



**MAILED**  
May 30, 2019  
OAH – SEATTLE

STATE OF WASHINGTON  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
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May 30, 2019

Parents  


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**In re: Everett School District**  
**OSPI Cause No. 2018-SE-0107**  
**OAH Docket No. 10-2018-OSPI-00612**

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(i) (Individuals with Disabilities Education Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Becker".

Jacqueline H. Becker  
Administrative Law Judge

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

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May 30, 2019

OAH – SEATTLE

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

IN THE MATTER OF

OSPI CAUSE NO. 2018-SE-0107

EVERETT SCHOOL DISTRICT

OAH DOCKET NO. 10-2018-OSPI-00612

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

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Jacqueline Becker in Everett, Washington on March 11-15, 2019. The Parents<sup>1</sup> of the Student whose education is at issue<sup>2</sup> appeared at the hearing and were represented by Lara Hruska and Jinju Park, attorneys at law. The Everett School District (District) was represented by Sarah Johnson and Carlos Chavez, attorneys at law. Rebecca Clifford, Executive Director of Special Services, appeared for the District.

**PROCEDURAL HISTORY OF THE CASE**

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on October 17, 2018. The Complaint was assigned Cause No. 2018-SE-0107 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered on October 19, 2018. The District filed its response to the Complaint on October 29, 2018. Prehearing conferences were held on November 27, 2018, and January 28, 2019. Prehearing orders were entered on December 3, 2018, and January 29, 2019.

The Parents moved to amend the issues for the due process hearing on December 11, 2018, and the motion was granted on December 13, 2018.

The District filed a Motion for Summary Judgment to Dismiss Untimely Claims on January 22, 2019. On February 1, 2019, the Parents filed their Opposition in Response to District's Motion for Summary Judgment, which was treated as a cross-motion for summary judgment. The cross-motions for summary judgment were denied by the ALJ on February 26, 2019.

**Evidence Relied Upon**

**Exhibits Admitted:**

Parents' Exhibits: P1, 2, 4, 5, 7, 8, 10-35, 42, 43 (pp. 1-2 only), 44-51, 54, 58-60, 64-69.

<sup>1</sup> The Student's father did not appear or otherwise participate in the hearing. "Parents" will be used herein to refer to the Student's Mother and Stepfather.

<sup>2</sup> To help ensure confidentiality, names of parents and students are not used. The exhibits show the Mother with differing last names because she changed her name during the relevant time period.

District's Exhibits: D1-30, 31 (pp. 1-4 only), 32-39.

Witnesses Heard (in order of appearance):

Andrea Liddane, private tutor  
The Mother of the Student  
Danielle Baker, director of Lindamood-Bell Learning Center  
The Stepfather of the Student  
Wendy Nelson, speech-language pathologist  
Stacy Cecchet, clinical psychologist  
Robin Arnold, District school psychologist  
Robert Lee, District reading specialist  
Linda McKinnon, District school counselor  
Sandy Koznek, District second grade general education teacher  
Stephanie Vincent, District school psychologist  
Laurena La Porte, District speech/language pathologist  
Lauren Weeden, District director of special education, North Region  
Jennifer Reyes, District third grade general education teacher  
Katie Finley, District special education teacher  
Rebecca Clifford, District executive director of special services

Post-Hearing Briefs

The parties agreed that post-hearing briefs would be filed and exchanged by May 3, 2019. The post-hearing briefs were timely filed.

Due Date for Written Decision

As set forth in the Order dated December 13, 2018, the due date for a written decision in this case was continued to thirty (30) calendar days after the close of record. The record closed with the receipt of the post-hearing briefs on May 3, 2019, so the due date for the written decision is **June 2, 2019**.

**ISSUES/REMEDIES**

The issues and requested remedies addressed in the due process hearing were:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
  - i. Failing to timely identify and evaluate the Student's eligibility for special education services;
  - ii. Failing to provide the Student with sufficient minutes of special education services in the 2016-17 and 2017-18 school years, and, if so, whether the Student is entitled to compensatory education;
  - iii. Failing to identify the Student as eligible for special education services in mathematics and provide the Student with specially designed instruction in

mathematics; and, if so, when such eligibility should have been identified and whether the Student is entitled to compensatory education in mathematics;

- iv. During the 2016-17, 2017-18, and 2018-19 school years, failing to develop appropriate goals in the Student's individualized education programs (IEPs); and
  - v. During the 2016-17, 2017-18 and 2018-19 school years, failing to provide appropriate supplemental aids and services, including but not limited to counseling, tutoring, speech/language services, occupational therapy, and assistive technology.
- b. Whether the Parents of the Student are entitled to reimbursement for speech/language evaluations of the Student, speech/language services, tutoring, summer school, and counseling during the 2014-15, 2015-16, 2016-17, 2017-18, and 2018-19 school years;
  - c. What is the appropriate compensatory education for the Student, if any; and
  - d. Whether any of the Parents' claims are barred by the statute of limitations.

### 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 conflicts, the evidence adopted has been determined to be more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence may be set forth below regarding specific facts at issue.

### BACKGROUND

1. The Student entered kindergarten in the District in September of 2014 and has attended school in the District since that time. D6; D15.<sup>3</sup>

2. The Mother is a general education high school teacher in the District. She teaches [REDACTED]. Her teaching certification is for marketing and work-based learning, and she oversees students who work or volunteer in the community. She has no expertise in the area of special education. Tr. 95-97 (Mother).

3. The Stepfather met the Student in 2013 and became involved in decisions regarding the Student's education in 2014. Tr. 210 (Stepfather). The Stepfather is employed by the District as an [REDACTED], and as a [REDACTED]. Additionally, he was a member of the District's [REDACTED]. *Id.* at 208. In his capacity as [REDACTED] the Stepfather learned about the "financial side" of special education, but he has no expertise in other areas of special education. *Id.* at 212-13. The Stepfather holds a bachelor's degree in philosophy, as well as master of divinity degree. *Id.* at 207.

<sup>3</sup> "Tr." refers to the transcript of the proceedings. "D" and "P" refer to the specified exhibit.

4. The Mother was concerned about the Student prior to kindergarten because he did not know his colors; sometimes he could remember them, but would forget a few hours later. Tr. 103 (Mother). He also confused the names of pieces of fruit, such as peaches and apples. *Id.* at 104. His daycare provider informed the Mother that the fact that the Student confused the names of fruit was unusual. *Id.* at 602-04. The Mother felt the Student did not learn the same way other children learn. *Id.*

5. The Student struggled academically in kindergarten and was referred to the District's Learning Assistance Program (LAP) by his classroom teacher. Tr. 99 (Mother). At the parent-teacher conference early in the school year, the Student's teacher informed the Parents that he was not where she expected him to be in terms of knowing letters and numbers. *Id.*

6. The Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) in November of 2014 (early in kindergarten) by clinical psychologist Stacy Cecchet. D3 p.1.<sup>4</sup> A speech and language evaluation performed at the Mother's request by Evergreen Speech & Hearing Clinic in June of 2015 (the end of kindergarten) identified the Student as having a reading disorder, as well as a mixed receptive/expressive language disorder. D3 p.4.

7. The Parents were confused for a long period as to the difference between 504 accommodations [provided under the federal Rehabilitation Act of 1973] and special education services. Tr. 493 (Mother). The Mother contends that she requested a 504 accommodation evaluation of the Student, which she thought was special education, via an email to District personnel on January 13, 2015, during the Student's kindergarten year. *Id.* at 495; D1. The text of the email states, "I wanted to provide you with some information and to make a request to hold a meeting to create a 504 for Sibling [the Student's older brother]." D1 p. 2. Further into the email chain, the Mother states, "I want to focus first on Sibling, as he is struggling more than Student, and has for a few years." *Id.* Despite the Mother's belief, this email clearly did not constitute a request for a special education evaluation of the Student.

8. The Student's kindergarten teacher told the Mother that it is uncommon for children as young as kindergarten to qualify for special education services, and that interventions are often put in place first, which was why she had referred him to the LAP. Tr. 107 (Mother).

9. After kindergarten, the Student attended an eight-week summer program that focused on reading skills. Tr. 102 (Mother).

10. In October of his first grade year, the Student began receiving Leveled Literary Intervention (LLI), an intensive reading intervention delivered to a group of three students at a time for 30 minutes a day, four days per week. D15 p. 2; Tr. 716 (Lee).

11. The Student was also referred to the Student Assistance Team (SAT) in October of 2015. D15 p.2. At the first SAT meeting on October 13, 2015, it was noted that "reading is the main concern." D6 p. 5. The SAT notes reflect that the Student had recognized 20 out of 42 sight words at the end of kindergarten. *Id.* at 4. The Mother reported to the SAT that the Student had begun

<sup>4</sup> The Student's various IEPs state that he was diagnosed with ADHD in November of 2015. The initial diagnosis was made in 2014 by Dr. Cecchet. The ADHD diagnosis was also made in 2015 by Dr. Katch, the Student's pediatrician. D15 pp. 6, 27, and 35. The date of the diagnosis is difficult to read on Dr. Katch's "verification of medical condition" form, but it appears to be March 17, 2015. (The month is unclear, but the year, 2015, is legible.) D15 p. 35.

to notice that "he learns differently and reading is harder for him." *Id.* at 5. His classroom teacher reported that he was excellent at memorizing "which is often true for students challenged with reading and remembering site [sic] words." *Id.* The Student could usually get the beginning and middle sound of three-letter words. He knew 24 out of 26 uppercase and lowercase letters, and "knew his sounds." He was doing well in math, although the challenge increased for him as there were more words in the problems. *Id.*

12. The action plan that resulted from the SAT meeting was to place the Student in a small daily reading group and "reading recovery"<sup>5</sup> within his classroom, continue with LLI with the reading specialist, and review data and the Student's progress in one month. D6 p.5.

13. The SAT met again on November 17, 2015. The Student was reading "at the beginning of a first grade level" at this time, and was also distinguishing between sounds and letters, which was noted by the SAT to be a "huge step." D6 p. 3. His knowledge of sight words had increased, and he was writing 2-3 sentences when working with the reading specialist. *Id.* The Mother noted that the Student could not always remember what he had read, and she was concerned with his receptive and expressive reading ability. *Id.* at 3-4.

14. The Mother was also concerned that the Student was still struggling with reading, despite the LAP and LLI interventions he had received. She asked the SAT if they could meet again to evaluate the Student's progress, and the District said the team would meet again in about three months. The Mother understood this to be the typical intervention plan. Tr. 117 (Mother). However, the Mother felt that the Student should have been evaluated for eligibility for special education services in November of 2015. *Id.* at 521.

15. The Mother is "absolutely positive" that she asked for a special education evaluation of the Student at the November 17, 2015 SAT meeting. Tr. 118 (Mother). She testified that the District replied to her request essentially by saying, "Well, we like to have time for interventions, and so we'll talk about that at the meeting when we meet in February." *Id.* at 117-18. The Mother's request for an evaluation is not recorded in the SAT minutes; she does not know why. *Id.*

16. The Stepfather recalls the Mother asking for a special education evaluation at this meeting, as well. Tr. 242. (Stepfather). He recalls that the District responded that they "had plans to do interventions, and that you work through all of this process first, and then we'll take a look at that down the road." *Id.* at 243. He did not express disagreement with that plan at the meeting.

