

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

IN THE MATTER OF:

OSPI CAUSE NO. 2019-SE-0106

OAH DOCKET NO. 07-2019-OSPI-00824

SEATTLE SCHOOL DISTRICT

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

Courtney E. Beebe, Administrative Law Judge (“ALJ”) held a hearing in this matter via video conference on June 8, 9, 10, and 11, 2020. The Mother of the Student whose education is at issue¹ appeared and was represented by Laura Hruska, attorney at law. The Seattle School District (“District”) appeared and was represented by Sam Chalfant, attorney at law. Present on behalf of the District was Rachel Disario, Senior Assistant General Counsel, and Michael Bylsma, Regional Supervisor of Special Education. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a request for a due process hearing on July 26, 2019, and filed an amended due process hearing request on March 6, 2020. The decision due date in this matter was continued to fourteen (14) days after the close of the record as per the First Prehearing Order issued August 20, 2019. The record in this matter closed on July 17, 2020.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: P1, P2, P3, P4, P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15, P16, P17, P18, P19, P20, P21, P22, P23, P24, P25, P26, P27, P28.

District Exhibits: D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, D13, D14, D15, D16, D17, D18, D19.

The following witnesses testified under oath. They are listed in order of appearance: Kellie Krefft, Speech Language Pathologist, Seattle Therapy – Skills for Life; Dr. Lionel Enns, PhD, BCBA-D, NCSP; Laura Russell, District Speech Language Pathologist; Emma Stern, District Occupational Therapist; Dr. Stephen Camarata, Dept. Hearing & Speech, Vanderbilt University; Mother of the Student; Nicholas Mundell, District Resource Teacher; Michael Bylsma, District Regional Supervisor of Special Education; Shelley O’Donnell, Occupational Therapist, Seattle Therapy-Skills for Life; Melody Bernal, District General Education Teacher; Jennifer Pelland, District Program Specialist; Alessandra LaRosa, Assistant Principal; and Dr. Jeffrey Vannice, M.D., Kaiser Permanente.

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

ISSUES AND REMEDIES

1. The issue(s) for the due process hearing are:
 - a. Whether the District violated the Individuals with Disabilities Education Act (“IDEA”) and denied the Student a free appropriate public education (“FAPE”) in its June 21, 2019 Individualized Education Program (“IEP”) by:
 - i. Failing to raise or consider any educational placement other than 0-39% general education participation and thus violated the IDEA in a procedural manner that significantly impeded the Parents’ participation rights;
 - ii. Selecting an educational placement that is not the Student’s least restrictive environment; and
 - iii. Failing to provide an adequate amount of speech-language therapy for the Student.²
 - b. Whether the District violated the IDEA and denied the Student FAPE since receiving the occupational therapy (“OT”) Independent Educational Evaluation (“IEE”) by Seattle Therapy Skills for Life on September 12, 2019, by failing to make the student eligible for OT until December 4, 2019, and at that time only offering 30 minutes per week of occupational therapy.
 - c. Whether the District violated the IDEA and denied the Student FAPE since receiving the speech language pathology (“SLP”) IEE by Seattle Therapy Skills for Life on September 12, 2019, by failing to increase the Student’s speech services until December 4, 2019, and at that time only increasing by 90 minutes per month.
 - d. Whether the District violated the IDEA and denied the Student FAPE beginning February 20, 2020, by refusing to incorporate the recommendations of the IEE by Dr. Enns recommending that the Student remain at TOPS K-8 with increased speech and language therapy provided by a 1:1 aid who is either licensed as or in the process of training up to a behavior (“BT”) supervised by a Board Certified Behavior Analyst (“BCBA”) utilizing Pivotal Response Treatment (“PRT”).
2. And, whether the Parents are entitled to their requested remedies:
 - a. A declaration that the District’s June 2019 IEP and December 2019 IEP violated the IDEA and denied the Student FAPE;
 - b. A declaration that the District delayed the implementation of occupational therapy services and increased speech services between September 12, 2019 and December 4, 2019 was undue and violated the IDEA and denied the Student FAPE.

² At the hearing, the Parents and District agreed to amend issue (a)(iii) by withdrawing the following sentence “and failing to include annual goals to address the motor aspects of speech production.” The request was granted on the record.

