information was provided on a recent private assessment that will change [the Student’s] eligibility classification.” *Id.* The Mother signed the consent on March 16, 2020, giving consent for the Student to be evaluated. *Id.* p28.

148. Dr. Henderson explained that an assessment clarification is:

(W)here you’ve gotten some additional data that wouldn’t impact the data you have already collected. And what you are doing is, in [the Student’s] case, we are reframing the eligibility taking what was a secondary issue and putting it as primary. Taking the primary issue in our assessment and putting it as secondary.

T655-T656. He went on to explain that in the Student’s case:

(W)hat was asked of us, was to really recreate the outside assessment to be put into an educational format that worked with special education guidelines...So what we were doing is, essentially, keeping all the data in place, but reframing what we were asked by the Parent to incorporate into a document that created eligibility for SLD, as opposed to health impairment...(The) mother was pretty adamant that [the Student] had been tested enough and that she had what she thought was the appropriate data, that could create the eligibility. We concurred and we followed suit with the second April piece of work we did.

T657.

149. In an email on March 25, 2020 to Ms. Johnson, the Mother wrote in part, “Thanks for the update on the Evaluation...Once Sarah comes up for air after transferring all her clients to remote learning, I will see if I can get some more feedback on IEP goals.” D23.

150. In early April 2020, Mr. Van Hulse was:

(P)resented with revisions and I made those revisions presented by [the Mother]. And we are trying to get paperwork done so that services don’t expire for [the Student] and [the Mother] is busy...and we are just hoping that we can put together a document that reflects what all the team believes and agrees upon...the document’s been handed over to Ms. Fish...for her revisions. And I’m to, presumably, put those into the new document in time for us to hold a meeting.

Id. T555. Mr. Van Hulse characterized his communication with the Mother attempting to incorporate all her proposed revisions to develop an amended version of the February 25, 2020 IEP as, “more communication, and more discussion, about revisions than I have ever spent on any child in my 25 years. I don’t know how many times I communicated with her. It was extensive.” *Id.* T556.

The Student’s April 30, 2020 Reevaluation Meeting: Assessment Clarification or Revision

151. On April 30, 2020, a reevaluation team meeting was held via Zoom video conference due to Covid-19 restrictions on in-person gatherings. D27p4; Mother T1006. The Mother, Dr. Henderson, Mr. Van Hulse, and Ms. Johnson attended. D27p4. No one attended in the role of a general education teacher at the Mother’s request. *Id.*, (Note: Mother requested SpEd team only), D27p3; Mother T1006-T1007. Ms. Freeburg, who is certificated as a general education teacher as well as a special education teacher, attended as a special education teacher. D27p4; Freeburg T320. Jill Barrett, a District administrator, was invited to the meeting, but was unable to appear due to a schedule conflict. D27p20. “[The Mother] OK’d this verbally at the start of the Zoom meeting.” *Id.*

152. The reevaluation “was requested by [the Student’s] mother...to respond to questions raised during the Eligibility Determination meeting on 1/27/20 with regard to the most appropriate qualifying area for [the Student].” D27p2; Henderson T684.

153. The reevaluation concluded that Dr. Espinoza’s revised evaluation report (D17) supported a change in the Student’s eligibility category, and the Student now qualified under the SLD eligibility category. D27p2. The change in eligibility category was based on Dr. Espinoza’s “February rediagnosis (sic) of the Student with the dyslexia as being the primary issue that he saw impacting [the Student] in the educational environment.” HendersonT654.

154. Dr. Henderson confirmed that this reevaluation or assessment revision “essentially, was somewhat pre-negotiated with the Parent...Dr. Espinoza would provide us with a revision or an update. We had to put it into this format, so we met a special ed criteria audit.” *Id.* T685.

155. The reevaluation report determined that the Student “will continue to receive consult speech/language services,” and would receive “SLP Support Services” as a related service. D27 p2, p3. For this reevaluation, the report noted that all “testing was completed (by an outside provider using standardized test measures.” *Id.* p3. However, the reevaluation report included Ms. Manzano-Moudy’s speech and language evaluation, the classroom observations, and Ms. Richmond’s AT evaluation from the Student’s January 27, 2020 reevaluation. *Id.*, pp8-11, p12, pp15-16.

156. In a PWN dated April 30, 2020, Dr. Henderson confirmed the change from OHI to SLD, and stated:

While the services remain consistent with the January 2020 reevaluation, the eligibility category was changed in this reevaluation, as the evaluation team received a revised copy of Dr. Espinoza’s report clarifying and confirming Dyslexia as the primary disability.

D27p20.

157. In an email to the Mother on May 22, 2020, Mr. Van Hulse stated:

At your direction, I have tried to use your exact wording for much of the iep and the revision. As this progresses though, I am feeling very uncomfortable, as this iep is becoming specifically crafted to match what [the Student's] private reading tutor is teaching. In my experience, that has not been the goal of an iep. I believe I will need to ask for guidance from the district office before continuing to develop this document.

D29, D31p2. Mr. Van Hulse elaborated on his email during his testimony, stating that:

This was me saying thank you for all the work you are doing; however, I no longer understand what these goals mean, although I'm writing them myself, and I'm copying them. And so I think we should – we should put the brakes on and reevaluate...I literally did not understand what the goals were and how a teacher would be able to assess them.

Van Hulse T560. Mr. Van Hulse did contact the district office for guidance, but he cannot recall who he spoke with or any of the details of the conversation. *Id.* T573-T574. However, he does not recall telling the Mother that the District would not allow him to move forward with any of the goals that Ms. Fish suggested. *Id.*

158. The Mother replied to Mr. Van Hulse via email the next day stating, "Thank you! I know Sarah (Fish) isn't entirely comfortable either. Some guidance would be appreciated!" D29.

159. The Mother understood that she and Mr. Van Hulse were working to incorporate Ms. Fish's ideas and expertise into the IEP so that the reading and writing sections would match what was recommended in the evaluation, and they had spent quite a bit of time doing so. Mother T1007. "Mr. Van Hulse was worried that we would have an IEP with goals that the school district couldn't administer, and Ms. Fish was a bit concerned about being directly quoted." *Id.* T1007-T1008.

The Student's May 27, 2020 Special Education Continuous Learning Plan

160. On May 27, 2020, Mr. Van Hulse and the Mother completed a Special Education Continuous Learning Plan (CLP). D30. They were the only two members of the Student's IEP team that participated in the development of the CLP. *Id.* p1. The Mother recalls speaking with Mr. Van Hulse about the CLP. Mother T1008. No IEP team meeting was held before the Student was transitioned from in-person to remote learning. Van Hulse T529.

161. The purpose of the CLP was to:

(S)upport individualized student planning for the delivery of special education and related services through continuous learning instruction during school facility closure due to the COVID 19 outbreak. The Continuous Learning Plan (unreadable) intended to replace a student's IEP, but rather to document individual decisions for special education services during school facility closure.

D30p1. The CLP was not intended to replace the Student's IEP. Van Hulse T528.