17. Linda McKinnon,<sup>6</sup> the District counselor, attended the November 17, 2015 SAT meeting and took the minutes/notes. She does not recall the Parents making a request for a special education evaluation at this meeting. Tr. 768 (McKinnon). If such a request had been made, she would have referred the Student to the Evaluation Team. *Id.* She did not think the Student needed a special education evaluation as of November 17, 2015. *Id.* at 769-72.

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<sup>5</sup> No evidence was presented as to what constitutes "reading recovery."

<sup>6</sup> Ms. McKinnon holds a bachelor's degree in early childhood development from Iowa State University and a master's degree in social work, and is a licensed clinical social worker. Tr. 756-57 (McKinnon).

18. Robert Lee<sup>7</sup>, the District reading specialist, also attended the November 17, 2015 SAT meeting. He does not recall the Parents requesting that the Student be evaluated for special education eligibility at the meeting. He stated, “[W]e would have arranged for that” if the Parents had asked. Tr. 718-19 (Lee). The ALJ finds the District witnesses and documentation to be more reliable than the Parents on this issue and finds that the Parents did not request a special education evaluation of the Student at the November 17, 2015 SAT meeting.

19. The Student attended therapy at Monroe Speech & Language Center from December 2015 to April 2016. D2 p. 6. In that therapy, he worked on word relationships, identifying words, vocabulary, and listening. *Id.*

20. The Mother exchanged emails with District personnel in February of 2016 in order to arrange the next SAT meeting. The Mother was heavily involved in the scheduling because she “really wanted to meet.” Tr. 124 (Mother). She was concerned about the Student and “did not want more time to go by.” *Id.* Her concerns stemmed from the fact that “it was already going into March, and I had contacted them the March before. And really, other than us meeting twice for this SAT, I didn’t feel like anything else had been done, other than the, you know, interventions through the SAT, so I was really concerned.” *Id.*

21. On March 1, 2016, (still the Student’s first grade year), the SAT met again and noted that the Student was reading more accurately and faster. Mr. Lee noted that things were “beginning to click” for the Student and that he was starting to progress. D6 p. 2. The Student was noted to do some self-correcting, which is a higher-level skill. The Student appeared to be motivated to learn and was improving his ability to retell stories. His writing was improving, but it was hard for him to re-read his own work. The Mother reported that she could not read what he wrote at home due to spacing and other factors. Often, the Student could not read what he wrote, either, and could not remember what it said. He was getting “heavy support” for sight words and it was noted, “In the past, he has not had any grasp on site [sic] words, but starting to see more improvement.” *Id.* at 2. This observation contradicts prior SAT observations regarding the Student’s grasp of sight words.

22. At the March 2016 SAT meeting, the Student’s math abilities were discussed and he was observed to “flip” numbers and signs, sometimes adding when he should subtract and vice versa. He needed guidance to solve more complex problems. Math was not identified as an area of concern, however, and was not mentioned in the SAT action plan. D6 p. 3. The SAT and the Parents remained concerned about the Student’s challenges with reading and writing and the speed of his progress compared to that of his peers. *Id.* at 2-3. The team decided to continue current interventions with close monitoring through the end of the school year. They planned to bring the Student back during the first two to three weeks of the next school year to “look at progress and make a decision about a referral to Evaluation Team.” *Id.* at 3. The action plan noted, “Monitor through end of year. SAT will meet week 2 or 3 to review data & progress. Pursuing or not pursuing a referral to Eval Team will be decided at that time.” *Id.* The Mother expressed concern that, with a new teacher in the fall, the Student would be starting all over again with the process. *Id.*

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<sup>7</sup> Mr. Lee holds a bachelor’s degree in education from Pacific Lutheran University, and a master’s degree in reading from Western Washington University. He was a classroom teacher in grades two and three for eight years in the District, and was a reading specialist in the District for 33 years. Tr. 704 (Lee). He is now retired.

23. Ms. McKinnon did not think the Student needed a special education evaluation as of March of 2016. Tr. 769-72 (McKinnon).

24. By March of 2016, the Mother understood that the special education evaluation team was different from the SAT. Tr. 524 (Mother).

25. At the March 2016 SAT meeting, Mr. Lee discussed concerns that the Student was not where he should be in terms of reading. The Mother did not feel that she was given a good explanation of how much progress the Student was making, and felt that she was given generalizations. When asked why the team decided to continue current interventions through the end of this school year, the Mother testified:

*They told me that that was what the process was, that they would continue to do the interventions. They wanted to see if he would progress through - Mr. Wentworth, the principal, said that he wanted Student to go to the summer school program again in the summer through the Children's Museum, through that grant he had done in kindergarten. And they said, you know, maybe after having done interventions for another semester and him doing the summer school, he would be able to be at standard, and so they wanted to wait to do testing. But then, as we - as Mr. Parent and I, I should say, voiced our concerns that I didn't want to wait another school year because then he'd be starting over with another teacher, we'd have the same issues that we've heard in October, that, "Well, we're going to need some more time with him to be able to give you data," because that's what they told us in October, and I didn't want to have to wait until November of second grade to be discussing it again. And so I asked. And when I questioned that, they said, "Well, we'll have to put him on the calendar for first thing in the fall to be evaluated."<sup>8</sup>*

Tr. 127-28 (Mother).

26. The Mother was asked at the hearing if it was her understanding that this (as she described above) was how the referral process worked, and she testified:

*Yes. That's what they told me. The principal, the counselor, the reading specialist, that's what they said was the process, and they - the school district has to have the opportunity to do interventions to see if the student can be - meet standard before they test them to put them on an IEP, because it's very costly. So, obviously, they want to try and get him to standard without having to put him in special ed and having being pulled out from the gen ed classroom, and so that was the process.... They were saying they didn't want to have to do that [put him into the special ed program], that that would be a three-year plan versus doing interventions for another semester. You know, it's not - obviously, it's costly, and if he could go to the summer program, which is free, then, you know, he might be*

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<sup>8</sup> The ALJ makes no finding(s) regarding the factual accuracy of this portion of the Mother's testimony. The testimony is considered only for the purpose of the statute of limitations analysis.

*at standard, is what they led me to believe. And I voiced my concern about waiting until the fall.*<sup>9</sup>

Tr. 128-129 (Mother).

27. After she voiced her concern at the March 1, 2016 SAT meeting, the Mother thought the special education evaluation referral was underway. Tr. 525 (Mother). The Mother does not believe the SAT initially informed her the evaluation would be in the fall. When she was later told that the Student was on the calendar for an evaluation in the fall, she asked Ms. McKinnon why it was going to take so long. The Mother believes Ms. McKinnon replied that the school psychologist was “backed up” and, “That’s when she will be able to meet with him.” *Id.* at 527. The Mother did not feel that she could question the timing or ask that the evaluation be performed sooner. *Id.* at 529-30.

28. On March 12, 2016, Ms. McKinnon sent an email to the SAT members and copied the Mother. She stated, “March 1<sup>st</sup> notes added to previous SAT documentation. I have shared w/Robin & she has him on her list as pending for fall 2016. See action plan.” P15 p. 1. (“Robin” refers to school psychologist Robin Arnold.) According to Ms. McKinnon, “pending” in this message means that the Student may or may not be referred to the special education evaluation team, “that we’re monitoring him and will look again at him in the fall.” Tr. 773 (McKinnon). She explained that she and Ms. Arnold use “pending” to “let each other know when students might be coming either way. So, semantics, but yes, that’s a pending, may or may not.” *Id.* at 781. She did not know whether a parent would understand this use of the term “pending.” When asked, “If I said to you, ‘I have a vacation pending,’ would that mean I may or may not go on vacation?”, Ms. McKinnon responded, “That - well, it means you probably were going on vacation.” She never discussed with the Mother what she meant to communicate in this email. *Id.* at 781-82.

29. The Mother understood Ms. McKinnon’s email, and the consistent use of the term “pre-referral process” to describe the SAT team, to mean that the Student had been properly referred for a special education evaluation and that the SAT was the first step in the process. Tr. 128-129 (Mother).

30. On March 30, 2016, the Student’s first grade teacher, Shannon Heining, sent an email to the Mother. She stated, “I don’t recall giving you the update about potential future testing. Mrs. McKinnon shared with Robin Arnold our school psychologist the concerns we discussed at the last SAT meeting. Robin has Student down on her list as pending for fall 2016. So, all this hard work now (meetings, data collection...) will help speed the process up. I will make copies of the sight words data I recently collected and future assessments I feel valuable for Robin to see.” D8 p. 1.

31. In a subsequent email from Ms. Heining to the Mother, dated May 25, 2016, Ms. Heining said she was optimistic about the Student’s reading progress and, “I am hoping it will all click soon for [Student].” D9 p.2. When asked if she thought as of May 2016 that it had “all clicked in for him,” the Mother replied, “Not at all, no.” Tr. 134 (Mother).

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<sup>9</sup> The ALJ makes no finding(s) regarding the factual accuracy of this portion of the Mother’s testimony. The testimony is considered only for the purpose the statute of limitations analysis.

32. Mr. Lee measured the Student's reading progress throughout first grade. Tr. 720 (Lee). As of March 2016, Mr. Lee did not believe that the Student needed to be referred for a special education evaluation. *Id.* At the end of first grade, the Student was at a Developmental Reading Assessment (DRA) level of 6, which is within normal limits for a first grader. *Id.* at 724.

33. Robin Arnold<sup>10</sup> is the District psychologist who worked with the Student during kindergarten and first grade. Tr. 612 (Arnold). Ms. Arnold explained the referral process to the Mother in 2015 in connection with the Student's older Sibling.<sup>11</sup> *Id.* at 627. According to Ms. Arnold, when a teacher identifies that a student has needs that are not typical, the teacher will make a referral to the SAT as a first intervention. *Id.* at 670.

34. Response To Intervention (RTI) data gathered by the SAT is part of the District's "pre-referral" process. Kindergarten and first grade are developmental periods, and if children are not where they are supposed to be according to curriculum standards at that time, it does not necessarily mean they have a disability. RTI analysis gathers data to see if a student is making progress. Tr. 657 (Arnold). A student's progress is monitored to see if interventions work. *Id.* at 658. It is not unusual for a student to receive interventions from the SAT for an entire year. *Id.* at 693.

35. Ms. Arnold consistently referred to the SAT as the "pre-referral process." Tr. 651-52 (Arnold). According to Ms. Arnold, "the special education evaluation process and the pre-referral process are one and the same. We go through the pre-referral process before we enter into a special education eligibility, if we're doing our due diligence, to make sure that this is not a child that just requires targeted intervention." *Id.* at 674. A referral for a special education evaluation is the next step in the process if a student does not respond to SAT interventions. *Id.* at 690-93.

36. Ms. Arnold denied that her schedule was too busy in March of 2016 to permit her evaluate the Student, and described the "overload" procedure whereby another psychologist would have performed the evaluation had she been too busy. Tr. 631-32 (Arnold).

37. The summer after first grade, the Student attended the same intensive summer school program that he had attended after kindergarten, four days per week for eight weeks. D15 p. 2.

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<sup>10</sup> Ms. Arnold holds a bachelor's degree in psychology from the University of Washington, a master's degree in school counseling from Seattle University, and an education specialist degree in psychology from Seattle University. She has worked as a school psychologist for 14 years and is nationally board certified in school psychology. Tr. 610-11 (Arnold).