- c. An order that the District adopt an IEP within 10 days of the date of the Final Order in this case that provides:
- i. Maintained enrollment at TOPS K-8 with a 1:1 support provided by a behavior technician overseen by a BCBA using PRT assisting the Student throughout his time in the general education setting;
 - ii. Accommodations, modifications, and methods of instruction required to provide the Student a FAPE, as set forth in the Relevant Facts section of the Parent's amended due process hearing request;
 - iii. Speech-language therapy in a clinic-based setting for the number of minutes per week recommended as educationally necessary by the independent speech-language process ("SLP") evaluator, in an individual or group setting as recommended by that evaluator, and based on annual goals as recommended by that evaluator;
 - iv. Occupational therapy in a clinic-based setting for the number of minutes per week recommended as educationally necessary by the independent OT evaluator, in an individual or group setting as recommended by that evaluator;
 - v. Reimbursement for the out-of-pocket expenses the Parents have incurred since January 2020 providing private speech language and occupational therapy services;
 - vi. Compensatory education for the hours of missed speech language and occupational therapy services the student was denied since the District received the speech language and occupational IEEs and rejected those recommendations;
 - vii. Or other equitable remedies, as appropriate.

See Fourth Prehearing Order dated March 18, 2020.

FINDINGS OF FACT

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

1. The Student attended preschool at Seattle Children's Play Garden from September 2017 through mid-June 2019.³ (Tr., pp.379-380 (Mother).) On October 20, 2017, the District's child find team referred the Student for a special education evaluation "due to concerns with possible developmental delays in one or more of the following areas: motor, communication, adaptive,

³ The Student was eligible to attend kindergarten in the Fall of 2018 at the age of five (5) but the Parents elected to continue the Student's attendance in preschool at Seattle Children's Play Garden for the 2018-2019 academic year. (Tr., pp.727-728 (Mother).)

cognitive, and social emotional development.” (D1, p.3; Tr., pp.377-379 (Mother).) The District conducted an evaluation of the Student in November 2017 (“2017 Evaluation”) and determined that the Student met the special education eligibility criteria for Autism. (D1, p.3; Tr., p.162 (Russell); 256 (Stern).) The Student fell in the first percentile in social-emotional development, the fourth percentile in cognition, and the fifth percentile in adaptive/life skills. (D1, pp.4, 8-9, 18-20.) More specifically, the Student’s:

[re]ceptive and expressive language delays may have a negative effect on [the Student’s] ability to learn pre-academic skills and to develop appropriate foundational social skills, both of which are beneficial for later school success. He may have difficulty following directions, learning new concepts and vocabulary, understanding conversation, sharing ideas, asking questions and communicating effectively with adults and peers.

[The Student’s] disability falls under the eligibility category of Autism and affects his verbal and nonverbal communication and social interaction. Specifically, his disability adversely affects his capacity to approach and form relationships with peers, engage in social interactions in an educational setting, and demonstrate age appropriate life skills. These factors prevent [the Student] from collaborating effectively with peers in an educational environment, building and maintaining friendships, and engaging in academic instruction. As a result, [the Student] requires specially designed instruction in adaptive/life skills, cognitive – pre-academics, and social behavior skills.

(D1, pp.3-4.)

2. In the area of motor skills, the Student faced challenges in “fine motor skills, visual motor skills, and attention to tasks [that] significantly impede his ability to engage successfully in the demands of the least restrictive environment.” (D1, pp.4, 14-16.) The evaluation recommended:

Occupational Therapy services are required as part of this student’s educational plan . . . The educational team requires the skilled services of an occupational therapist to support [the Student] for the development of accommodations and modifications, and development of programming and in consultation with the educational team. It is recommended that OT support for [the Student] under Support for Personnel to support successful classroom interactions, to collaborate with the team and support the development of skills needed for school . . .

(D1, p.4; Tr., pp.256-257 (Stern).)

3. In the area of communication, the 2017 Evaluation revealed a significant discrepancy that placed the Student -2 standard deviations below the mean (second percentile or below) in the area of communication. (D1, pp.4, 10-11.) It was recommended that the Student receive speech-language pathology (“SLP”) specially designed instruction (“SDI”) and related services. (D1, pp.4, 10; Tr., pp.164-166 (Russell).) The Student attended Seattle Children’s Play Garden with an IEP.⁴

⁴ The IEPs in effect prior to June 21, 2019 are not part of the record in this matter.