162. The CLP described the Student's "Continuous learning goals," and when and how progress towards those goals would be measured. D30pp1-2. It described the accommodations and modifications for continuous learning needed by the Student in the continuous learning setting, and how and when they would be provided. *Id.* p2. It identified "Zoom meetings (tutoring) available in math, science, history and study skills as well as individualized areas" as services that would be delivered through continuous learning during school facility closure. *Id.* The CLP identified that the Student's "IEP will resume as agreed upon by the team, including parent, teachers and administrator" as the planning for when school resumed. *Id.*

163. Responding to his May 22, 2020 email, the Mother emailed Mr. Van Hulse on May 27, 2020, asking if there was "anything back on this?" D31pp1-2. The Mother was referencing Mr. Van Hulse's contact with the district office about needing guidance on the Student's IEP goals.

164. Mr. Van Hulse responded to the Mother via email the next day, stating:

Since we are going to focus on getting an agreeable plan in place for [the Student's] high school years we're not going to rush to meet dates. Instead I'm going to reach out to a wider team of high school staff. If you're ok with this, I'll contact you again when I have made some progress on this. Next week, I would think.

D31p1. As they had not been able to agree on new goals for the Student's IEP, Mr. Van Hulse wanted to bring in more people. Van Hulse T563. "I didn't want to be the sole recipient of these recommendations from [the Mother] and be the sole person to say no, I can't do that...I wanted to get more input." *Id.* T564

165. The Mother replied to Mr. Van Hulse the same day via email stating in part, "Ok sounds good thank you!" D31p1.

The Student's June 9, 2020 IEP Amendment

166. On June 9, 2020, the Student's February 25, 2020 IEP (D190) was amended. D32p1. However, the evidence as such regarding the mechanics of this amendment is very difficult to decipher.

167. A meeting was held via a combination of in-person, Zoom video conference, telephone and email attendance. Van Hulse T565; D32p13. The in-person participants appeared at EHS using social distancing. Van Hulse T565; Mother T1012. Staff from both EMS and EHS participated in one manner or another. Van Hulse T564. The Mother attended in person. Mother T1012 ("It was in...the building...we were all spaced."). Mr. Van Hulse attended in person. See *generally* Van Hulse T564-T568; D32p1. Ms. Terry either attended, or agreed with the results via email. Terry T510. Lindsey Ryan, a special education language arts teacher at EHS, attended in person at EHS. Ryan T228-T229. Courtney Bowie participated via Zoom. Bowie T1018, T1019. Based upon an email sent the same day by Mr. Van Hulse after the meeting, and the Mother's email response the next day (See D33), it is possible but not certain that Dr. Henderson, Ms. Johnson, and Paul Iacobazzi, an assistant principal at EHS, also attended in one manner or another.

168. The meeting lasted at least an hour, and there was a general discussion about the Student's IEP goals, and his reading needs. Bowie T1020, T1019. Mr. Van Hulse recalls that the team reached agreement, and that everyone was "satisfied with the IEP that we developed." Van Hulse T567. The Mother believed this was a "productive meeting," and she was "hopeful." Mother T1013.

169. Much of this amended IEP is materially the same or similar to the Student's prior IEP (D19). The amended IEP adds one additional reading goal, for a total of three. D32pp4-5. The amended IEP has two writing goals and two math goals, the same number as the prior IEP. Compare D19pp5-6 with D32p5, and D19pp4-5 with D32p6.

170. With respect to the provision of SDI, the amended IEP provides the same total amount of SDI for the remainder of the Student's time in eighth grade at EMS as his prior IEP: 500 total minutes of SDI per week. Compare D19p10 with D32p10. However, once the Student would enter ninth grade at EHS, the amended IEP reduces the total amount of SDI in the prior IEP from 750 minutes per week to 500 minutes per week. *Id.* This reduction in SDI once the Student entered EHS was requested by the Mother as Mr. Van Hulse was drafting the IEP amendment. Van Hulse T597. The team decided to agree to the Mother's request. *Id.* T597-598. A PWN dated June 9, 2020, reflects that the IEP team agreed to changes requested by the parent. D32p13.

171. And like the prior IEP, the amended IEP provides no minutes of speech/language consultation as a related service. D32p10.

172. The day after the IEP meeting, the Mother sent an email to members of the IEP team. D33. In her email, the Mother stated, "Thank you everyone! We appreciate all your expertise, ideas, input and the extra time allotted for this meeting. Looking forward to school in Fall (sic) in whatever form that may be." *Id.*

173. On August 25, 2020, the District Complaint was filed.

2020-2021 SY: Student Enters EHS for Ninth Grade

174. September 1, 2020, was the first school day of the 2020-2021 SY at EHS. D43p3. The Student attended EHS for ninth grade. During the first quarter of the school year, Elyssa Greene was the Student's IEP case manager. Greene T840. Ms. Greene is a special education language arts and academic skills teacher. *Id.* The Student's special education math teacher was Brady Van Hoof. Van Hoof T35. Raeann Webb was the Student's general education science teacher for environmental biology. Webb T118. Kathleen Smith is a certificated special education teacher who supported Ms. Webb's classroom. *Id.* T156. Ms. Webb's classroom paraeducator was

Janine Page, then Janine Currow.¹⁴ *Id.* T133. Chad Davidson was an assistant principal at EHS. Davidson T169.

175. Ms. Greene confirmed she was responsible for provision of the reading and writing SDI in the Student's IEP. Greene T844; D32p10. Ms. Greene also confirmed she was responsible for monitoring the delivery of any reading or writing SDI to the Student by anyone other than herself. *Id.* T903.

176. EHS adopted a four-quarter schedule for the 2020-2021 SY. Greene T845; D43p3. During Quarters 1 (Q1) and 3 (Q3), students attended periods 1-3, and during Quarters 2 (Q2) and 4 (Q4), the students attended periods 4-6. Greene T845. In-person instruction was not offered as an option for any student at the start of the school year. Davidson T171

The Student's September 8, 2020 IEP Team Meeting

177. On September 8, 2020, the Student's IEP team convened at the Mother's request to discuss the Student's IEP, programming, and SDI. D37p2.¹⁵ The meeting was held at EHS. Van Hulse T533. The Parents and the District each had their present counsel at the meeting. D37p1. This was a very large meeting, with at least 15 identified participants, including staff from EMS and EHS. *Id.*

178. The Mother reported to the team that the Student struggled with distance or remote learning, she was spending a lot of time reading and scribing for the Student, and that the Student struggles with email, apparently due to his limited reading skills. *Id.*

179. The team reviewed the Student's IEP and determined that speech services were still an option for the Student, and if the Mother wanted to add service minutes the team would complete an amendment without another meeting. *Id.* p2.

180. Ultimately no changes were made to the Student's IEP. See D37p1 (PWN proposing to continue IEP).

181. A PWN associated with the IEP and dated September 11, 2020, states in part that, "Questions were raised about how [the Student] would receive SDI in the current model. Please see the attached plan/description of [the Student's] SDI instruction." *Id.* p2.