<sup>11</sup> The Parents have an older child, the Student's Sibling, who was referred for a special education evaluation in June of 2015, which was the end of the Sibling's fourth-grade year. It is unclear how or by whom the Sibling was referred for this evaluation. The Mother contends that the January 13, 2015 email, described in Finding of Fact No. 7, was the referral. Tr. 497 (Mother). However, the referral date indicated in the Referral/Review of Referral for Special Education Evaluation of the Sibling is June 9, 2015. D4 p.1. The Referral Team did not recommend a special education evaluation of the Sibling. *Id.* at 3. The District explained to the Mother that the Sibling was not "low enough on the scale" to receive special education services. She did not dispute this decision. Tr. 503-04 (Mother).

38. On September 26, 2016, at the start of the Student's second grade year, the Mother emailed his classroom teacher, Ms. Koznek.<sup>12</sup> P17. She asked if Ms. Koznek could send books home with the Student. She also mentioned the Student's frustration with the classroom reading tests, and that he was not doing well because he could not read the questions. She asked if it was possible to have someone read the questions to him. When asked why she sent this email, the Mother testified:

*Because I was really concerned about Student and his class, specifically. We had gone to Back to School Night, and Ms. Koznek had spoken to the parents about curriculum, which is what they often do, and talk about what they're going to cover for the, you know, next few months. And one of the things that she discussed was that – she pointed out that there were some kids' names on cabinets, on the cabinet doors up above, and that they had pictures of chapter books with their name. And she explained that when a student finishes a chapter book, she would make a photocopy and put it up on the cabinet, and then once they had hit 10, she would shrink them and put them on a ring and they'd start over. And a parent asked, you know, "I don't see my child's name up there." And she said, "Well, once your child reads a chapter book I will put their name up there with their first chapter book." As knowing where my son was at this point and knowing that we were supposed to be pushing forward and I knew that he had not done – had any kind of significant growth from the second year of summer school, this was devastating to hear.... There were multiple other parents in there who were teachers, whose kids were in there who I knew were reading chapter books, and Mr. Parent and I just looked at each other and shook our head [sic], because we knew that our child probably would never read a chapter book in all of second grade, let alone get put up on this cabinet and that this would be a constant reminder for him in this classroom. And I wanted to reach out to her and talk to her about the fact that he is struggling, and I wanted her, you know, to know that he is frustrated and disappointed, and I wanted her to be aware that Student was struggling.<sup>13</sup>*

Tr. 136-37 (Mother)(emphasis added).

39. On October 4, 2016, during the Student's second grade year, the SAT met again. It noted that, at times, the teachers, the Parents, and the Student himself had difficulty reading what he had written. On his math sample work, the Student had 6 out of 16 correct and "1 out of 7 in the proficient category."<sup>14</sup> D6 p. 1. The Student's reading skills had improved, but his spelling was inconsistent. He could spell words one day but not the next. He knew 91 out of 100 sight words. Phonics were a "definite challenge" for him. The Parents stated that "this is what they have seen with the Student all the way along." *Id.* They were concerned that the Student was aware that he was not able to do what his same-age peers were able to do, and expressed that they were

<sup>12</sup> Ms. Koznek holds a degree in home economics with an emphasis in child development from Western Washington University. She is qualified to teach K-12 and has taught kindergarten, first grade, and second grade since 1991. Tr. 785 (Koznek).

<sup>13</sup> The ALJ makes no finding(s) regarding the factual accuracy of this portion of the Mother's testimony. The testimony is considered only for the purpose of the statute of limitations analysis.

<sup>14</sup> The meaning of this note was not made clear at the hearing.

"worried." The District staff observed that the Student's learning was inconsistent, in that he would understand a concept one day but not know it the next. *Id.* While inconsistent learning is not unusual in younger children, if it fails to improve, it needs to be assessed. Tr. 738-39 (Lee).

40. Ms. Koznek shared the Student's work samples at this meeting, as well as work samples of average same-age peers. Compared to the same-age peers, the Student's work was illegible. This was the most significant example the Mother had seen that her son was not at standard; she referred to it as a "devastating" moment for her as a parent, seeing what a child his age is supposed to be doing versus what he was actually capable of doing. Tr. 139 (Mother).

41. The SAT decided to make a "formal" referral to the evaluation team for a special education evaluation at this meeting on October 4, 2016. D6 p. 2. When asked why she thought a referral was made at this particular meeting, the Mother stated, "Because we were asking for it." Tr. 141 (Mother).

42. The Student was at a DRA level of 8 in October of 2016. He had ended first grade at a level 6. An 8 is the level at which Mr. Lee "would generally like to see kids to be in their first-grade year in December." Tr. 721 (Lee). The Student's reading level was, however, within normal limits. *Id.* at 725. Mr. Lee does not believe that a special education evaluation should have been recommended earlier than October of 2016. *Id.* at 730.

43. In January of 2017 (mid second grade), the Student was at a DRA level of 16. This is where children are expected to be at the end of first grade, and was seven months better than the Student had tested in the fall of 2016. Tr. at 726 (Lee). As of January 2017, Mr. Lee assessed the Student to be making "solid progress." *Id.* at 727.

## EVALUATIONS

44. Based upon the recommendation of the SAT, a special education initial evaluation of the Student was performed in late 2016 and early 2017 by District school psychologist Stephanie Vincent.<sup>15</sup> The evaluation team was "on the fence" regarding whether to evaluate the Student in the area of math, but decided to do so in order to have a comprehensive evaluation. Tr. 827-28 (Vincent). The Prior Written Notice proposing to evaluate the Student, dated November 7, 2016, states, in part, "The data available does demonstrate significant academic concerns and delays in reading, math and writing. Plus, he may qualify for and be in need of specially designed instruction." D13 p. 1.

45. The speech/language portion of the evaluation was conducted by Laurena La Porte,<sup>16</sup> District speech/language pathologist, and the fine motor assessment was conducted by Marci Ameluxen, District occupational therapist.<sup>17</sup> D15.

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<sup>15</sup> Dr. Vincent holds a bachelor of arts in psychology from Whitman College, and a doctorate in school psychology from the University of Oregon. She has worked as a school psychologist since 1993. Tr. 822-23 (Vincent).

<sup>16</sup> Ms. La Porte holds a bachelor's degree in sociology and a master's degree in communication sciences and disorders from Western Washington University. She is a nationally certified speech/language pathologist.

<sup>17</sup> Ms. Ameluxen did not testify and her credentials were not presented at the hearing.

46. The evaluation determined the Student's overall level of performance to be in the above average range of cognitive functioning compared to other children his age. D15 p. 4.

47. The Wechsler Individual Achievement Test - Third Edition (WIAT-III) basic reading composite showed the Student to be in the below average range for basic reading. D15 p.4. His written language assessment score on the Oral and Written Language Scales Second Edition (OWLS-II) written expression test was in the deficient range and was below the first percentile. Conventions, such as capitalization, spelling, and punctuation, as well as sentence structure and function words, were the most difficult concepts for the Student. *Id.*

48. The Student's receptive/expressive language skills were mostly within the average range, with the exception of following directions. His articulation, voice, and fluency were all within normal limits. His fine motor skills were within normal limits. D15 p. 5.

49. The 2017 evaluation determined the Student continued to struggle with reading despite multiple interventions. His deficits in basic reading skills, fluency, and comprehension inhibited his ability to access grade level reading material in all areas, and inhibited his ability to acquire knowledge through the reading process. His struggle with basic writing skills made it difficult for him to communicate his ideas clearly in writing, and made it difficult to progress in the general education curriculum. D15 p. 7. It was determined that a significant discrepancy existed between the Student's cognitive potential and his current academic skills in the areas of reading comprehension, basic reading and written expression. Tr. 845-50 (Vincent).

50. On the WIAT-III mathematics composite test, the Student's score of 88 fell within the average or expected range for his age. He demonstrated mastery, with 100% accuracy, of several skills, including single digit addition and subtraction. D15 p. 5. The Student's test scores in mathematics problem solving and numerical operations were average.<sup>18</sup> *Id.* These are the scores that are used by the District to determine whether a specific learning disability (SLD) in mathematics exists. The Student's score of 91 in numerical operations did not meet the discrepancy criterion for an SLD. *Id.* at 9; Tr. 836-845 (Vincent).

51. The Student's score of 87 in mathematics problem solving did meet the criterion for a discrepancy. However, there are two other prongs that must be satisfied in order to be eligible for special education to address an SLD: an adverse educational impact, and the need for specially designed instruction (SDI) in order to access one's education. Tr. 838-89 (Vincent). The Student did not meet either of these prongs. The Student's score of 87 was in the average range, which indicated that he did not experience an adverse educational impact in math problem solving; and SDI was not needed because he was making adequate progress in math in the general education curriculum. Tr. 838-845 (Vincent); D15 pp. 9 and 19.

52. As part of the evaluation, Dr. Vincent observed the Student for twenty-three minutes during an LLI reading group. She monitored his level of engagement, compliance with directions, and response to questions. D15 p. 10.

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<sup>18</sup> The Student's numerical operations score range is erroneously listed as "below average" on Exhibit D15, p. 17. The score of 91 is actually in the average range. Tr. 836 (Vincent).

53. The Student's second grade classroom teacher, Ms. Koznek, was a member of the evaluation team. D15 p. 14. She informed the team that the Student was making adequate progress in math and that he did not require any outside additional supports for math. Tr. 849 (Vincent).

54. An assistive technology (AT) evaluation was not performed because it was not requested or raised as an area of concern. Tr. 855 (Vincent); D13 (the Prior Written Notice and assessment plan for the evaluation do not mention AT).

55. A meeting was held on January 19, 2017, to discuss the initial evaluation. D15 p.14. At the meeting, the Parents questioned the math ineligibility determination. The Parents were informed by Dr. Vincent that they could request a reevaluation in math if the Student's skills slipped or if math became an area of concern. Tr. pp. 852-53 (Vincent).

56. On January 19, 2017, the Student was found eligible for special education services under the category of specific learning disability. He was deemed eligible for SDI in reading (basic reading and reading comprehension) and written expression. D15 pp. 12 and 19. The evaluation report states, under Recommended Interventions/Accommodation, that the Student "may" benefit from continued access to adaptive word processing programs to assist with spelling when composing longer writing assignments, and that voice to text software "might" help him with the writing process and "getting thoughts onto paper." *Id.* at 12.

57. The Student had either approached performance expectations or met performance expectations for mathematics throughout first grade. D32 p. 6. The Student's progress report for second grade indicates that he was either approaching performance expectations or meeting performance expectations for mathematics throughout second grade. *Id.* at 3. Ms. Koznek did not have concerns about the Student's math performance and thought "he was on his way, making gains." Tr. 789 (Koznek).

58. Neither the Parents nor the Student's teachers requested a math reevaluation in second or third grade. Tr. 854-55 (Vincent).

59. Dr. Vincent conducted a reevaluation of the Student in February of 2019, after the Parents filed the Complaint in this action. The Student was reevaluated in reading, writing, math, executive functioning, and communication. D29 p.1; Tr. 857 (Vincent).

60. Based on the reevaluation, the Student continued to qualify for special education in the area of basic reading. He no longer qualified in reading comprehension because his score of 94 was well within the average range, as were his two subtest scores, and he was reading at grade level. Tr. 858-59 (Vincent); D29 p.5. His reading comprehension and fluency scores had improved substantially, going from the fifth percentile to the 34<sup>th</sup> percentile. D29 p. 5.

61. At the time of the reevaluation, the District was aware that the Student had been diagnosed with dyslexia, but it did not have a copy of the diagnosing report. Tr. 873 (Vincent).