June 21, 2019 IEP

4. In preparation for attending kindergarten in the fall of 2019 at the District, the Parents began communicating with the District's special education personnel and requested development of an IEP. (D10, p.1; Tr. pp.384-385 (Mother).) The Student's sister attends TOPS K-8 and the Parents desired that the Student also attend the same school because they considered it their "neighborhood school." (Tr., pp. 384, 394 (Mother).) The Parents found communication with the District cumbersome and obtaining information difficult. (Tr., pp.384-385 (Mother).)

5. The District convened an IEP team ("IEP Team") and on June 13, 2019, issued a "Review Individualized Education Program (IEP) Invitation" inviting the IEP Team members to meet and discuss a draft IEP for the Student on June 21, 2019. (D2, p.2.) The following individuals comprised the IEP Team: Alassandra LaRosa,⁵ Assistant Principal at TOPS K-8; Melody Bernal,⁶ General Education (Kindergarten) Teacher at TOPS K-8; Emma Stern,⁷ District Occupational Therapist; Michelle Bammert, District Program Specialist; Nick Mundell,⁸ Resource Teacher at TOPS K-8; Laura Russell,⁹ District Speech-Language Pathologist; Patricia Whitmore, Speech Language Team Lead; and the Mother.¹⁰ (D2, p.1.)

6. Prior to the June 21, 2019, IEP meeting, the IEP Team developed an IEP for discussion. (D2, pp.4-14; Tr., pp.165-166 (Russell); 259-260 (Stern); 393-394 (Mother).) The IEP Team considered the strengths of the Student, the concerns of the Parents, the communication needs of the Student, strategies for behavioral interventions and supports, and considered the Student's bilingual household. (D2, p.6; D10, pp.1-3; Tr., pp.393-395 (Mother); 162 (Russell); 260-262 (Stern); 458-459 (Mundell); 640-650 (LaRosa).) Because the Student had not attended kindergarten at the District yet, the IEP Team relied heavily on information from the Mother, Hannah Gallagher, a teacher at Seattle Children's Play Garden, and the 2017 Evaluation to assess the Student's present level of educational performance. (D2, pp.7-13; D9, pp.1-2; D10, pp1-3; Tr., pp.395-398 (Mother); 162-163 (Russell); 260-261 (Stern); 639-644 (LaRosa).)

7. In a June 12, 2019, email to the other members of the IEP Team, the Mother listed a number of goals, requests, and explanations. (D10, pp.1-3; Tr., pp.386-387 (Mother); 643-645 (LaRosa).) Specifically, the Mother expressed concerns about the Student's communication level and identified it as "our highest priority. We think targeting speech itself-along with language-is the fastest way to improve his overall school performance." (*Id.*) The Mother requested that the

⁵ Alassandra LaRosa is currently the assistant principal at TOPS K-8 and has a Master's Degree in Special Education and Applied Behavior Analysis (Tr., p.638 (LaRosa).) Ms. LaRosa earned her administrative degree in 2018 and has worked in the school setting since 2007. (*Id.*)

⁶ Melody Bernal is a kindergarten teacher at TOPS K-8 and has worked in the District for 16 years. (Tr., p.584 (Bernal).)

⁷ Emma Stern has worked for the District since August 2018, and previously worked as in various capacities since 2015. (D18, pp.1-2; Tr., p.275 (Stern).) Ms. Stern has a Master's of Science in Occupational Therapy and a Bachelor of Arts in Psychology. (*Id.*)

⁸ Nicholas Mundell is the special education teacher for the Student at TOPS K-8. (Tr., pp.456-457 (Mundell).)

⁹ Laura Russell has worked for the District since October 2016, and previously worked in other educational and clinical settings. (D17, pp.1-2; Tr., p.162 (Russell).) Ms. Russell has a Master's of Science in Speech-Language Pathology and a Bachelor of Arts in Psychology. (*Id.*)

¹⁰ It is undisputed that these individuals attended the June 21, 2019, IEP meeting. Ms. Bammert and Ms. Whitmore did not testify at the due process hearing.