182. Attached to the PWN was a four-page plan or description identifying how the District intended to provide the Student's SDI in his IEP during the 2020-2021 school year. D37pp3-6. The best evidence establishes this plan was developed after the IEP meeting, and attached to

¹⁴ Ms. Webb identified her paraeducator as "Janine" Page. Webb. T133. However, during testimony of witnesses and in exhibits, Ms. Page is also identified as "Janae" Page or "Janae." See, e.g. D41, Greene T895. This is the same individual.

¹⁵ The evidence regarding this IEP meeting comes from an associated PWN dated September 11, 2020 (D37) and testimony of some of the participants.

the PWN. There is no express reference to the plan itself being reviewed at the meeting. See D37pp1-2. Ms. Greene recalls discussing how best to provide the Student's SDI in a remote format, and how to provide him with his SDI when he was not enrolled in an English or math course. Greene T887. But Ms. Greene made no express reference to reviewing the plan attached to the PWN. Mr. Davidson attended the IEP meeting, but could not recall if the plan was discussed, and upon review could not tell if the plan was developed before or after the meeting. D37p1; Davidson T172. Finally, an email exchange between Ms. Greene and the Mother after the IEP meeting set a weekly meeting with Ms. Greene and the Student for Tuesdays. See *generally* D38. The plan attached to the PWN specifically identifies the weekly meeting between Ms. Greene and the Student as set for Tuesdays. D37p3 ("Weekly 30 min. 1:1 call/Virtual meeting with case manager. (11am Tues)). This information could not have been included in the PWN until after the email exchange between Ms. Greene and the Mother subsequent to the IEP meeting.

183. During Q1 (9/1/20 thru 11/6/20; D43p3), the Student was enrolled in a weight-training class, Ms. Webb's environmental science class, and Mr. Van Hoof's Learning Center (LC) math class. P1. All of the Student's instruction during Q1 was remote/virtual instruction. P1.

184. The plan or description for how the Student's SDI would be delivered remotely during Q1 (D37pp3-6) anticipated that all of the Student's SDI in reading and writing would be delivered through Ms. Webb's science class. D37pp3, 4 (SDI addressed through environmental biology). The plan set out the following schedule to deliver the Student's reading and writing SDI each week through Ms. Webb's class:

- Two 30-minute synchronous¹⁶ class meetings (Tues/Thurs, 10:00 a.m.), with Ms. Page (the content specific paraeducator) participating;
- One 30-minute synchronous 1:1 call/virtual meeting (Tues, 11:00am) with Ms. Green (the case manager);

- One 30-minute synchronous 1:1 call/virtual meeting (Wed, 10:00am–10:30am) with Ms. Page;

- Two 50-minute synchronous small group meetings (Mon/Wed, 11:00am – 11:50am) with either Ms. Webb or Ms. Smith (certificated staff);¹⁷

Id. pp3-4. The schedules to provide the Student's SDI in reading and writing are materially identical except for identification of the content of the SDI.

¹⁶ Synchronous instruction or virtual meetings occurred where a teacher and a student(s) were all present simultaneously. Asynchronous instruction or virtual meetings occurred where students watched prerecorded videos or worked on instructional materials or assignments without a live teacher present. Teachers were given the option to use asynchronous and/or synchronous instruction. Davidson T171.

¹⁷ There is no evidence to find Ms. Page is a certificated staff member. Ms. Greene, who is a certificated staff member, could not have delivered the small-group instruction, as the evidence establishes she provided only 1:1 remote instruction to the Student.

185. This plan appears to anticipate a combined total of 220 minutes per week of reading and writing SDI for the Student: 160 minutes with Ms. Webb or Ms. Smith; 30 minutes with Ms. Greene; and 30 minutes with Ms. Page. This would generally align with what the Student’s IEP provided for his reading and writing SDI: a combined total of 250 minutes per week. D32p10.

186. However, Ms. Greene apparently understood that she was expected to have two 30-minute synchronous meetings (or apparently one 60-minute meeting) with the Student each week: one meeting to provide reading SDI, and one meeting to provide writing SDI. Greene T898. However, were her interpretation of the plan correct and applied to all the SDI identified for reading (D37pp3-4) and writing (D37pp4-5), the amount of SDI provided under the plan would apparently be a total of 440 minutes per week, far exceeding the Student’s IEP.

187. Further confounding a determination of how and whether the District provided the Student’s SDI is a “Service/Contact Log” for the Student. D41. It was offered and admitted without objection. See T894. This Log was represented as an outline of the reading and writing SDI provided to the Student during his remote meetings with Ms. Greene and Ms. Page (joined on occasion by Ms. Kathleen (Katt) Smith) during Q1. Greene T895. However, careful review of D41 raises only more questions, not answers. With respect to Ms. Page’s provision of SDI, Exhibit D41 reflects the following:

DATE	TIME IN MINUTES	TOTAL TIME PER CALENDAR WEEK
Wed. 9/16/20	50	50
Mon. 9/28/20	30	
Wed. 9/30/20	100	130
Mon. 10/5/20*	30	
Wed. 10/7/20	30	
Thurs.10/8/ 20	30	90
Wed. 10/14/20	30	30
Wed. 10/21/20	30	30
Mon. 10/26/20*	30	
Wed. 10/28/20	45	75

*Co-instruction with Ms. Smith. *Id.* With respect to Ms. Greene’s provision of SDI, Exhibit D41 reflects the following:

DATE	TIME IN MINUTES	TOTAL TIME PER CALENDAR WEEK
Tues. 9/15/20	50	50
Tues. 9/22/20	40	
Wed. 9/23/20	100	140
Tues. 9/29/20	50	50
Tues. 10/6/20	40	40
Tues. 10/13/20	70	70

Id.

188. With respect to Ms. Page, even adopting Ms. Greene’s interpretation of the Student’s then-current IEP, which would have required Ms. Page to have two 30-minute 1:1 calls or virtual meetings per week with the Student (one for reading SDI and one for writing SDI), Ms. Page would be responsible for providing no more than a maximum of 60 minutes per week. This cannot explain why or for what reason Ms. Page would record spending anywhere from only 30 minutes per week to as many as 130 minutes per week with the Student. Ms. Page could not have been providing the Student with any of the 100 minutes per week of SDI for the two synchronous small group meetings because she is not a certificated staff member.

189. With respect to Ms. Greene, who confirmed entering the information on the Log associated with her name, why she would have provided 140 minutes of SDI during a one-week period remains unexplained. It could not have been part of the two 50-minute per week small group instruction meetings because there is no evidence to find she provided any SDI to the Student during Q1 other than 1:1 instruction. Furthermore, Ms. Greene’s understanding of the plan for providing the Student with his SDI flies in the face of her communication with the Mother to set up only one 30-minute meeting on Tuesday. See below.

190. Ms. Greene is not aware of any special education staff member providing the Student with reading instruction for 30 minutes, five times a week during Q1. *Id.* T859. Ms. Greene does not know if any special education staff member provided the Student with SDI in writing for 30 minutes, five times a week during Q1. *Id.* T860.