62. The reevaluation determined that the Student qualified for special education in math problem solving. D29 p. 13; Tr. 861-864 (Vincent). He scored in the average range for numerical

operations,<sup>19</sup> but below average for math problem solving with a score of 81. D29 pp.7 and 20. This was a "cutoff" score for academic underachievement, meaning that he came close to not qualifying for services. Tr. 863 (Vincent). Nonetheless, he demonstrated a significant deficit in the area of math problem solving which was deemed to adversely impact his ability to apply calculation skills and make inferences when solving math word problems. The Student was determined to require SDI in math to increase his ability to consistently identify operations in word problems, interpret graphs, interpret a calendar, identify place value, and perform other skills. D29 pp. 11 and 20.

63. The Student remained eligible for services in the area of written expression, but his skills had improved substantially. He had moved from the first percentile to the 10<sup>th</sup> percentile, which is just below the normal range. D29 p. 6; Tr. 864-65 (Vincent).

64. Based on the reevaluation, the Student became eligible for special education services in the area of social/behavior, specifically executive functioning skills. D29 pp. 26 and 37; Tr. 870-872 (Vincent). The Comprehensive Executive Functions Inventory (CEFI) indicated the Student had weaknesses in initiation and organization, as well as attention and working memory. He was determined to need support with cueing himself to start on tasks, complete homework on time, manage his time and workload, and work neatly. He also needed to improve his ability to complete work that is uninteresting to him, to remain focused around noise, and to work well for longer periods. D29 p. 26.

65. An AT assessment was performed as part of the reevaluation. The AT team, comprised of an occupational therapist and a speech/language pathologist, collaborated with the IEP team to determine what types of AT the Student currently used, and whether there are other technologies that could benefit him. D29 p. 34. It was determined that the Student was already using graphic organizers, voice typing, fidgets, and a scribe. The AT team made several suggestions that were discussed with the Student's teachers. *Id.* at 34-36. The reevaluation concluded that the Student was using both low and high tech AT tools but needed prompts and cues in order to use them consistently. *Id.* at 36.

66. As part of the reevaluation, Dr. Vincent observed the Student in his general education classroom for a little over an hour, during math instruction. Tr. 876 (Vincent). Part of the observation occurred right after recess. Dr. Vincent observed the Student to write his name so rapidly on a worksheet that he left out a letter. She observed his name writing to be "haphazard, quick, not best work... he was doing it very quickly.... he finished before the other kids." *Id.* at 876-77. It was her impression that the Student "absolutely" knew how to write his name at the time. *Id.* at 877. The Student wrote his first and last name clearly when working with Dr. Vincent on his reevaluation tasks, though she did not check to see if it was spelled correctly. *Id.* at 890-91.

67. During the classroom observation, the Student was noted to engage in frequent off-task peer interactions. He often talked while the teacher was talking or when another student was answering a question. When given group direction, he complied 31% of the time. He was academically engaged approximately 49% of the observation time. D29 p. 10. While filling out a math worksheet, the Student worked very quickly. When the teacher asked him to stop writing

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<sup>19</sup> There is an error on D29 p. 20, in that the score of 87 in numerical operations should be categorized as average, not below average. Tr. 862-63 (Vincent).

and asked him a question about the first problem, she had to physically cover his page with her hand so he would not continue writing while she was talking to him. She also had to prompt him to erase before changing his response and writing over his previous response. *Id.*

68. Dr. Vincent observed that the Student exhibited more difficulty with the testing in the reevaluation than he had previously exhibited. He had difficulty remaining focused and remembering what questions had been asked. He frequently needed to have questions repeated. D29 p. 20; Tr. 865-66 (Vincent). He was very distracted by the origami paper he had brought with him to the testing. He did not attempt to slow down to decode unfamiliar words, but would simply guess a word with a similar beginning letter. He lost his place frequently while reading. He did not go back to look at text, or reread to confirm his answers, on most reading comprehension questions. When writing, he did not attempt to edit or improve what he had written. His legibility was impacted by the fact that he wrote over words and letters without first erasing. D29 p. 20.

69. Several members of the reevaluation team suggested that "other health impairment" would be a more appropriate primary disability category for the Student, due to the impacts of his ADHD. Dr. Vincent, the classroom teacher and the special education teacher all agreed that the Student's ADHD and associated symptoms represented his primary disability, rather than his learning disabilities. Changing the category was discussed at the reevaluation team meeting, but the Parents ultimately decided that they did not want the eligibility category changed. Tr. 868-869 (Vincent); D29 p. 37.

#### THE IEPs AND THEIR GOALS

70. The Student has had three IEPs since being found eligible for special education. The first IEP is dated February 9, 2017. D16. It was written by District special education teacher Katie Finley.<sup>20</sup> It provided for 60 minutes of reading SDI and 45 minutes of writing SDI per week. *Id.* at 7. The IEP was discussed by the IEP team, and the Parents never asked for an increase in these minutes. Tr. 541-48 (Mother).

71. Ms. Finley was only at Whittier Elementary (the Student's school) on Mondays, Wednesdays and Thursdays during the 2017-18 school year, so she could not provide instruction to the Student every day. The Parents contend that Ms. Finley's schedule and availability impacted the number of minutes of SDI provided to the Student in the first IEP. Tr. 597 (Mother). Ms. Finley denied this. Tr. 1061 (Finley). Ms. Finley is more credible as to this issue. It is found that her work location and schedule did not influence or impact the number of SDI minutes the Student received under any of his IEPs.

72. The 2017 IEP sets forth four goals for the Student at D16 pp. 3-4:

- 1) By 1/8/18,<sup>21</sup> from personal experience or text read with him, Student will be able to improve writing skills to write an informative or opinion paragraph FROM a paragraph with no introduction and one long run-on sentence TO a paragraph with at least 1 sentence for

<sup>20</sup> Ms. Finley holds a bachelor's degree in business administration from the University of Puget Sound and a bachelor's degree in elementary education from Bloomsburg University. She holds an endorsement in special education and is board certified in special education. Tr. 996-99 (Finley). She has taught special education since 2003.

<sup>21</sup> It is unclear, based on the record, why January 8, 2018, is the date by which the goals are to be achieved.

the topic, 2 sentences with details/reasons about the topic and 1 sentence for a conclusion on 2 out of 3 trials according to teacher made assessments.

- 2) By 1/8/18, Student will improve writing conventions by using a rubric or checklist to edit his work for correct beginning a sentence [sic] with capitals and ending punctuation FROM using capitals correctly 17% of the time and punctuation 0% of the time TO 75% correct capitalization and ending punctuation on 2 out of 3 trials according to teacher made assessments.
- 3) By 1/8/18, when given an Oral Reading Fluency at a 2<sup>nd</sup> grade level, Student will improve FROM read 31 words correct per minute with 82% accuracy TO read 90 words per minute with 96% accuracy according to fluency test (Dibels, QRI, etc.).
- 4) By 1/8/18, Student will improve reading comprehension on a 2<sup>nd</sup> grade passage FROM not able to correctly answer the main idea comprehension question TO answer implicit and explicit questions with 80% accuracy according to grade leveled assessments (QRI, DRA, etc.).

73. Ms. Finley determined that these goals were appropriate based on the Student's ability and present levels of performance, as determined by the 2017 evaluation and as provided by his classroom teacher. Tr. 1003-8 (Finley), 790 (Koznek). The timeframe for achievement of IEP goals is one year. D21.

74. The IEP was discussed by the IPE team. The Mother had concerns about the goals but did not disagree with them at the IEP meeting because she felt that the special education teachers knew what the Student was capable of doing. Tr. 154, 541-42 (Mother).

75. In April of 2017, Ms. Finley emailed Ms. Koznek and stated that the Student had asked her how to spell "he". P24. This concerned the Mother. Ms. Koznek testified that the Student knew how to spell "he" at this point and was simply asking for the spelling, rather than doing the work to spell the word himself. Tr. 801 (Koznek). Ms. Finley also testified that the Student was able to spell "he" at this time. She had seen him spell the word correctly and he had "definitely" spelled more complex words correctly, as well. Tr. 1036 (Finley). No finding of fact is reached as to this issue; the evidence regarding whether or not the Student could spell "he" at this point is not relevant and is not given any weight.

76. The Student came close to achieving the first IEP goal within a year but did not have a conclusion in his paragraph. Tr. 1021 (Finley); D21 p3. He achieved the second goal. Tr. 1022 (Finley).

77. With regard to reading, the Student progressed from a beginning second grade level to an ending second grade level during the course of the 2017 IEP. Tr. 1023 (Finley). He achieved the accuracy portion of the third goal but not the speed portion. *Id.* at 1023; D21 p. 4. He was close to achieving the fourth goal, with a 75% accuracy rate. Tr. 1023 (Finley).

78. He also approached performance expectations for reading and writing throughout second grade. D32 p. 4.<sup>22</sup>

79. At home, the Student was not exhibiting the progress toward these goals that was observed by Ms. Finley. Tr. 152-160 (Mother).

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<sup>22</sup> There is an error on D32 p. 4. The "1" listed for S2 in Range of Reading should be a 2. Tr. 797 (Koznek).

80. The IEP was amended on March 10, 2017, to add various accommodations. These included a small-group setting and use of text-to-speech technology during state-mandated testing. D18. The IEP was amended again on October 11, 2017, to include a diagnosis of dyslexia from an outside agency. D20.

81. The Student's second IEP is dated February 6, 2018. D22. This IEP notes that the Student was diagnosed with dyslexia by an outside agency as of October 11, 2017. D22 p. 2. It identifies as an accommodation, "Text to speech (for math scenarios & items; for ELA<sup>23</sup> items & stimuli, not reading passages)." D22 p. 5. Text-to-speech and speech-to-text software are identified as needed accommodations/modifications. *Id.* at 7.

82. The 2018 IEP sets forth four goals at D22 pp. 4-5:

- 1) By February 2019, given a mid-3<sup>rd</sup> grade reading passage, Student will increase reading skills FROM 74 words per minute at 93% accuracy TO 110 words per minute and 96% accuracy on 3 trials.
- 2) By February 2019, Student will improve reading comprehension on mid-3<sup>rd</sup> grade passage from 0% to 80% implicit and explicit questions on three trials.
- 3) By February 2018 [sic],<sup>24</sup> when responding to reading questions, Student will increase writing skills to be able to write a single paragraph (3-5 sentences) to clearly answer the question with details from the text and an explanation FROM needing adult support at each step TO independently writing a response on 2/3 trials.
- 4) By February 2019, when responding with a single paragraph to a reading question, Student will improve his editing skills to spell words found in the reading passage or in the question FROM 50% words spelled correct TO 90% of words spelled correct on 3 trials.

83. Ms. Finley used the Student's present levels of performance, which are set forth in the IEP, to develop these goals. D22. The goals were discussed with the Parents at the IEP team meeting, and the Parents did not express concern or disagreement with them. Tr. 1025 (Finley).

84. The number of minutes of SDI the Student was receiving increased in the 2018 IEP, from 105 to 120 per week. D22 p. 8. This increase was recommended by Ms. Finley because the Student had not achieved all of his goals from the prior IEP. Tr. 1027 (Finley). Ms. Finley's observation was that the Student understood the concepts he was working on and that his reading had definitely improved. *Id.* at 1027-28.