Student receive SLP five (5) days per week and placement of the Student in the general education classroom “for at least 90 minutes every day.” (*Ids.*)

8. Ms. Russell and Ms. LaRosa consulted with the Mother and the Student’s preschool teacher regarding the Student’s communication abilities. (D2, pp.9-10; D9, pp.1-2; D10, pp.1-3; Tr., pp.162-163 (Russell); 640-643 (LaRosa).) The information showed that the Student “demonstrates limited expressive verbal communication” and that the Student was “mostly nonverbal.” (D2, p.9; D9, pp.1-2; Tr., pp.164-165 (Russell); 640 (LaRosa).) The Student “understands simple directions and routines, but spends most of his time on his own, slightly removed from the group,” and “needs full adult support to participate and engage.” (*Ids.*)

9. Ms. Stern and Ms. LaRosa also gathered information regarding the Student’s motor, play, and self-care skills from the Mother and the Student’s preschool teacher. (D2, p.10; D9, pp.1-2; Tr., pp.255-256 (Stern); 640-643 (LaRosa).) The information collected revealed that the Student cannot write, tolerates other students well but is not interested in playing, wears a diaper, and needs adult support to wash his hands. (D2, p.10; D9, pp.1-2; Tr., pp.257-259 (Stern).) Additionally, the Student needs adults to physically carry him through transitions and keep him engaged in activities that exceed thirty (30) seconds. (*Ids.*)

10. The IEP Team established annual goals for the Student in the area of Adaptive / Life Skills, Communication, Cognitive / Pre-academics, and Social – Emotional Behavioral. (D2, pp.14-16.) In the area of communication, the IEP Team established the following goals:

By 6/24/2020, when given an adult saying his name from a distance of 2-5 feet away [the Student] will respond to his name by orienting toward the adult, looking at the adult, or vocalizing improved pragmatic language skills from 10% of observed opportunities to 80% of observed opportunities over each of 2 data days as measured by SLP data and classroom staff report.

By 6/24/2020, when given therapist-designed or classroom based activities [the Student] will combine two words to request recurrence (e.g. “more bubbles”), request (e.g. “want ball”), protest (e.g. “no ball”), or comment (e.g. “big dog”) improving expressive communication and vocabulary from 0% of observed opportunities to 80% of observed opportunities over each of 2 data days as measured by SLP data and observations.

By 06/24/2020, when given therapist-designed and classroom-based activities [the Student] will one-step (sic) directions improving receptive communication skills from 0% of observed opportunities to 80% of observed opportunities over each of 2 data days as measured by SLP and classroom data.

(D2, pp.14-15; Tr., pp.165-166 (Russell).)

11. To accommodate the Student in the general education setting, the IEP provided for 1) a quiet area for sensory breaks and 2) shared instructional assistant (“IA”) support during special classes (physical education, art, music, and library), lunch and recesses. (D2, p.17.) Further, the IEP included a visual schedule for the Student in the special education setting.

12. The IEP also established the frequency and location for delivering specially designed instruction (“SDI”) to the Student. (D2, p.19.) In the areas of Adaptive / Life Skills, Cognitive / Pre-Academics, and Social – Emotional Behavior, the Student would receive 400 minutes per week

in each area, delivered by a special education teacher in a special education classroom. (D2, p.19; Tr., pp.245-249 (Russell); 280-282 (Stern).)

13. Because of the number of minutes and high level of support the Student was receiving in the areas of Adaptive / Life Skills, Cognitive / Pre-Academics, and Social - Emotional Behavior Ms. Stern recommended that an OT consultation of 30 minutes per month would be appropriate to support personnel. (D2, p.17; Tr., pp.260-262 (Stern).)

14. Ms. Russell recommended that the Student receive 120 minutes per month of SLP specially designed instruction (“SDI”) with an SLP in the special education classroom, along with 150 minutes per month of SLP SDI delivered by an IA in the special education classroom. (D2, p.19; Tr., pp.165-171 (Russell); 460-462 (Mundell).) The intent of the IEP was to create a “language – rich” environment with flexibility for the Student in both the special education and general education environments. (Tr., pp.165-166, 233-235 (Russell).) Using the ACT model, the Student would receive SLP SDI from an SLP 20 minutes per session, 2 to 3 times per week for 3 weeks, and then the SLP would observe the Student in the general education environment the remaining time for 1 week. (Tr., pp.178-179 (Russell).) Additionally, through the delivery of other SDI services, particularly the 400 minutes per week of Social-Emotional Behavior services, the Student would receive indirect communication SDI. (Tr., pp.179-180 (Russell).) The remaining 150 minutes per month would be delivered by an IA in the special education environment. (*Id.*)