191. After careful consideration of the evidence, it is found that the Log cannot be relied upon as an accurate record of SDI provided to the Student during Q1. It is found as fact that Ms. Greene’s interpretation of the Student then-current IEP is not credible. It is found as fact that the District’s plan to provide the Student with his reading and writing SDI during Q1 was intended to provide him with combined total of 220 minutes per week. It is found as fact that the District has not offered sufficient credible and reliable evidence to establish it provided the Student with even 220 total combined minutes of SDI in reading and writing during Q1.

192. Ms. Greene did not provide Ms. Page any training on how to deliver SDI in reading or writing to the Student. Greene T849-T850. Ms. Greene does not know how much time Ms. Page spent with the Student teaching him phonics, decoding, or writing structure versus helping the Student access the science curriculum. *Id.* T852.

193. The Student never read aloud in Ms. Webb's science class, had the option to respond verbally rather than in writing, and did not have a scribe for her class. Webb, T130, T142. Ms. Webb was aware the Mother scribed for the Student at home, and that she helped the Student access his remote learning. *Id.* T145-T146. During Q1, Ms. Webb communicated directly with the Student; it was always the Mother who communicated with her. *Id.* 146.

194. With respect to the Student's attendance in her science class, Ms. Webb understood that, "my class was used...as an opportunity for [the Student] to learn and to do the hands-on work and enjoy it...So then the...special education teacher – she handled the other end as far as meeting (the Student's IEP)... goals." Webb T138-T139.

195. There is no evidence to find the Student received any SDI in his weight-training class during Q1. See *generally* Gunderson T193-T200.

196. The Student's IEP provided him with 250 minutes per week of SDI in math. D32p10. During Q1, Mr. Van Hoof provided, at most, 115 minutes per week of math instruction for the Student. This consisted of two 50-minute periods of group instruction with the Student's entire class, and one 15-minute synchronous meeting between just the Student and Mr. Van Hoof. Van Hoof T69, T77. It is unclear how the class group instruction was individualized to meet the Student's IEP math goals.

197. Mr. Van Hoof reviewed the Student's June 9, 2020 IEP during his testimony. (D32); Van Hoof T85-T86. Referencing the Student's Present Level of Educational Performance (PLOP) in math (D32pp3-4), specifically the Student's GE 2.1 for math problem solving, Mr. Van Hoof opined the Student "has shown growth from there." *Id.* T86. He opined that at the current time, the Student's math skills are "grade level two, five to six months range." *Id.* T48, T78. Mr. Van Hoof opined that his review of the Student's STAR math assessments (P7p1) did not change his opinion the Student showed growth in his math skills. *Id.* T110.

198. The math problem solving GE 2.1 in the Student's June 9, 2020 IEP comes from Dr. Espinoza's January 2019 evaluation of the Student. *Compare* D32p3 (standard score of 60, 0.4 PR, and GE 2.1) with D12p7 (WIAT-III Math Problem Solving: Standard Score 60, Percentile Rank 0.4, and Grade Eq. 2.1).

199. Mr. Van Hoof opined it "would be roughly about right" that the Student met his first math goal (D32p6) by February 25, 2021. Van Hoof T52. Mr. Van Hoof's opinion regarding the Student's alleged IEP goal mastery is not considered because it would have occurred after the filing of the Parents Complaint. See, Preliminary Issues, above.

200. During Q1, Ms. Greene met virtually with the Student one-to-one for synchronous instruction once a week to provide SDI pursuant to the District's plan. Greene T857.

201. Ms. Greene testified she tried to work with the Student for one hour. Greene T857. However, it is found more likely than not that Ms. Greene met virtually with the Student for 30 minutes each week, not sixty minutes. First, the District's own plan called for Ms. Greene to provide SDI for 30 minutes once per week. D37p3 ("Weekly 30 min. 1:1 call/Virtual meeting with case manager."). Second, an email from Ms. Greene to the Mother specifically mentions setting up a weekly 30-minute Google meeting. D38.

202. Ms. Greene had the Student read aloud to her. Greene T855. She focused primarily on the Student's written expression IEP goals. *Id.* T856. She scribed for the Student because he did not write on his own. *Id.* T856. When she asked the Student to type, he was uncomfortable and asked her to scribe for him. *Id.*

203. Via email on September 9, 2020, Ms. Greene told the Mother that she would like to schedule a weekly 30-minute Google Meet call with the Student to "work through anything he needs help with, make sure everything is going well with his classes, and provide instruction to support his IEP goals and progress in his classes." D38pp3-4.

204. In subsequent emails between the Mother and Ms. Greene the same day, it was agreed Ms. Greene and the Student would meet virtually on Tuesdays. D38pp2-3. In her final email to the Mother, Ms. Greene stated in part that she, "also spoke with the science team today and you should be receiving an email soon with information regarding a 1:1 weekly time with a para, and a small group meeting time with other Biology students. *Id.* The Mother later received an email from Ms. Page, and confirmed the Student would meet with her and join the small group meeting. D38pp1-2.

205. As the 2020-2021 SY progressed, the District began to offer special education students the opportunity for in-person instruction either one-to-one, or in small groups. In-person instruction was offered on an as-needed basis, and was at the discretion of IEP case managers. Greene T848.

206. Via email to the Mother on October 1, 2020, Ms. Greene offered to have the Student come into EHS for in-person instruction with Ms. Page and one other student. D40pp3-4. Ms. Greene also told the Mother that the District would provide transportation for the Student to come into EHS. *Id.*

207. Via email to Ms. Greene on October 5, 2020, the Mother declined her offer of in-person instruction for the Student. D40p1. The Mother wanted to "see how (the District) progress through the phases." *Id.* Whether her reference to "phases" refers to the phases of the ongoing pandemic or the phases of the District reopening for students is not clear.

208. The Parents Complaint was filed October 28, 2020.

209. Q1 for the 2020-2021 SY at EHS ended on November 6, 2020. D43p3.

CONCLUSIONS OF LAW

The IDEA and Jurisdiction

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Therefore, in this consolidated due process hearing, the District bears the burden of proving its January 2020 and related April 2020 reevaluations of the Student were appropriate. The Parents bear the burden of proof on all the other issues.

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 *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

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

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

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

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

Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Endrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation

omitted), taking into account the progress of his non-disabled peers, and the child's potential.

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 583 U.S. ___, 138 S. Ct. 556 (2017).

5. Procedural safeguards are essential under the IDEA. The Ninth Circuit has stated:

Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001).

6. Procedural violations of the IDEA amount to a denial of FAPE, and therefore 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.

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

Whether the District has failed to provide the Student with FAPE since October 27, 2018 by failing to provide him specially designed instruction in reading and writing that was sufficient and appropriate based on his unique needs to allow for him to make meaningful educational progress.

Whether the District has failed to provide the Student with FAPE since October 27, 2018 by failing to provide him specially designed instruction in communication focused on building his language and literacy skills.