85. The February 2018 IEP was amended on October 5, 2018, to add a diagnosis of dysgraphia from an outside agency. D25 p. 4. The IEP was amended again on November 26, 2018, in response to concerns raised by the Parents via the filing of the Complaint in this action, and the Student's minutes of special education for reading and writing were increased to 150 each. D29 p. 45.

86. The Student came close to achieving the first goal of the 2018 IEP in that he achieved the accuracy rate but not the speed goal. D28 p. 1. Ms. Finley observed that this progress was "really

<sup>23</sup> "ELA" stands for English Language Arts.

<sup>24</sup> This appears to be an error. The year should be 2019.

good” and that he was reading at a mid-third grade level as of January 2019 (the Student’s fourth grade year). Tr. 1038 (Finley). The Student also came close to achieving the second goal in that he answered 75 percent of inferential and comprehension questions correctly (the goal was 80%). *Id.*; D28 p. 1.

87. The Student achieved the third goal of the 2018 IEP in that he was able to write a 3-5 sentence paragraph. D28 p.1. He also achieved the fourth goal. *Id.* at 2. Ms. Finley observed that the Student was making slow but consistent progress using the strategies and tools with which he had been provided. His success was increasing in both general education and special education. Tr. 1041 (Finley).

88. Ms. Finley monitored the Student’s progress, in part, through work he performed in his general education classroom. She saw both edited and unedited work samples. Tr. 1065 (Finley). However, she relied on her own direct observation of the Student’s writing to monitor progress. *Id.* at 1056. Ms. Finley firmly believes that the Student is able to read information in order to learn. *Id.* at 1038-39.

89. Jennifer Reyes was the Student’s classroom teacher for the 2017-18 school year (third grade).<sup>25</sup> That year, the Student was in a small reading group of five students with similar skills. Ms. Reyes noted that the Student was able to read the required text and understand it, and to ask and answer questions. He shared responses with the group and did not lack confidence in doing so. She felt he was making steady progress and was not significantly below grade level in reading. Tr. 950, 959 (Reyes). He was approaching or meeting performance standards for reading and writing throughout third grade. He was never “below performance expectations” for reading or writing in third grade. D32 p. 1.

90. The DRA that had been used in previous years to assess reading was no longer used in the 2017-18 school year. Rather, the “i-Ready” assessment was piloted. As of May 2018, the Student was approaching level 2 in overall performance. D31 p.2. A level 3 is the on-standard i-Ready level for third grade. Tr. 954 (Reyes). The Student had been at a level 2 in January of 2018 as well, so had made no progress in that time period, according to the assessment. *Id.* at 955. As of May 2018, the Student had “tested out” of third grade standards for phonological awareness, which means he met the standard and did not need to continue to practice in that area. He had also tested out of high-frequency words. He was on-standard for comprehension. Phonics was at a level 1, which is below grade level. *Id.* at 954-57. The i-Ready indicated that the student had not acquired fundamental decoding skills and needed instruction in phonics. Vocabulary was also an area of concern. D31 p.2.

91. The Student’s third grade progress report, completed by Ms. Reyes, indicated that he was either approaching or meeting performance standards for mathematics throughout the year. He was never “below performance expectations” for math in third grade. D32 p. 1.

92. The Parents communicated to Ms. Reyes in January of 2018 that they did not want the Student working on math worksheets at home. Tr. 970-73 (Reyes). Ms. Reyes referred the

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<sup>25</sup> Ms. Reyes holds a bachelor’s degree in elementary education from Western Washington University, and an administration certificate in educational leadership. She is certificated to teach elementary education. She was a classroom teacher for six years and is now an assistant principal at two District elementary schools. Tr. 945-46 (Reyes).

Student to an afterschool program that provided extra math practice, but the Parents did not want the Student to attend. *Id.* at 974. Ms. Reyes did not believe the Student needed specially designed instruction in math while in third grade because he was meeting or approaching the standards. *Id.* at 976.

93. The Mother disputes the accuracy of Ms. Reyes' assessments of the Student. In the Mother's experience from working with him at home, the Student did not know multiplication and division well enough to get a 3 ("at standard") in mathematics. Tr. 353 (Mother). The Mother finds it "shocking" that the Student was assessed as 3 on "speaking and listening." *Id.* at 354. She also believes, regarding the "reading key ideas" and "writing" assessments, that he was not at standard or approaching standard. *Id.* 355.

94. The Mother never observed the Student in his third grade classroom. Tr. 565-66(Mother).

95. Throughout third grade, the Student used a ChromeBook for writing, and sometimes used the speech-to-text software on the ChromeBook. Tr. 961 (Reyes). The Student had access to a ChromeBook the majority of the time he was in class and this adequately met his need for the device. *Id.* at 988 and 993.

96. Ms. Reyes worked one-on-one or in small groups with students who needed additional support for writing. Tr. 961 (Reyes). She would brainstorm with the students and sometimes scribe for them. She would sit side-by-side with them and confer, looking through their writing, adding details, making changes and editing. *Id.* at 963.

97. Exhibit P67 shows the Student's unedited third grade general education writing drafts, as well as the edited final products. The differences between the two are stark. The Student wrote in one draft, for example, "I see pineios, I weta a 000,1 dollars...I touch my jagin pet." The final product, with Ms. Reyes' assistance, became, "I see a volcano guy, I want 1,000 dollars...I touch my dragon pet." P67 p. 2. Ms. Reyes explained that she would talk through the sentences, the Student would explain what it was describing, and she would prompt him by asking, for example, "Do you mean dragon?" She used this type of prompting with other students. The Student's drafts did not raise concerns for Ms. Reyes and she did not discuss the draft essays with the special education teacher. Tr. 991-92 (Reyes).

98. The Student's third IEP is dated February 14, 2019. It addresses SDI in the areas of reading, written expression, math and social/behavior. D30 p. 3. Math minutes of 120 per week were added, as were 30 minutes of behavior/social skills. *Id.* at 14.

99. Ms. Finley has not had concerns about the Student's rate of progress in special education. If she had, she would have reconvened the IEP team. At no point prior to filing the Complaint in this action did the Parents express concern over the Student's progress in special education. Tr. 1041 (Finley).

100. The Stepfather formed the opinion that something was "severely wrong with the help the Student had been getting at school" when he saw examples of the Student's writing of his name in September of 2018 (fourth grade). Tr. 221 (Stepfather).

101. Currently, in his fourth grade year, the Mother has observed the Student to be unable to write complete sentences and unable to spell. She cannot understand his written work. Tr. 55-56 (Mother).

#### PRIVATE SERVICES AND EVALUATIONS

102. Stacy Cecchet<sup>26</sup> is a clinical psychologist who began working with the Student and his family approximately five years ago. The family came to her because the Student was struggling with behaviors such as noncompliance, impulsivity, hyperactivity, and executive functioning deficits. According to Dr. Cecchet, the noncompliance was confusion-based, rather than a form of defiance. Tr. 364 (Cecchet).

103. Dr. Cecchet diagnosed the Student with ADHD in 2014, and with dyslexia and dysgraphia in June 2017. Tr. 384, 392 and 424 (Cecchet).

104. Dr. Cecchet recommended that the family refer the Student for a special education evaluation as early as the middle of kindergarten. Tr. 402 (Cecchet); P60 p. 2. However, she does not think it is unreasonable that he was not evaluated at that time because sometimes children only need an extra "boost" of services and not necessarily special education. Tr. 402-03, and 433 (Cecchet). She believes the Student should have been evaluated for special education eligibility by the middle of first grade, and she thought the Parents had referred the Student for an evaluation by that time. *Id.* at 435.

105. Dr. Cecchet wrote a letter regarding the Student at the request of the Parents' attorney in this action in January of 2019.<sup>27</sup> P60; Tr. 364-65 (Cecchet). The letter states that the Student has struggled significantly with reading, writing and mathematics for the entire time she has worked with him. It also states that the Student has been denied an appropriate public education by the District's refusal to conduct an IEP evaluation in first grade and, instead, referring him to the SAT. P60 p. 2.

106. Dr. Cecchet does not believe the Student has been getting appropriate services from the District because, in her opinion, the District: did not evaluate the Student for special education eligibility as early as it should have, "never" provided special education service for mathematics, denied special education in the area of speech/language, and has not provided targeted interventions for dyslexia and dysgraphia from an educator trained in "comorbid learning disabilities and ADHD." P60 pp. 2-3; Tr. 416-17 (Cecchet).

107. Dr. Cecchet's current recommendation is that the Student receive: significant one-to-one support from an expert trained in intervention for dyslexia and dysgraphia and in serving children with ADHD; speech and language intervention for at least 30 minutes per week for expressive and receptive language to promote and support progress with reading and writing; targeted mathematics support; and support for executive functioning deficits, such as interventions to

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<sup>26</sup> Dr. Cecchet holds a bachelor's degree in psychology from the University of Puget Sound, and a master's degree and Ph.D. in clinical psychology from Seattle Pacific University. She is board certified in couple and family psychology. Tr. 390 (Cecchet); P59. She has been an adjunct faculty member at Seattle University and the University of Puget Sound.

<sup>27</sup> The letter erroneously shows a date of 2018. The correct year is 2019. Tr. 365 (Cecchet)

increase planning and organization, sustained attention and concentration, and self-monitoring. P60 p. 2.

108. Dr. Cecchet has not observed the Student in school classes, has not spoken with his teachers, and has not performed academic work with the Student. Tr. 417 (Cecchet). She based much of her opinion on feedback from Andrea Liddane, a private tutor she recommended for the family. *Id.* at 422.

109. At no point did Dr. Cecchet believe that the District was intentionally failing to serve the Student, or intentionally neglecting its responsibilities. She observed the Mother to be enthusiastic and supportive of the interventions the Student was receiving at school even though the Mother felt he was not making much progress. Tr. 431-32 (Cecchet).

110. The Student worked with tutor Andrea Liddane<sup>28</sup> from December 2016 through October 2017 (part of the Student's second grade year and the start of third grade). The Student saw Ms. Liddane approximately once a week for approximately sixty minutes. She observed the Student to be struggling with his self-esteem and with reading. She noted he was "very obviously delayed" in reading. Tr. p. 56 (Liddane). She did not work with the Student on math. *Id.* at 87.

111. Ms. Liddane did not administer any assessments to the Student, and did not observe him at school. Tr. 88-90 (Liddane).

112. Ms. Liddane contends that, while the Student worked with her, he did not know his alphabet completely and was not able to fully write it by himself. Tr. 61 (Liddane).<sup>29</sup> When presented with the Student's progress report for the first semester of third grade, Ms. Liddane was surprised at the assessment levels for reading that had been made by Ms. Reyes. Ms. Liddane stated that she "would think this was for a different student because...I can't imagine how he would be approaching grade level, given what I was seeing from him...in a one-on-one setting." *Id.* at 73. She also did not agree that the Student was at grade level for writing ability, given her observation that he was unable to write all the letters and did not know their sounds. *Id.* at 74.

113. The Student was assessed at Lindamood-Bell Learning Center in November of 2018, after the Complaint in this action was filed. The purpose of the assessment was to create an instructional plan for the Lindamood-Bell staff to implement; it was not intended to direct the instructional plan of other providers. Tr. 198 (Baker). Danielle Baker,<sup>30</sup> center director of Lindamood-Bell, was unable to explain in any meaningful way why certain assessments were selected to be administered to the Student or what their results showed. Some of the assessments that were administered were out of date, or were subtests or single components of larger

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<sup>28</sup> Ms. Liddane holds a bachelor's degree in American Ethnic Studies from the University of Washington and a teaching certification from Seattle Pacific University. She is certificated to teach K-8, and was a teacher in the Seattle Public schools for 5 years, teaching third, fourth and fifth grades. Tr. 53, 81 (Liddane). She does not hold a special education endorsement. *Id.* at 82.