15. As a result the Student would be placed in the special education environment for 1267.5 minutes per week, or 72.43 percent of the school week. (D2, p.19; Tr., pp.646-648, 653-654 (LaRosa).) The Student would attend lunch, recess, and special classes (art, music, physical education, and library) in the general education environment 27.57 percent of the school week, or 96.6 minutes per day. (*Id.*)

16. After meeting on June 21, 2019, the IEP Team members, including the Mother, signed the June 21, 2019 IEP. (D2, p.1; Tr., pp.391-392 (Mother).) The IEP took effect on June 25, 2019. (*Id.*) The Mother believed she was signing a draft version of the IEP and she could continue to work with District personnel to further develop and amend the IEP. (Tr., pp.391-392 (Mother).)

17. After signing the June 21, 2019, IEP Ms. Bammert informed the Mother that TOPS K-8 could not deliver the services in the IEP because the school uses a resource model special education program,¹¹ not a focus method based special education program. (Tr., pp.396-398 (Mother); 468-470 (Mundell); 488-491 (Bylsma); 647-649 (LaRosa).) The key attributes of a focus program are that “the instruction is aligned with the core curriculum and modified to the individual level of the student . . . it’s a smaller group setting, typically less distractions, high visual supports, targeted language, and . . . rich in language development.” (Tr., pp.610 (Pelland); 483-484 (Mundell); 490-496 (Bylsma).) The typical caseload for a focus method program is ten students, one special education teacher and two IAs. (*Id.*) “The goal is to maximize the opportunities for inclusion of students with disabilities and the services and the location of the services are adjusted to reflect the needs of that individual student as they make progress within the program.” (Tr., pp.613-614 (Pelland).) The IEP Team provided the Mother with information that the Student would be best served at Lowell elementary school in the focus method program. (Tr., pp.398-399 (Mother).)

¹¹ A “resource model” is “for students who are just off grade level . . . working on academic areas, although they may have some study and organization skills deficits . . . they are primarily spending 80-90 percent of their school day in a gen ed setting.” (Tr., pp.493-494 (Bylsma).)

18. The instructional minutes per week at Lowell consist of 1750 minutes (including 240 minutes of recess time at 55 minutes per day (20 minutes on Wednesdays)) and an additional 150 minutes of lunchtime (30 minutes per day). (Tr., pp.620-622 (Pelland).) The students attend school from 8:55 a.m. to 3:25 p.m. on Monday, Tuesday, Thursday, and Friday, and from 8:55 a.m. to 2:10 p.m. on Wednesday. (*Id.*) All students attend 30 minutes per day of “special classes,” consisting of physical education, art, music and library in the general education environment. (*Id.*) Focus program students who participate only in special classes, lunchtime, and recess are in the general education environment approximately 27% of the time each week. (*Id.*)

19. The IEP Team considered placing the Student in the general education environment more than 0-39% of the time, but did not indicate on the IEP form that the consideration occurred. (D2, p.20; D6 p.2; Tr., pp.180 (Russell); 200 (Stern); 396-397 (Mother); 649-652 (LaRosa).) The IEP Team began the IEP process by assuming placement of the Student in the general education environment 100% of the time would occur, and then proceeded to conduct the IEP Team meeting. (Tr., pp. 180 (Russell); 200 (Stern); 649-650 (LaRosa).) “Then upon reviewing present levels and the Student’s needs, we looked at the 0-39 percent LRE, and then at the end of the meeting when the Parent requested that the student be served with fewer minutes, we considered it at that point as well.” (Tr., pp. 649-650 (LaRosa).) After reviewing all the information and recommendations, the IEP Team concluded that:

based on [the Student’s] present levels, he’s currently not able to access the gen ed-level curriculum and instruction . . . the gen ed students would be receiving instruction from the teacher and [the Student] would possibly be kind of off to the side working one-on-one with an adult, doing something completely different than (sic) everybody else is doing . . .

Working in a small group setting, the adult could be in control of the objects that the student wanted to play with and could provide them to him as he completed work, rather than having kind of a whole classroom of easily accessible reinforcement . . .