7. These two issues are essentially one issue involving multiple subject matters in the same IEP(s), and so will be treated as one issue.

8. These first two issues are ambiguously phrased. The issues may reasonably be interpreted as a challenge to the substantive appropriateness of the Student's IEPs, i.e. what services were offered in the IEP and whether those services provided FAPE. The issues may also reasonably be interpreted as a challenge to how the District implemented the services in the Student's IEPs. Both interpretations will be examined.

9. The Parents Complaint was filed October 28, 2020. The Parents are therefore precluded

by the applicable statute of limitations (See WAC 392-172A-05060) from raising any issue prior to two years before the Parents Complaint was filed, or prior to October 28, 2018.

10. The Student's current IEP as of October 28, 2018 was his May 22, 2018 IEP. The substantive appropriateness of an IEP is determined based upon what was known or reasonably should have been known at the time the IEP is created. *Adams v. State of Oregon*, 195 F.3d 1141 (9th Cir. 1999). This is the so-called "snapshot" rule. Determining whether an IEP was appropriate at the time it was created is not a retrospective analysis. Because the May 22, 2018 IEP was created before October 28, 2018, the Parents may not raise any issue regarding the substantive appropriateness of the May 22, 2018 IEP. This includes whether the IEP provided the Student SDI and related services in reading, writing, or communication sufficient to allow him to make meaningful educational progress. The first IEP about which the Parents may raise a substantive-appropriateness challenge is the May 21, 2019 IEP.

11. The Parents are also precluded from raising any failure-to-implement challenge prior to October 28, 2018, again due to the effect of the statute of limitations. However, the Parents may raise a failure-to-implement challenge regarding services in the May 22, 2018 IEP but not provided with fidelity beginning on or after October 28, 2018, two years before the Parents Complaint was filed. The Parents bear the burden of proof on this failure-to-implement challenge.

12. School Districts are not held to a standard of perfect implementation with IEPs. Only a material failure to implement an IEP will result in a violation of the IDEA and a denial of FAPE. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007). In *Van Duyn*, the court held that:

[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.

Id. at 821-22 (italics in original).

13. Careful review of the evidence does not support a conclusion the Parents have carried their burden to prove the District materially failed to implement the Student's May 22, 2018 IEP between October 28, 2018, and May 21, 2019, when the Student's next IEP was created. The Parents' arguments in their Post-Hearing Memorandum (Parents Brief) on the first of the above two issues (reading and writing) go much more to a substantive challenge of the Student's May 22, 2018 IEP rather than a failure-to-implement challenge. Parents Brief pp.12-18. That challenge may not be raised against the May 22, 2018 IEP, as concluded above. With respect to a failure-to-implement challenge from October 28, 2018, through May 20, 2019, the Parents appear to argue that the Student's failure to progress, or failure to progress faster in his reading and writing must necessarily compel a conclusion the District was not faithfully implementing the May 22, 2018 IEP. The undersigned respectfully disagrees with the Parents' argument. The evidence to prove the District materially failed to implement the Student's May 22, 2018 IEP is simply not clear and present in the record. A student's progress, or lack thereof, towards IEP goals may be due to any number of factors separate and apart from a material implementation failure.

14. With respect to the Parents' assertion the Mother was misled by the District, specifically

Ms. Richmond, the Student's SLP from kindergarten through fifth grade, into errantly believing he would not benefit from continuing SLP services into middle school for the 17-18 SY, the undersigned disagrees with the Parents' characterization of Ms. Richmond's statement or intent. While Ms. Richmond offered her opinion that the Student's language skills would continue to develop in a language-rich environment as he entered middle school, this was her opinion. There is simply no evidence to conclude Ms. Richmond's opinion misled the Mother. On the contrary, the record is replete with evidence that it was the Mother who had concerns regarding the Student's emotional health if he continued SLP services in middle school.

15. No witness testified and no document clearly established by a preponderance of the evidence that the District materially failed to implement the Student's May 22, 2018 IEP at any time. It is concluded that the Parents have not carried their burden to prove any violation of the IDEA or denial of FAPE to the Student through May 20, 2019.

Whether the District has failed to provide the Student with FAPE since May 21, 2019 by failing to provide him specially designed instruction in reading and writing, or in communication focused on building his language and literacy skills, that was sufficient and appropriate based on his unique needs to allow for him to make meaningful educational progress.

16. This is a restatement of the above two issues beginning with the creation of the Student's May 21, 2019 IEP. Again, any challenge to the substantive appropriateness of that IEP must be determined based upon what was known or reasonably should have been known as of May 21, 2019. Van Duyn, *supra*. Argument based on after-acquired information is not relevant to the legal analysis.

17. The Parents argue the evidence establishes the Student required "specific dyslexia curriculum to make meaningful educational progress," and that none of his IEPs at issue provided such curriculum. Parents Brief p13. However, this argument is clearly based upon after-acquired information. The Parents point to the testimony and opinions of Ms. Fish. However, for reasons already identified, Ms. Fish's testimony and opinions are given no weight. Even were her testimony and opinions given any weight, they all post-date the creation of the May 21, 2019 IEP. The Student was not diagnosed with dyslexia as of May 21, 2019. That would only come later in Dr. Espinoza's revised evaluation report received by the District on February 13, 2020. The District did not even receive a complete copy of Dr. Espinoza's evaluation of the Student until June 28, 2019. The Parents argue that the Student's IEP progress reports covering the time period June 18, 2018 through May 2019 (D4) cannot be believed, and do not contain "actual data." There is no requirement under the IDEA that IEP progress reports include the actual or underlying data on which any determination vis-à-vis any progress is made. The Parents' assertion the evidence supports finding the IEP progress reports cannot be believed has not been proven. Even if this were not the case, consideration of progress reporting after an IEP is created would violate Adams, *supra*.

18. The Parents Brief addresses the issue of communication services quite summarily. Parents Brief pp19-20. First, as a matter of fact, the Parents' argument that Ms. Richmond misled the Mother about the utility or efficacy of continuing speech services has already been considered and rejected. The Parents argue that the Student was denied FAPE as a result of the District's reevaluation on January 27, 2020, identifying in part Ms. Manzano-Moudy's SLP

assessment of the Student. That argument will be considered below when reviewing the appropriateness of that reevaluation. Given Ms. Manzano-Moudy's SLP assessment was conducted as part of the January 27, 2020 reevaluation, it cannot be considered in determining the substantive appropriateness of the May 21, 2019 IEP.

19. No witness apart from Ms. Fish, whose testimony is given no weight, and no exhibits provide sufficient evidence to conclude by a preponderance of the evidence that the May 21, 2019 IEP was either substantively inappropriate for the Student at the time it was created, or that it was not materially implemented. It is concluded the Parents have not carried their burden to prove any violation of the IDEA or denial of FAPE due to the Student's IEP from May 21, 2019, at least until February 25, 2020, when the Student's next IEP (D19) was created.