<sup>29</sup> Although Ms. Liddane testified, subject to an ongoing objection, about her opinion as to the appropriateness of the Student's first IEP, she does not have an adequate foundation to opine as to the IEP, and that testimony has not been given any weight.

<sup>30</sup> Ms. Baker holds an associate's degree in interior design and business management. She is not a certificated teacher. Tr. 192-94 (Baker).

assessment measures, and they do not provide reliable information. Tr. 637-46 (Arnold). This assessment is not informative and Ms. Baker's credentials do not qualify her to opine on the issues that are relevant in this action. This assessment has not been given any weight.

114. Wendy Nelson<sup>31</sup> is a speech/language pathologist who specializes in dyslexia and owns Tiny Dog Dyslexia & Language Strategies in Everett, Washington. The Mother brought the Student to Ms. Nelson for a reading evaluation on February 11, 2019 (one month prior to the due process hearing in this matter). P50. Ms. Nelson performed a 32-minute assessment of the Student. Tr. 271 (Nelson); P50. The assessment shows the Student to be "poor" in word identification, and "very poor" in spelling, fundamental literacy ability, and sounds-symbol knowledge. P50 p. 3. It notes that the Student meets the criteria for dyslexia. The report states that the Student would benefit from interventions with an emphasis on phonological awareness, decoding, encoding, and written expression. It also suggests the use of AT, such as audiobooks and speech-to-text software, and extra time for assignments, among other things. *Id.*

115. Based on her assessment, Ms. Nelson recommends that the Student receive 30 minutes of reading instruction, twice per week, for anywhere from 18 months to three years, in order to complete an Orton-Gillingham-based instruction program. Tr. 274 and 295 (Nelson). Orton-Gillingham is a widely-recognized approach to teaching people with dyslexia to read. It emphasizes sequential, systematic and multisensory instruction. *Id.* at 268. Instructional components of Orton-Gillingham include phonological awareness, decoding, encoding, and written expression. These components are not unique to the Orton-Gillingham approach. *Id.* at 314-15.

116. Ms. Nelson is not aware of the method by which literacy intervention is delivered in the public school setting. Tr. 305 (Nelson).

#### DISTRICT SPECIAL EDUCATION READING INSTRUCTION

117. Lauren Weeden<sup>32</sup> is the District director of special education for the North Region. She oversees the reading and writing programs used in special education instruction. She is familiar with the Orton-Gillingham method as an umbrella of teaching strategies that are systematic, sequential and multi-sensory. Tr. 924-25 (Weeden). The method can be used one-on-one, in small groups, or with a whole class. *Id.* at 926.

118. One of the reading curricula used by Ms. Finley is called "Phonics They Use." It is similar to the Wilson method, which is based on Orton-Gillingham. According to Ms. Weeden, explicit instruction in phonological awareness and phonics is "incredibly necessary" for all students and has been proven to be successful. Tr. 927-33 (Weeden).

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<sup>31</sup> Ms. Nelson holds undergraduate and master's degrees in communication disorders. She also holds a Certificate of Clinical Competence through the American Speech-Language Hearing Association. Tr. 265-266 (Nelson); P58.

<sup>32</sup> Ms. Weeden holds a bachelor's degree in accounting and business management from Whitworth University, and a master's degree in special education from Pace University. She is a certificated teacher in New York and holds administrative credentials in Washington. She has taught special education in second and third grade, and in high school.

119. Ms. Finley also uses Wordworks, which is sequential and multisensory. Tr. 1015-16 (Finley). Ms. Finley opined that the strategies and methodologies she has been using with the Student for reading have been effective. He remembers them and can apply what he learns. *Id.* at 1016.

#### EXCHANGE OF DOCUMENTS BETWEEN THE PARTIES

120. There is conflicting evidence as to whether the Parents provided the District with any outside evaluations or progress reports regarding the Student, such as the Evergreen Speech & Hearing Clinic evaluation report dated June 19, 2015 (Exhibit D2), for consideration when evaluating or reevaluating the Student for special education eligibility. The Mother believes she gave the District the Evergreen Speech & Hearing report, and that the District took it and said "thank you for this." Tr. 106 (Mother). The date on which the Mother gave the District the report, and to whom she gave it, is unclear. The Mother does not recall. *Id.* at 513-514. It could have been when the Mother was discussing the Sibling with Ms. McKinnon. *Id.*

121. The Mother also believes she provided the report of the Monroe Speech & Language Center assessment of the Student, which was conducted on November 14, 2015, to the SAT at the November 17, 2015 meeting. D2 pp. 8-12; Tr. 120 (Mother). The assessment report is five pages long and is not dated. The SAT notes do not reflect that the report was provided. On cross-examination, the Mother could not confirm that she brought the report to the meeting. She said she might have sent it through District mail, adding, "I have no idea." Tr. 519 (Mother).

122. It is unlikely that the detailed Monroe Speech & Language report could have been written and provided to the Mother in two days, such that the Mother could have provided it to the SAT on November 17<sup>th</sup>. Because of this and the Mother's uncertainty, the ALJ finds that the report of the Monroe Speech & Language Center assessment of the Student, conducted on November 14, 2015, was not given to the SAT on November 17, 2015.

123. The testimony of Dr. Vincent and other District personnel are persuasive on the issue of other reports being provided. D29 p.3 (states that the District does not possess an outside report diagnosing the Student with dyslexia); Tr. 832-33 (Vincent) (the District did not possess the Evergreen Speech & Hearing Clinic evaluation report or the Monroe Speech & Language Center progress reports at the time of the 2017 evaluation); Tr. 909 (La Porte) (she had not seen the speech and hearing/language evaluations at the time of the 2017 evaluation). The ALJ finds that the outside evaluations were not provided by the Parents to the District for use in either the evaluation or reevaluation of the Student.

124. There is conflicting evidence as to when the Parents were provided with the required Notice of Procedural Safeguards (Safeguards) by the District. The Parents contend that they were not provided with the Safeguards until February of 2017, when they were told that the Student qualified for special education. Tr. 143 (Mother). According to the Mother, she "keeps very good files" and is extremely organized. She recalled that she put the papers from the February 2017 meeting into the Safeguards pamphlet, and that is how she found the papers in her file. *Id.* at 143.<sup>33</sup>

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<sup>33</sup> The Mother likewise denied ever receiving the Safeguards in connection with the referral of the Sibling for an evaluation. Tr. 143 (Mother).

125. Exhibits D13 p.2, and D15 p.31, as well as the testimony of Dr. Vincent, contradict the Mother's testimony. Dr. Vincent testified that she gave the Safeguards to the Parents on November 7, 2016. Tr. p. 831 (Vincent). She explained that she has a "process" whereby "I head into every meeting with one of those pamphlets and then I go back and write it in my documents. So I do it probably 150 times a year." *Id.* at 888. She concedes that she does not have a specific recollection of providing the Safeguards to these Parents. *Id.* The Prior Written Notice documentation of November 7, 2016, states that the Parent was offered a copy of the "Notice of Special Education Procedural Safeguards" and accepted it. D13 p. 2.

126. The Mother demonstrated a high degree of confusion as to when she provided various reports to the District. Her recollection regarding the timing of exchanges of paperwork with District is not reliable and her testimony on the issue of receipt of the Safeguards is not persuasive. The ALJ finds that the Parents were provided with the Notice of Procedural Safeguards on November 7, 2016, as indicated by the District.

## CONCLUSIONS OF LAW

### Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings 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 pursuant to these statutes, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *See Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Since the Parents are the party seeking relief in this case, they have the burden of proof. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof to resolve a dispute in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981); *Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). Therefore, the Parents' burden of proof in this matter is preponderance of the evidence.

### The IDEA

3. The IDEA and its implementing regulations provide federal funds 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). In order for a school district to provide a free and appropriate public education (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 . . .

*Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_\_, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Andrew 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 (9<sup>th</sup> Cir.), *cert. denied*, 583 U.S. \_\_\_\_, 138 S. Ct. 556 (2017).

5. Procedural violations of the IDEA amount to a denial of FAPE only if they:

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

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

#### Statute of Limitations

6. The Washington regulation concerning the IDEA statute of limitations provides, in pertinent part:

The due process hearing request must be made within two years of, and allege a violation that occurred not more than two years before, the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint except the timeline does not apply to a parent if the parent was prevented from filing a due process hearing request due to:

(a) Specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process hearing request; or

(b) The school district withheld information from the parent that was required under this chapter to be provided to the parent.

WAC 392-172A-05080(2). See 20 United States Code (USC) §1415(b)(6)(B) and §1415(f)(3); 34 Code of Federal Regulations (CFR) §300.507.

7. The Ninth Circuit Court of Appeals addressed the IDEA statute of limitations in *Avila v. Spokane School District 81*, 852 F.3d 936, 117 LRP 11513 (9<sup>th</sup> Cir. 2017).<sup>34</sup> In *Avila*, the parents asked the school district to evaluate their child for special education services based on the child's behavioral issues. The school district conducted an evaluation in December 2006 and concluded the child was not eligible for special education. A later reevaluation in 2008 determined the child was eligible for special education. The child was again reevaluated by the school district in early 2010. The parents disagreed with the results of that reevaluation, and on April 26, 2010, requested a due process hearing. One of the parents' claims was that the school district denied the child FAPE by failing to identify the child as eligible for special education as far back as the initial evaluation in 2006. The ALJ ruled, in part, that the Avilas' claims preceding the 2008 reevaluation were time-barred by the statute of limitations. On appeal, the district court agreed with the ALJ, and barred the Avilas' claims arising before April 26, 2008, two years before they requested a hearing. The Ninth Circuit, however, adopted a different analysis.

8. The Ninth Circuit held that the "discovery rule" applies, and the IDEA's statute of limitations requires courts to bar only claims brought more than two years after the parents knew or should have known about the actions forming the basis of their complaint. *Avila*, 852 F.3d at 945. The "knew or should have known" (KOSHK) inquiry is an element of the discovery rule, meaning that "the statute of limitations is triggered when 'a plaintiff discovers, or reasonably could have discovered, his claim.'" *Id.* at 940 (citing *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1147 (9<sup>th</sup> Cir. 2002)). The court acknowledged that the Avilas' awareness of evaluations of their child did not necessarily mean they knew or should have known of the basis of their claim against the school district. 852 F.3d at 944. The Ninth Circuit remanded the matter to the district court for a determination of when the Avilas knew or should have known about the alleged action(s) that formed the basis of their complaint. The district court entered its decision on remand in *Avila v. Spokane School District 81*, 2018 U.S. Dist. LEXIS 14152, 118 LRP 3933 (E.D. WA 2018), *aff'd*, 744 Fed. Appx. 506 (9<sup>th</sup> Cir. 2018), and found that three separate evaluations of the Avilas' child occurred between October of 2007 and April of 2008, including a special education evaluation conducted at the parents' request. The evaluations diagnosed the child with Asperger's Syndrome and autism. The court held that, as matter of law, by no later than April of 2008, the Avilas KOSHK of the injury caused to their child by the school district's failure to find him eligible for special education in 2006. 2018 U.S. Dist. LEXIS 14152 ¶14.