. . . in the gen ed setting a student is not able to do . . . his work or his programming with peers, [the Student] really becomes (sic) just interacting with that adult and becoming very dependent on prompting and support from that adult. Whereas if the [S]tudent is able to be grouped with students working on similar activities, then it can be structured in a way that students are interacting with each other and communicating with each other and kind of sharing with other kids, rather than just being focused on that one adult.

(Tr., pp.653-654, 667, 671 (LaRosa).) The Parent and the IEP team discussed the Student’s present levels of educational performance, IEP goals, and services for approximately 90 minutes, before making any decisions on placement. (Tr., pp.396-397(Mother).)

20. On June 21, 2019, the District issued the Parent a prior written notice (“PWN”) that reflected consideration of other placements:

Description of any other options considered and rejected: When it was determined that intensive staffing would be needed to provide [the Student] services, parent

did ask the team to consider decreasing his services in order for him to stay at his current school [TOPS K-8].

The reasons we rejected those options were: The IEP team members did not agree that [the Student] could be served and make progress in his qualifying areas with less support and services.

(Ex.D2, p.22.) The Parent, however, assumed the District would place the Student at TOPS K-8 and that the Student would have another opportunity to amend the IEP to allow for placement in the general education environment more than 0-39% of the time. (Tr., pp.396-397 (Mother).)

21. On June 22, 2019, Ms. Bammert (District Program Specialist) emailed the Mother with information about school transfer appeals and assignments. (P20, pp.1-10; Tr., pp.487-488 (Bylsma).) This information included a matrix of service models provided by the elementary schools in the District, reflecting that in the area of special education TOPS K-8 provided deaf / hard of hearing services and that Lowell provided focus method special education services. (P20, p.5.; Tr., pp.489-491 (Bylsma); 197-198 (Russell).) On June 29, 2019, Michael Bylsma, Regional Supervisor for Special Education, emailed the Mother to inform her of the Student's placement at Lowell Elementary for the 2019-2020 school year based on the recommendations of the IEP Team.¹² (P19, p.1; Tr., pp.494-496 (Bylsma).)

22. On July 26, 2019, the Parents filed a due process hearing request with the Office of Superintendent of Public Instruction ("OSPI").

Evaluations and Submissions During August 2019 and September 2019

23. In August 2019, the District agreed to fund an Independent Educational Evaluation ("IEE") in the areas of SLP and OT and the Mother selected Seattle Therapy Skills for Life ("STS") to conduct the IEE. (Tr., pp. 416, 418 (Mother).)

24. Kellie Krefft, MA, CCC-SLP,¹³ evaluated the Student in the area of SLP on August 8, 2019, at the STS clinic. (P4, pp.1-5; Tr., pp.48-51 (Krefft).)

25. Ms. Krefft reviewed the 2017 Evaluation, the June 19, 2019, IEP, and conducted a parent interview. (P4, p.2; Tr., pp.49-50; 66-67 (Krefft).) Ms. Krefft conducted a behavioral observation in the clinical setting and performed assessments in receptive / expressive language, social communication and play, voice/fluency, and speech/phonology/articulation. (P4, pp.2-3; Tr., pp.49-51 (Krefft).) Ms. Krefft concluded that the Student:

... presents with significantly delayed speech and language skills characterized by difficulty following directions, using verbal language to communicate wants, needs and ideas, and engaging in reciprocal play . . . [the Student's] reluctance to

¹² The email included a statement that the Mother could appeal the assignment through the "Enrollment Planning's transfer appeal process" and provided the Mother with a copy of the Special Education Procedural Safeguards information. (P19, p.1; Tr., pp.496-497 (Bylsma).)

¹³ Kellie Krefft earned a Bachelor of Science Degree in Speech and Hearing Science and a Master of Arts in Speech-Language Pathology. (P3, p.1; Tr., pp.43-45 (Krefft).) She is certified in Applied Verbal Behavior, Level 1 Prompt, PECS, The Beckman Oral Motor Protocol, and Augmentative & Alternative Communication ("AAC"). (*Id.*)

demonstrate his skills or participate in structured learning opportunities is cause for concern and has major implications for [the Student's] learning and participation in school, home, and the community."

(P4, p.4; Tr., pp.51-52 (Krefftt).)