20. The Parents also raise an argument regarding the goals in the Student's IEPs, specifically whether the goals are repeated from IEP to IEP, and if so what implication that might hold vis-à-vis a determination of the substantive appropriateness or material implementation of the Student's IEPs. Parents Brief pp14-15. It is concluded the Parents have not raised any issue regarding goals in the Student's IEPs in their Complaint. To any extent the Parents argue that issues regarding the Student's goals are somehow suggested or implicated as an issue related to whether or not an IEP was appropriate or not materially implemented, that argument is rejected. As already discussed in the Preliminary Issues section, above, Parents' counsel is a very experienced and knowledgeable special education attorney. If the Parents intended to raise an issue regarding the Student's IEP goals, Parents' counsel could have, and should have, expressly raised the issue in the Parents Complaint. For example, Parents' counsel raised the general issue of the District's failure to comply with procedural requirements of the IDEA when it allegedly changed the Student's educational placement effective March 16, 2020. See Issue 6, above. Parents' counsel then went on to specifically list those alleged procedural violations (e.g., changing the placement outside of an IEP team meeting, without meaningful parental participation, without evaluative data, without prior written notice to the Parents). Nothing prevented Parents' counsel from doing the same with respect to how the District allegedly denied the Student FAPE since October 27, 2018. There is no mention or reference to IEP goals in the Parents Complaint, and that issue will not now be read into the Parents Complaint. Nor was any issue regarding IEP goals tried by any implicit consent of the District at hearing. See M.C., *supra*.

Whether the District denied the Student FAPE from January of 2020 to April 30, 2020 because the District's January 2020 Reevaluation failed to determine the nature and extent of the Student's disabilities as well as the special education and related services that the Student needed.

Whether the District failed to comply with procedural requirements of the IDEA and in turn failed to provide the Student with FAPE by the way it conducted its January 2020 reevaluation.

Whether the District's evaluation in January 20, 2020, was appropriate and, if not, whether the Parents are entitled to an independent educational evaluation (IEE) at public expense in the form of reimbursement for an IEE obtained by the Parents and/or a new IEE.

21. These three issues all relate to the District's January 27, 2020 reevaluation (the January

reevaluation) and so will be considered jointly.

22. As a preliminary matter, the limitations on District's opportunity to reevaluate the Student imposed by the Mother's very limited consent must be considered. The evidence is clear that the Mother had her own preconceived idea of how the January reevaluation should be conducted. It is clear the Mother really was seeking not a comprehensive reevaluation of the Student, but rather it was her priority to have the District simply adopt Dr. Espinoza's February 2019 evaluation of the Student as its reevaluation. She did not want any additional or duplicative assessments of the Student. This is reflected in the consent form she amended to reflect not what Dr. Henderson was proposing, but what she wanted the reevaluation to encompass. Dr. Henderson confirmed as much with the Mother. She did request an AT assessment, which Ms. Richmond conducted, and she consented to a classroom observation of the Student, which Ms. Johnson conducted, and a speech-language assessment which Ms. Manzano-Moudy conducted. The Parents seemed to assert at hearing that the District should have sought a due process hearing to override the Mother's either refusal to consent to all of what Dr. Henderson proposed for the January reevaluation, or the scope of her limited consent. The District was under no legal duty to do so. WAC 392-172A-03000(3)(b).

23. The procedures for conducting evaluations and reevaluations under the IDEA are found at WAC 392-172A-03020, and provide in relevant part:

(2) In conducting the evaluation, the group of qualified professionals selected by the school district must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

(i) Whether the student is eligible for special education as defined in WAC [392-172A-01175](#); and

(ii) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum, or for a preschool child, to participate in appropriate activities;

(b) Not use any single measure or assessment as the sole criterion for determining whether a student's eligibility for special education and for determining an appropriate educational program for the student; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Each school district must ensure that:

(a) Assessments and other evaluation materials used to assess a student:

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable. If properly validated tests are unavailable, each member of the group shall use professional judgment to determine eligibility based on other evidence of the existence of a disability and need for special education. Use of professional judgment shall be documented in the evaluation report;

(iv) Are administered by trained and knowledgeable personnel; and

- (v) Are administered in accordance with any instructions provided by the producer of the assessments.
- (b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.
- (c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).
- (d) If necessary as part of a complete assessment, the school district obtains a medical statement or assessment indicating whether there are any other factors that may be affecting the student's educational performance.
- (e) The 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.
- (f) Assessments of students eligible for special education who transfer from one school district to another school district in the same school year are coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.
- (g) In evaluating each student to determine eligibility or continued eligibility for special education service, 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.
- (h) Assessment tools and strategies are used that provide relevant information that directly assists persons in determining the educational needs of the student.

24. After review of the evidence, it is concluded that the January 2020 reevaluation of the Student complied with the procedural regulations. The evidence raises no questions regarding the professional qualifications of the District staff who conducted the few new assessments the Mother consented to or requested. The reevaluation utilized a variety of technically sound assessment tools and strategies. And the Student was assessed in all suspected areas of disability.

25. Of particular note is that a significant part of the information and assessments in the January 2020 reevaluation report were adopted without material change from Dr. Espinoza's February 2019 evaluation of the Student, just as the Mother wanted the District to do.

26. The Parents Brief raises only four specific objections to the District's reevaluation. Parents Brief pp32-33. First, the Parents argue the District did not conduct any assessment or evaluation of the Student's reported anxiety or stress in the school setting. However, the Mother had made clear she did not want any assessment of the Student that was additional or duplicative of what Dr. Espinoza had completed. Dr. Espinoza's Social/Emotional/Behavioral Functioning portion of his evaluation was very comprehensive, and it is concluded that the District could reasonably rely on his findings and conclusions regarding any anxiety or stress the Student might experience in the school environment. Furthermore, Ms. Johnson did conduct a classroom observation of the Student at EHS as part of the District's reevaluation.

27. The Parents' second objection is that Dr. Henderson identified the lack of an in-school

observation as problematic. Ms. Johnson did observe the Student in his EHS classroom. Furthermore, there is no evidence to conclude any lack of classroom observation was so critical that it in turn rendered the entire January 2020 reevaluation inappropriate. As with IEPs, there is no legal basis to argue that a school district must conduct a perfect evaluation.

28. The Parents' third objection goes to the concern that none of the Student's teachers completed a BASC-3 Teachers Report form, which Dr. Henderson confirmed he normally would have included as part of a student's reevaluation. But again, neither Dr. Henderson nor anyone else qualified to offer an opinion on the appropriateness of the reevaluation opined this resulted in an inappropriate reevaluation for the Student in January 2020.

29. The Parents' last objection goes to the fact that despite Ms. Manzano-Moudy's speech-language assessment, the reevaluation did not recommend any speech-language services for the Student. Ms. Manzano-Moudy's conclusion that the Student's receptive and expressive language deficits might have a negative impact on his education performance, and that apart from his articulation score, all of his remaining assessment scores support a need for SDI is troubling. However, the evidence is clear the Mother did not want the Student to receive speech-language services at EHS, and that services would not be in his best interests at that time. Ultimately, the team decided to agree with the Mother, and direct speech-language services was not included in the reevaluation report.