9. As the Ninth Circuit explained, other circuits have held:

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<sup>34</sup> Although the *Avila* Court considered the statute of limitations under the federal IDEA, WAC 392-172A-05080 is substantially similar to the federal statute of limitations and is subject to the same legal interpretation as its federal counterpart with respect to when a claim accrues.

*The "knew or had reason to know date" stems from when parents know or have reason to know of an alleged denial of a free appropriate public education under the IDEA, not necessarily when the parents became aware that the district acted or failed to act. See, e.g., Somoza v. N.Y. City Dep't of Educ., 538 F.3d 106, 114 (2d Cir. 2008) (holding that the "knew or should have known" date occurred when parent viewed a child's rapid improvement in a new program); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1288 (11th Cir. 2008) (holding the "knew or should have known date" occurred after new evaluation and declining to hold that "famil[ies] should be blamed for not being experts about learning disabilities").*

852 F.3d at 944-45.

10. These cases demonstrate that, once parents believe, or reasonably should have come to believe, not just that their child is doing poorly in school, but that the school has wronged their child, then the parents have two years to take action by filing a due process complaint. But parents cannot prevail simply by asserting they were unaware that a school district was responsible for harming their child. Rather, parents must exercise "due diligence" in discovering critical facts. *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139, 1147 (9<sup>th</sup> Cir. 2002).

11. As the district court articulated in *Avila* on remand from the Ninth Circuit, it is often difficult for a court, from its retrospective position, to determine the date on which a parent KOSHK about the alleged action that forms the basis of their complaint. 2018 U.S. Dist. LEXIS 14152 ¶11.

12. In the present case, the Parents contend they did not realize the Student had been wronged by the District until he was in fourth grade, when they came to believe that he could not write his last name. Parents' Post Hearing Memorandum p. 30. The District contends that the Parents KOSHK the basis of their claims by January of 2015, when the Mother believes she requested the District evaluate the Student for special education eligibility. District's Post-Hearing Brief p. 28.

13. It is clear from the Mother's own testimony that the Parents KOSHK that the District was failing their child before October 17, 2016 (which is two years prior to the October 17, 2018 filing of date of this action). The Student had been diagnosed with ADHD, as well as a reading disorder and a receptive/expressive language disorder, in kindergarten. Dr. Cecchet had recommended to the Parents in the mid-kindergarten timeframe that the Student be referred for a special education evaluation. The Mother believed she requested an evaluation via her email to the District on January 13, 2015. But no evaluation was done. She testified that she thought the Student should have been evaluated in November of 2015, and she is "absolutely positive" that she asked for a special education evaluation at the November 17, 2015 SAT meeting. The Stepfather also believed that the Mother asked for an evaluation at this meeting. Again, no evaluation was done. By February of 2016, the Mother was "really concerned" because she "had contacted the District a year before," and other than two SAT meetings, she did not feel that anything had been done. In March of 2016, the Mother felt that she had been given mere generalizations regarding the Student's progress, but when the Parents said that they did not want to wait another school year for an evaluation, the District staff responded that they would put the Student on the calendar for evaluation in the fall. The Mother repeatedly voiced that she did not want to wait until the fall, but still no evaluation was done.

14. Additionally, the Mother's testimony about the September 2016 second grade back-to-

school night, and the classroom's public display of student success at reading chapter books, is highly compelling: "[K]nowing where my son was at this point and knowing ...that he had not ...had any kind of significant growth from the second year of summer school, this was devastating to hear.... and Mr. Parent and I just looked at each other and shook our head [sic], because we knew that our child probably would never read a chapter book in all of second grade, let alone get put up on this cabinet, and that this would be a constant reminder for him in this classroom." A reasonable parent would have concluded, at this point, if not before, that the District was failing her child.

15. At the SAT meeting on October 4, 2016, the Parents had another "devastating" experience when Ms. Koznek shared the Student's work samples along with work samples from average same-age peers. The Mother testified that the Student's illegible work, compared to the work of his peers, was the most significant example she had seen that her son was not meeting grade-level standards. Again, a reasonable parent would have concluded, at this point, if not before, that the District was failing her child.

16. Although the Mother exhibited extreme confusion about the referral process, she had been through it with the older Sibling. She was also consulting regularly with Dr. Cecchet, who had experience with the process. The District's consistent use of the term "pre-referral process" to describe the SAT and the interventions the Student was receiving likely caused confusion on the part of the Parents. Such confusion would have been understandable and reasonable, to a point, but eventually it became incumbent on the Parents to exercise due diligence to clear up their confusion. It was not reasonable to think that the referral process could drag on over more than an entire school year. It was not reasonable to accept that no evaluation was performed in light of the fact that they believed they had requested an evaluation at least three times. The Parents KOSHK of their claim against the District by the SAT meeting on October 4, 2016 at the very latest. A reasonable parent exercising due diligence would have known that the District was failing her child at the September 2016 back-to-school night, and/or the March 2016 SAT meeting at which she objected to the evaluation being put off until the fall but got no response from the District. The degree to which the Parents allege they misunderstood the process is not reasonable, and they did not exercise the due diligence that a reasonable parent would have exercised to discover the necessary facts.

17. "[A]lthough a child's right to special education under the IDEA does not turn on parental vigilance, parental vigilance is vital to the preservation and enforcement of that right." *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 625 (3<sup>rd</sup> Cir. 2015)(citations omitted). Parents may not knowingly sit on their rights or attempt to sweep both timely and expired claims into a single claim brought years later. *Id.* It is concluded that WAC 392-172A-05080(2) bars any of the Parents' claims that date back more than two years prior to the filing of this action unless an exception to the statute of limitations is established.

18. The first exception to the two-year statute of limitations set forth in WAC 392-172A-05080(2) provides that the limitation does not apply to a parent if the parent was prevented from filing a due process hearing request due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the hearing request. No such representations were made in this case. Although the District continued to assert that the Student was progressing and that things were "beginning to click" for him, the Student remained on the SAT and continued to receive interventions that were not provided to the average student. He continued to be monitored throughout first grade and into second grade, up until he was referred for evaluation.

At no time did the District tell the Parents that the Student was “at standard” in all areas of concern such that he no longer needed the interventions he had been receiving. It remained obvious to the Parents up until the time he was referred for an evaluation, and beyond, that the Student was struggling academically. The Mother’s testimony, set forth above, demonstrates that the Parents were acutely aware of these struggles. It is therefore concluded that the District did not represent to the Parents that the Student’s academic issues which form the basis of this action had been resolved. Consequently, the first exception to the statute of limitations does not apply.

19. The second exception to the two-year statute of limitations set forth in WAC 392-172A-05080(2) provides that the limitation does not apply if a parent was prevented from filing a due process hearing request due to the school district withholding information that was required under this chapter to be provided to the parent. The Parents do not address this issue in their Post Hearing Memorandum; however, when they cross-moved for summary judgment prior to the due process hearing, they alleged that the Parents were not timely provided with the required Safeguards.

20. School districts are required to provide a copy of the Safeguards that are available to the parents of a student eligible for special education one time per school year; and upon initial referral, upon a parent request for evaluation, and upon request for the Safeguards by a parent (as well as under other circumstances that do not apply here). WAC 392-172A-05015(1). As found above, in this case, the District provided the Parents with a copy of the Safeguards on November 7, 2016, at the time the District provided prior written notice that the referral team had decided to refer the Student for an evaluation. The District staff and documentation were more credible than was the Mother regarding the issue of when the Safeguards were provided. Moreover, evidence of Dr. Vincent’s habit and the District’s routine practice can be used to prove that, on this particular occasion, Dr. Vincent provided the Safeguards even though she has no present recollection of specifically doing so. *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842, 859 (9<sup>th</sup> Cir. 2014).

21. Even if the Safeguards had not been timely provided and were instead provided in February of 2017, as the Parents contend, in order to prove an exception to the statute of limitations, the Parents must show that timely receipt of the Safeguards would have caused them to file their due process complaint earlier. *Id.* They have not done so. Rather, they contend that they did not know the Student had been harmed by the District until the fall of 2018, at which point, according to them, they had been given the Safeguards eighteen months earlier.

22. Although the Parents do not address this in their Post Hearing Memorandum, they argued briefly on summary judgment that they should have been given the Safeguards in November of 2015, when they contend they referred the Student for an evaluation. However, the evidence does not support the Parents’ contention that they requested an evaluation at that time. The SAT meeting notes do not reflect such a request, no other documentation reflects that request, and two District staff members who attended the meeting testified that no such request was made.

23. It is concluded that the Parents were provided with the required Safeguards in a timely manner, that the District did not withhold information that was required to be provided, and that the Parents were not prevented from filing a request for a due process hearing as contemplated by this exception to the statute of limitations.

24. It is concluded that WAC 392-172A-05080(2) bars any of the Parents’ claims that date back more than two years prior to the filing of this action. The Parents’ claim that the District failed

to timely identify and evaluate the Student's eligibility for special education services is barred and will not be addressed herein.

Failure to Timely Identify the Student as Eligible for Special Education Services in Mathematics

25. As set forth above, procedural violations of the IDEA amount to a denial of FAPE only if they:

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

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

26. Not every procedural violation is sufficient to support a finding that the child in question was denied FAPE. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003)(quoting *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 887, 892 (9th Cir. 2001)). "A procedural violation denies a free appropriate public education if it results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010)(citations omitted).

27. The Parents argue that the District committed a procedural violation when Dr. Vincent failed to observe the Student in his general education classroom as part of the 2017 evaluation. That evaluation determined that the Student did not qualify for special education in mathematics, whereas the February 2019 reevaluation determined that the Student qualified for special education in math problem solving.

28. With respect to observations required as part of an evaluation, WAC 392-172A-03075, entitled "Observation of students suspected of having a specific learning disability," provides, in pertinent part:

- (1) School districts must ensure that a student who is suspected of having a specific learning disability is observed in the student's learning environment, including the general education classroom setting, to document the student's academic performance and behavior in the areas of difficulty.
- (2) The evaluation group must:
  - (a) Use information from an observation in routine classroom instruction and monitoring of the student's performance that was done before the student was referred for an evaluation; or
  - (b) Have at least one member of the evaluation group conduct an observation of the student's academic performance in the general education classroom after the student has been referred for an evaluation and parental consent is obtained.

29. Dr. Vincent chose to observe the Student during an LLI reading group, which was conducted by the reading specialist and was not part of the general education classroom instruction. The Student's classroom teacher, Ms. Koznek, was a member of the 2017 evaluation team. She informed the team that the Student was making adequate progress in math and that he did not require any outside additional math support. The issue of lack of a general education classroom observation appears to be an afterthought by the Parents. It was not directly identified as an issue prior to the hearing, and the topic was not raised at the hearing. There was no examination regarding why Dr. Vincent chose to observe the Student in LLI rather than the general education classroom, and no evidence was presented as to how observing the Student in his classroom setting might have altered the determination regarding eligibility for SDI in math.<sup>35</sup> Nonetheless, because the issue falls generally within (a)(ii) of the issues identified for the hearing, it will be considered here. (Issue (a)(ii) is: Whether the District violated the IDEA and denied the Student FAPE by failing to identify the Student as eligible for special education services in mathematics and provide the Student with specially designed instruction in mathematics; and, if so, when such eligibility should have been identified and whether the Student is entitled to compensatory education in mathematics.)