26. Based on her observation of the Student in the clinical setting only, on September 8, 2019, Ms. Krefft created a report titled "Speech and Language Therapy Evaluation Report and Treatment Plan" ("SLP IEE"). (P4, pp.1-4; Tr. pp.51-52 (Krefftt).) Ms. Krefft recommended "intensive speech and language therapy services . . . at a frequency of at least 4 times per week for 50 minutes to support [the Student's] continued speech and language acquisition, development, and generalization of skills . . . It is recommended that [the Student] receive 50% of his services using a pull-out model and 50% using a classroom push-in model of treatment." (P4, p.4; Tr., pp.51-52; 56-59 (Krefftt).) Ms. Krefft also recommended treating the Student's motor speech deficits by using motor programming approaches implemented by an SLP during 4-5 sessions at 20 minutes per session, implementing alternative and augmentative communication (iPad, picture cards, or communication board), and allowing the Student to access "a language rich environment with strong peer models, such as a general education classroom." (P4, p.4; P.28, p.2; Tr., pp.52-53; 56-59 (Krefftt).) Ms. Krefft noted the importance of ensuring "consistency and generalization of skills across environments and people," and recommended that District personnel, STS, and the Parents closely collaborate. (*Ids.*)

27. On August 22, 2019, Megan Eastman, MOT, OTR/L and Cin-Shuan Cynthia Ting, MS, OTR/L, of STS¹⁴ conducted an OT evaluation of the Student in the clinical setting. (P5, pp.1-5; Tr., pp.520-522 (O'Donnell).) Ms. Eastman and Ms. Ting conducted behavioral observations of the Student in the clinical environment and the Mother completed a Sensory Profile 2, Caregiver Questionnaire. (P5, pp.3-4; Tr., pp.520-522 (O'Donnell).) Based on the information, Ms. Eastman and Ms. Ting concluded, "The highest frequency of occupational therapy services, both in the school and in an outpatient setting, is medically indicated. Each session should be composed of at least 30 minutes of direct treatment time." (P5, p.4; Tr., pp.527-529 (O'Donnell).)

28. On September 3, 2019, Ms. Eastman and Ms. Ting, under the supervision of Ms. O'Donnell, issued an "Occupational Therapy Evaluation Summary and Treatment Plan" ("OT IEE") recommending OT five days per week for 50 minutes per day. (P5, pp.1-5; Tr., pp.520-522, 529 (O'Donnell).) The OT IEE included a recommendation that the Student receive both SLP and OT to "develop a reliable communication system." (P5, pp.1-5; Tr., pp.528-529 (O'Donnell).)

29. STS submitted the SLP IEE and the OT IEE to the District on September 12, 2019.

¹⁴ Megan Eastman and Cin-Shuan Cynthia Ting did not testify at the due process hearing in this matter, but their curriculum vitae were admitted as Exhibit P7, pp.2-3. Instead Shelley O'Donnell, MS, OTR/L testified as to the evaluation that is Exhibit P5 because she also observed the Student and supervised the evaluators. (Tr., pp.520-522 (O'Donnell).) Ms. Eastman and Ms. Ting.. Ms. O'Donnell is the director and founder of STS, and has a Bachelor of Science in occupational therapy and a Master of Science in rehabilitation medicine. (P6, p.1; P28, p.1; Tr., pp.516-519 (O'Donnell).) Ms. O'Donnell is certified in DIR /Floortime methodology. (*Id.*)

30. Dr. Jeffery Vannice¹⁵ at Kaiser Permanente also assessed the Student and he drafted a letter to the District summarizing his opinions. (P11, p.1; Tr., pp.707 (Vannice).) Dr. Vannice's primary duty is to consult with the Mother to help "equip the parent to do work with the child." (Tr., pp.704-705 (Vannice).) Dr. Vannice concluded that the Student "will likely need much 1:1 attention and support in any placement." (*Id.*) Dr. Vannice also noted:

[b]ecause of [the Student's] current inability to express himself verbally, it is difficult to determine his capabilities clearly . . . placing [the Student] in a self-contained setting initially is that this (sic) may not meet his needs for stimulation or engagement . . . and would not provide enough opportunities for skill practice and observational / imitative learning with non-disabled peers.