30. Along with limiting the scope of the District's reevaluation to comply with the constraints imposed by the Mother's limited consent and essentially adopting Dr. Espinoza's evaluation as the primary basis for the District's own January 2020 reevaluation, again to appease the express wishes of the Mother, it appears this is a situation where the District members of the reevaluation team ultimately capitulated to the Mother and agreed not to recommend any direct speech services in the reevaluation. The legal question now is, does this render the January 2020 reevaluation fatally flawed or inappropriate, and if so, do the facts warrant any remedy for the Parents? After careful review and consideration of the evidence and applicable law, it must be concluded that by not including a recommendation for services to address the Student's deficits in receptive and expressive language, the District's evaluation was not appropriate. Ms. Manzano-Moudy's speech assessment is clear. Without services to address those deficits, the Student's educational performance might be negatively impacted, and all but one of his assessment scores supported a need for SDI. This is a circumstance where by attempting to do what a parent wanted it to do rather than what the reevaluation required, the District has violated the IDEA and denied the Student FAPE. However, whether this violation warrants any remedy is a separate determination, and will be considered below.

Whether the District has failed to provide the Student with FAPE beginning February 25, 2020 by failing to provide him specially designed instruction in reading and writing, or in communication focused on building his language and literacy skills, that was sufficient and appropriate based on his unique needs to allow for him to make meaningful educational progress.

31. This is a restatement of the first two issues beginning with the creation of the Student's February 25, 2020 IEP.

32. The Student's IEP team met on February 25, 2020, to create a new IEP for him based on the results of the January 27, 2020 reevaluation. The February 2020 IEP did not offer the Student any direct speech services. This logically followed from the reevaluation team's decision not to recommend any direct speech services despite the conclusions from Ms. Manzano-Moudy's SLP assessment. Accordingly, it is concluded that the February 25, 2020 IEP was not appropriate for the Student because it did not provide the Student direct speech services, thereby violating the IDEA, and denying the Student FAPE. Whether this determination warrants any remedy is considered below.

33. With respect to reading and writing SDI, the February 2020 IEP keep the same amount of reading and writing SDI (150 minutes per week for reading and 100 minutes per week for writing) as the Student's prior May 21, 2019 IEP through the end of the 2019-2020 SY. However, by this time the IEP team had Dr. Espinoza's full and complete evaluation report. Giving Dr. Espinoza's opinions and recommendations for the Student's IEP some weight, it is concluded that by not substantially increasing the Student's reading and writing SDI to address his disabilities, the February 25, 2020 IEP violated the IDEA and denied the Student FAPE.

Whether the District failed to comply with procedural requirements of the IDEA and in turn failed to provide the Student with FAPE by the way it conducted its April 30, 2020 "Assessment Correction" Reevaluation.

Whether the District denied the Student FAPE from April 30, 2020 to present because its "Assessment Correction" Reevaluation failed to determine the nature and extent of the Student's disabilities as well as the special education and related services that the Student needed.

Whether the District's "Assessment Correction" Reevaluation in April 30, 2020, was appropriate and, if not, whether the Parents are entitled to an independent educational evaluation (IEE) at public expense in the form of reimbursement for an IEE obtained by the Parents and/or a new IEE.

34. These three issues all relate to the District's April 30, 2020 Assessment Correction (the Assessment Correction) and so will be considered jointly.

35. The Assessment Correction changed the Student's eligibility category from Other Health Impairment to Specific Learning Disability. This change was based upon Dr. Espinoza's revised evaluation report received by the District on February 13, 2020. The services recommended in the Assessment Correction remained the same from the January 2020 reevaluation.

36. Like the earlier January 2020 District reevaluation, the Assessment Correction did not provide the Student with any direct speech services. For the same reasons discussed above with respect to the January 2020 reevaluation, it is concluded that the Assessment Correction also violated the IDEA and denied the Student FAPE. Whether this violation warrants any remedy is considered below.

Whether the District failed to provide the Student with FAPE from March 16, 2020 to June 3, 2020 by not fully implementing the Student's then in place individualized education program (IEP).

Whether the District failed to provide the Student with FAPE from June 3, 2020 to present by not fully implementing the Student's June 3, 2020 IEP.

37. The Student's IEP was amended on June 9, 2020, to reflect the Assessment Correction. The June 2020 Amendment provided the same amount of reading and writing SDI through the end of the 19-20 SY as the earlier February 25, 2020 IEP. It also did not provide any direct SLP services to address the Student's deficits identified by Ms. Manzano-Moudy's assessment from the January 27, 2020 District reevaluation. For the same reasons discussed above regarding the February 25, 2020 IEP, the Student's June 9, 2020 Amended IEP violated the IDEA and denied the Student FAPE. The June 202 IEP Amendment decreased the Student's SDI upon his anticipated entry into EHS for the 2020-2021 SY. This reduction was requested by the Mother and agreed to by the IEP team.

38. The District closed all schools effective March 13, 2020, due to the Covid-19 Pandemic. All District schools remained closed the following week, March 16 through March 20, so teachers could plan and prepare to go to remote/virtual learning.

39. With respect to the period beginning March 23, 2020, through the filing of the Parents Complaint on October 28, 2020, the record is clear. The District, through no fault of its own making, was unable to materially implement first the Student's February 25, 2020 IEP, and then his June 9, 2020 IEP Amendment. During this period of time, the Student was limited to home-bound, remote/virtual instruction. Clearly, home-bound instruction is not the Student's LRE. Equally clear is that the District was not providing the SDI in the Student's IEPs.

40. The District very persuasively argues it did the best job it could to implement the Student's IEPs and provide FAPE under extraordinary, once-in-a-lifetime circumstances. It appears to have followed the guidelines regarding Covid19 precautions, and guidance from federal and state education authorities. There is no question that the District worked extraordinarily hard to serve its students, both students eligible for special education and students in general education. However, as this ALJ has had to rule in prior cases, the law regarding the education of students eligible for special education was not amended, changed, or suspended with respect to school districts' legal obligation to provide FAPE to eligible students during the Covid-19 pandemic. *Lake Stevens Sch. Dist.*, 77 IDELR 207, 120 LRP 30793 (WA SEA 2020). Even in situations where, practically speaking, it is impossible to materially implement an IEP, school districts cannot defend a denial of FAPE. See, e.g., *District of Columbia Pub. Schs.*, 120 LRP 8116 (SEA DC 01/03/20)(School districts cannot use an "impossibility" defense to thwart a parent's claim of FAPE denial where no private school will accept a child), citing *Schiff v. District of Columbia.*, 2019 WL 5683903 (D.D.C. Nov. 1, 2019). Accordingly it is concluded that some remedy is required.

41. 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, supra*, 401 F.3d at 523-524. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra*, 401 F.3d at 524.