30. The Washington Administrative Code defines what it means to be eligible for special education at WAC 392-172A-01035(1)(a): A student eligible for special education means a student who has been evaluated and determined to need special education because of having a disability in one of the following eligibility categories: Intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), an emotional/behavioral disability, an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, multiple disabilities, or for students, three through eight, a developmental delay and who, because of the disability and adverse educational impact, has unique needs that cannot be addressed exclusively through education in general education classes with or without individual accommodations, and needs special education and related services. (Emphasis added.) These are the "three prongs" to which Dr. Vincent referred in her testimony (disability, adverse educational impact from that disability, and instructional needs that cannot be addressed in the general education setting). The 2017 evaluation sets out why the Student was determined to be ineligible for special education in math. He was not experiencing an adverse educational impact from a disability because his score in mathematics problem solving was in the average range. Specially designed instruction was not needed because he was making adequate progress in the general education curriculum.

31. In *Y.N. v. Board of Education of Harrison Central School Dist.*, 73 IDELR 73, 118 LRP 43536 (S.D.N.Y. 2018), the court found the school district's failure to conduct a classroom observation as part of the evaluation of a student with ADHD and anxiety did not amount to a denial of FAPE. The court found that the IEP sufficiently addressed the student's then-present levels of performance, and that the classroom teacher's observations and other material relevant to the student were considered "in detail." While the district "could have been more thorough in conducting a classroom observation of S.N.," it did not deny the student FAPE. 73 IDELR 73 at 2(c).

32. Similarly, in *Parker ex rel. T.P. v. Friendship Edison Pub. Charter Sch.*, 577 F. Supp. 2d 68, 51 IDELR 39 (D.D.C. 2008), a charter school failed to conduct a classroom observation as part of the special education eligibility evaluation of a student with an adjustment disorder, and

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<sup>35</sup> Moreover, no case law is cited in the Parents' memorandum to support this argument.

subsequently determined that she was not eligible for special education services. The District of Columbia had a special education regulation that required the multidisciplinary team performing the evaluation to "ensure that at least one team member other than the child's regular teacher observes the child's academic performance in the regular classroom setting." D.C. Mun. Regs. tit. 5, Section 3005.10 (2006). Concluding that the student's evaluation was nonetheless "broad and thorough," the court found the lack of a classroom observation by a member of the multidisciplinary team was harmless. 577 F. Supp. 2d at 73-74. The court pointed out that the procedural violation was not actionable unless it affected the student's substantive rights, that the parent had not demonstrated that the failure to conduct a classroom observation impeded the student's receipt of an educational benefit, and that no evidence had been presented that the team would have come to a different conclusion had the student been observed in the classroom setting by someone other than her teacher.

33. The same conclusion can be reached in the present case. It was a procedural violation on the part of the District not to observe the Student in his general education classroom as part of the 2017 evaluation. However, as described in the Findings of Fact, the evaluation of the Student was appropriate and thorough, and was "sufficiently comprehensive to identify all of the child's special education and related service needs" as required by WAC 392-172A-03020(3)(g). The Student did not meet two of the three prongs that must be satisfied in order to be eligible for special education in math: an adverse educational impact, and the need for specially designed instruction in order to access his education. The Parents presented no evidence that a classroom observation would have changed this determination. It was undisputed that the Student's score of 87 in mathematics problem solving was in the average range, which indicated that he did not experience an adverse educational impact in math problem solving. Specially designed instruction was not needed because he was making adequate progress in the general education curriculum. Furthermore, neither the Parents nor the Student's classroom teachers requested that he be reevaluated in the area of mathematics during his second or third grade year. It is concluded that the District's failure to observe the Student in his general education classroom was harmless; it did not impede the Student's right to FAPE and did not cause a deprivation of educational benefits. *See also J.L. v. Mercer Island Sch. Dist.*, 592 F.3d at 953 (district's failure to specify the number of minutes of instruction to be devoted to each of the student's services in her IEP did not constitute a denial of FAPE).

34. The fact that the Student was found eligible for SDI in math in February of 2019 does not mean that he should have been found eligible in 2017. The Parents do not advance persuasive arguments that the 2017 evaluation was inappropriate with regard to the math determination. The Student did not meet the eligibility criteria for special education in math in 2017 and the District's determination regarding ineligibility was correct. Consequently, it is concluded that the District did not deny the Student FAPE or deprive him of an educational benefit when it determined that he did not qualify for special education services in math in 2017.

#### IEP Goals and Minutes

35. The Parents contend that the Student was denied FAPE during the 2016-17, 2017-18 and 2018-19 school years because his first two IEPs provided insufficient minutes of special education services, and contained goals that were not appropriate.

36. In order 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. *Endrew F.*, 137 S. Ct. at 999-1000. Whether an IEP was reasonably calculated to provide education benefit is measured at the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141,1149 (9<sup>th</sup> Cir. 1999). A school district "need not specify an instructional methodology in an IEP unless that methodology is necessary to enable the student to receive a FAPE." *L.C. ex rel. A.S. v. Issaquah School Dist.*, 119 LRP 18751 at 27 (W.D.WA 2019)(citations omitted).

37. "An 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child." *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9<sup>th</sup> Cir. 1987)(quoting *Rowley*, 458 U.S. at 197 n.21). The District's decisions must be upheld if they are reasonably calculated to provide the student with educational benefits. 811 F.2d at 1314. The IEP must be reasonable, not ideal. *Endrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S. at 206-07). The IDEA does not impose on the states an obligation to provide "an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded to children without disabilities." *Endrew F.*, 137 S. Ct. at 1001. The Supreme Court purposely did not attempt to "elaborate on what 'appropriate' progress will look like from case to case" because "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.*

38. Here, the Parents have the burden of proving that the IEP goals and minutes were not reasonably calculated at the time they were developed to enable the Student to make appropriate progress in light of his circumstances.

39. The first IEP was developed in February of 2017. The IEP team determined that the amount of minutes and the four measurable goals in the IEP were appropriate based on the Student's ability and present levels of performance, as measured by the 2017 evaluation and as provided by the classroom teacher. The Parents contend that these goals were inappropriately ambitious given the Student's then-present levels of performance, and that the focus on writing conventions in one of the goals would distract him and prevent him from getting information down on paper. Parents' Post Hearing Memorandum p. 36. However, the Student either achieved or came close to achieving the four goals set out in the IEP. He was also approaching performance expectations for reading and writing throughout second grade, and progressed from a beginning second grade reading level to an ending second grade level during the course of this IEP

40. The evidence the Parents offer to dispute the appropriateness of this IEP is that they were not observing progress toward the goals at home, and that the Student's tutor, Ms. Liddane, disagreed with the classroom teachers' assessments of the Student's performance. As set forth in *N.B. v. Hellgate Elementary Sch.*, 541 F.3d 1202, 1212 (9<sup>th</sup> Cir. 2008), it is reasonable to rely on the testimony of witnesses who have observed a student's school performance over the testimony of witnesses who lack such observation.

41. The second IEP was developed in February of 2018. It contained four measurable goals that were developed using the Student's present levels of performance. The goals were discussed with the Parents, and they did not express disagreement. The number of minutes of SDI the Student was receiving increased by 15 minutes per week in this IEP. The Student made meaningful progress during the course of this IEP and either achieved or came close to achieving all four goals. He was approaching or meeting performance standards for reading and writing throughout third grade.

42. The evidence offered by the Parents to dispute the appropriateness of this IEP is: the i-Ready assessment indicated that the Student was below grade level for phonics, the i-Ready assessment indicated that he had made no progress in reading between January and May of 2018, the Student's unedited third grade written work was not considered by Ms. Finley, and the Parents were not observing progress toward the goals at home.

43. The Parents' overall arguments and testimony regarding both IEPs emphasize that the Student was not keeping pace with his peers academically, and that this was and is a source of stress and disappointment to him and to them. While it is totally understandable that a parent would be disappointed or even distraught at the realization that her child is lagging behind his peers academically, this does not establish a violation of the IDEA.

44. It is concluded that the 2017 and 2018 IEPs were reasonably calculated at the time they were developed to enable the Student to make progress appropriate in light of his circumstances, and that he did, in fact, make appropriate progress. Moreover, the IEPs were appropriately ambitious in light of the Student's circumstances. The Parents have not demonstrated by a preponderance of the evidence that Student failed to receive FAPE during the 2016-17, 2017-18 and 2018-19 school years.

45. To the extent the Parents contend that the IEPs did not provide for instruction designed specifically to address dyslexia, there is no requirement that the IEPs needed to do so because the Student was receiving FAPE. Moreover, the evidence shows that the District's teaching methodologies include components of the Orton-Gillingham curriculum that the Parents contend is appropriate.

#### Failure to Provide Supplemental Aids and Services

46. The Parents contended prior to the due process hearing that the District failed to provide the Student with appropriate supplemental aids and services, including but not limited to counseling, tutoring, speech/language services, occupational therapy, and AT, during the 2016-17, 2017-18 and 2018-19 school years.

47. Under the IDEA, a student's IEP is developed based upon the student's special education evaluation and present levels of performance, among other things. WAC 392-172A-03035 and -03090. There is no counseling, tutoring, speech/language services, or occupational therapy identified as being needed in the Student's 2017 evaluation or 2019 reevaluation. Little to no evidence was presented at the due process hearing that the Student required any of the services set forth above, and he was deemed not to be eligible for speech/language or occupational therapy services in the 2017 evaluation. The Parents have not met their burden of showing that the District denied the Student FAPE by failing to provide counseling, tutoring, speech/language services, or occupational therapy services to the Student.

48. In their Post Hearing Memorandum, the Parents address only AT as an accommodation that was needed by the Student but not provided by the District. An AT device is any item, piece of equipment, or product system used to increase, maintain, or improve the functional capabilities of a student eligible for special education. WAC 392-172A-01025. WAC 392-172A-02015 mandates: Each school district shall ensure that assistive technology devices or assistive technology services, or both, are made available to a student eligible for special education if

required as part of the student's: (a) Special education; (b) Related services; or (c) Supplementary aids and services.

49. An AT evaluation was not performed as part of the 2017 evaluation because it was not requested or raised as an area of concern for the Student. The 2017 IEP did not initially list AT as an accommodation, but it was amended to include an accommodation of text-to-speech software only for use during state testing. The 2018 IEP identified text-to-speech and speech-to-text software as accommodations. During most of the relevant portion of the 2018 IEP, the Student was in third grade. He had access to a ChromeBook that contained speech-to-text software the majority of the time he was in class, and this adequately met his need for the device. The 2019 reevaluation confirmed that the Student was using a variety of low-tech and high-tech AT while at school. No evidence was presented that there were occasions when the Student needed a Chromebook but could not access one. No evidence was presented that lack of AT of any kind impacted the Student's access to his education.

50. The Parents have not met their burden of proving that the District denied the Student FAPE by failing to make AT available to him.

#### Conclusion

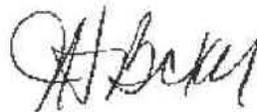
51. Having found in favor of the District on all issues, it is concluded that the Parents are not entitled to any relief.

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

#### **ORDER**

The Parents have not proven by a preponderance of the evidence that the Everett School District violated the Individuals with Disabilities Education Act, or that they are entitled to any relief. Accordingly, the Parents' requested remedies are denied.

DATED at Seattle, Washington on May 30, 2019.



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Jacqueline H. Becker  
Administrative Law Judge  
Office of Administrative Hearings

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. *lan*

Parents



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