42. Given that an award of compensatory education is an equitable remedy, the unique facts leading to, causing or perpetuating any denial of FAPE to a student may be considered when determining the appropriate type and quantum or amount of a compensatory education award. This includes consideration of both parent and school district conduct. The equitable doctrine of “clean hands” may be considered when determining any remedy involving a denial of FAPE. A party arguing for an award of compensatory education to cure a denial of FAPE must have clean hands, or have not engaged in conduct that materially contributes to that denial of FAPE. Absent such clean hands, a compensatory education award may be reduced or denied.

43. The District first denied the Student FAPE with the January 27, 2020 reevaluation when, despite a clear and well-founded conclusion by Ms. Manzano-Moudy that the Student’s receptive and expressive language deficits may impact his educational performance and that her assessment, absent a single score, supported providing SDI in communication, the reevaluation team did not include a recommendation that direct communication services be provided to the Student. The denial of FAPE continued into the Student’s February 2020 IEP because despite having Dr. Espinoza’s complete evaluation and recommendations for the Student’s education, that IEP did not offer the Student any more SDI for reading or writing than his May 2019 IEP. This cannot be reconciled as providing the Student sufficient SDI in reading or writing to obtain FAPE. The denial of FAPE continued into the Student’s June 2020 Amended IEP, which again maintained the same amount of SDI for reading and writing from the Student’s May 2019 IEP. And even that amount of SDI was not implemented for the Student once remote/virtual learning began in March 2020.

44. Dr. Espinoza’s recommendation for one hour per school day for reading SDI and one hour per school day for writing SDI is supported by the best evidence, and is adopted. There were 98 school days from January 27, 2020, through the end of the 2019-2020 school year.¹⁸ See DD43p2. Accordingly, the Parents are awarded a total of 98 hours of reading SDI and 98 hours of writing SDI for the denial of FAPE during the 2019-2020 school year.

45. The denial of appropriate reading and writing SDI continued with the start of the 2020-2021 school year via remote/virtual learning. The record establishes the denial continued through the filing of the Parents Complaint on October 28, 2020. Given the effect of stay-put, that denial must have continued through the end of the 2020-2021 school year. The Parents assume 180 school days per school year. Parents Brief p35. Therefore, the Parents are awarded 180 hours of reading SDI and 180 hours of writing SDI for the 2020-2021 school year.

46. Accordingly the Parents are awarded total compensatory education of 278 hours of

¹⁸ There were 103 school days scheduled, but five school days were cancelled and no students attended for the week after the schools closed on March 13, 2020. Therefore, only 98 school days are counted to determine the compensatory education award.

reading SDI and 278 hours of writing SDI.

47. The total compensatory education award shall not be reduced by any amount to account for whatever SDI the Student may have actually received. Parsing out any educational benefit the Student may or may not have obtained through receipt of a less-than-appropriate amount of SDI is simply impossible to reasonably determine.

48. This award of compensatory education is distinguished from the facts in Lake Stevens Sch. Dist., *supra*. In that case during the early period of the pandemic there was no way to determine or even estimate how long schools would be restricted to remote/virtual learning, and so a compensatory education award was truly an open-ended and speculative remedy. Thankfully, with the availability of the Covid-19 vaccines, there is reasonable likelihood of returning to in-person instruction with commencement of the 2021-2022 school year. However, should the District not resume in-person instruction for the 2021-2022 school year, and the denial of FAPE continues for the Student because his IEP cannot be materially implemented remotely, this decision and award of compensatory education does not preclude the Parents from filing for another due process hearing.

49. The District may provide the compensatory education SDI in reading and writing by properly trained and certificated District staff outside of the regular school day. Said staff must be trained to provide the reading and writing SDI in either Orton-Gillingham or an equivalent methodology. If no such properly trained and certificated District staff are available, the District shall pay for private instruction to provide the compensatory SDI at an hourly amount up to 115% of the locally prevailing hourly rate. The District shall work with the Parents to schedule the provision of the compensatory SDI. If a session of compensatory SDI is scheduled but the Student does not appear absent emergent circumstances, the scheduled SDI will be counted towards fulfillment of the compensatory award.

50. Any award of compensatory education must be based on the evidence, and that evidence must provide reasonable certainty to determine what kind and how much compensatory education a student is entitled to. Absent such reasonable certainty, there is authority supporting a denial of any compensatory education despite a demonstrable violation and denial of FAPE. See e.g., *Bethel Sch. Dist.*, 109 LRP 39477 (SEA WA 2009).

51. No compensatory education will be awarded for the denial of communication SDI because the Parents have not established through sufficient evidence either the type or amount of communication SDI that is warranted. Parents Brief p36. Any attempt to determine the type or amount based upon the evidence would be pure speculation.

52. The Parents are not awarded any other remedy for the District's inappropriate January 2020 reevaluation, or June 2020 Assessment Correction. The Parents are awarded no remedy because it is clear that it was primarily the Mother's insistence on not providing any direct speech-communication services that resulted in the inappropriate evaluations. The Parents do not come to this issue with clean hands. The evidence is clear that, in this case, by deferring to the Mother the District committed violations of the IDEA, and conducted inappropriate evaluations. But for the Mother's insistence, it is concluded that District more likely than not would not have conducted the inappropriate reevaluations. The Parents are not awarded any IEE at public expense with

respect to the two inappropriate District reevaluations.

53. The Parents are awarded no reimbursement for the expense of Dr. Espinoza's February 2019 evaluation of the Student. The Parents have not proven any District evaluation of the Student that predates Dr. Espinoza's evaluation was inappropriate.

54. The Student is entitled to an appropriate IEP moving forward with the 2021-2022 school year. If the District determines a new reevaluation is required to create an appropriate IEP, it shall promptly initiate an appropriate reevaluation of the Student. This will likely be most critical to a determination of the type and amount of speech-communication SDI the Student will require.

55. Given the above conclusions of law and remedies ordered, the Parents' remaining issues are moot. Accordingly, Parents issues A(5), A(6), A(7), and A(8) are **DISMISSED**.

56. The Parents' request for any additional relief this Tribunal may find just and equitable is denied.

ORDER

The Enumclaw School District has violated the Individuals with Disabilities Education Act and denied the Student a Free Appropriate Public Education pursuant to the Findings of Fact and Conclusions of Law herein.

The Parents are **AWARDED** 278 hours of Specially Designed Instruction in Reading and 278 hours of Specially Designed Instruction in Writing pursuant to the conditions in the Conclusions of Law.

All remaining remedies requested by the Parents are **DENIED**.

Served on the date of mailing.



MATTHEW D. WACKER
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 this 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.

Parents



Gerrie Garton
Enumclaw School District
2929 McDougall Avenue
Enumclaw, WA 98022-7499

Alexander Hagel
Shannon M. McMinimee
Cedar Law PLLC
113 Cherry Street
PMB 96563
Seattle, WA 98104-2205

Carlos Chavez
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101

Dated July 19, 2021 at Seattle, Washington.

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

cc: Administrative Resource Services, OSPI