(*Id.*)

31. One of the Student's teachers at Seattle Play Garden, Ms. Bertel, created a document titled "Strategies for Supporting [the Student]" and the Mother provided the document to the District on September 9, 2019. (P13, pp.1-5; Tr., pp.379-381 (Mother); 659-662 (LaRosa).)

Team Meetings, Assessment Revisions, and Classroom Observations September 4, 2019 through December 3, 2019

32. The Student did not attend Lowell, but instead the Parent chose to enroll the Student part-time at TOPS K-8 beginning September 4, 2019. (D5, p.10; Tr., pp.399-401 (Mother).) The Student attended school from the beginning of the school day to 12:00 p.m.¹⁶ (*Id.*) The Student attended the general education setting in Ms. Bernal's class with an IA most of the time, but also received SLP in the special education environment and attended Mr. Mundell's resource room. The District provided the OT consultation accommodation in the June 21, 2019, IEP. (D5, p.10; Tr., pp.181 (Russell); 590-591 (Bernal); 455-456 (Mundell).) The Student did not receive the remaining SDI in the IEP because of his part-time enrollment and the lack of a focus method program at TOPS K-8. (Tr., pp.236-238 (Russell); 456, 468-469 (Mundell).) In the afternoon, the Student left TOPS K-8 and received private, clinical SLP and OT services at STS. (Tr., pp.399-401 (Mother).)

33. In the general education environment, Ms. Bernal observed that:

[the Student] doesn't usually engage in activities per se with the other students . . . during the story time and learning time, he did not participate. It was hard for him to sit down in his space. He tended to roll on top of other children or he would run around the classroom or go to our classroom library with his IA or play with the little cars or animals there on the rug.

(Tr., pp.586- 588 (Bernal).)

¹⁵ Dr. Jeff Vannice is a Licensed Psychologist and PhD and has worked in the field since 1990. (P10, p.1; Tr, pp.700, 702-704 (Vannice).) Dr. Vannice earned a Doctor of Philosophy and Clinical Psychology. (*Id.*) Dr. Vannice met with the Parents six times and the Student approximately 2-3 times in person between June 2018 and August 2019. (Tr., pp.705-706.)

¹⁶ The Parents of the Student chose to send the Student to TOPS K-8 so that he could be placed in the general education environment and receive only SLP services. (Tr., pp.399, 728 (Mother); 584 (Bernal).)

34. On September 14, 2019, the Mother emailed Ms. Bernal, Mr. Mundell, and Ms. LaRosa with some suggestions to “improve [the Student’s] classroom participation right away.” (P21, p.1; Tr., pp.403 (Mother).) The Mother also requested that the IEP Team meet to “go over the OT & SLP IEEs.” (*Id.*)

35. The District issued a “Meeting Notice” for an IEP Team meeting on October 23, 2019. (D4, pp.1-2.) The IEP Team met on October 23, 2019 “for the purpose” of “initiating” an “assessment revision for SLP and OT.” (D4, p.3.) The District issued a Prior Written Notice the same day, reflecting that the IEP Team (including the Parent) met to review the SLP IEE and the OT IEE and that the IEP Team agreed to conduct an assessment revision in the areas of SLP and OT. (*Id.*) The IEP Team noted that the SLP and OT IEEs provided “valuable information” and “will inform amendments to the Student’s IEP,” but that the IEEs did not “include school based observations and the [IEP Team] needs this information in order to ensure that all of [the Student’s] needs are addressed in the IEP.” (D4, p.3.; Tr., pp.277-278 (Stern).)

36. On October 16, 2019, the District issued a Notice of Meeting giving notice of a meeting at the District on December 4, 2019, to discuss an assessment revision based on the SLP IEE and OT IEE. (D5, pp.2-3.) On October 16, 2019, the Mother signed an “Assessment Revision Notification / Consent” form. (D3, p.1.)

37. Between October 25, 2019 and March 6, 2020, Mr. Mundell emailed the Mother a weekly update of the Student’s progress in the areas of transition, participation, question answering, bathroom routines, and name writing. (D15, pp.1-15; P23, pp.1-21; Tr., pp. (Mundell).)

38. Between October 4, 2019 and November 9, 2019, the District and STS coordinated a time for Ms. Krefft to observe the Student in the classroom. (D12, pp.1-4; Tr., pp.558-559 (O’Donnell).) On November 14, 2019, Ms. Krefft observed the Student in the special education classroom with Mr. Mundell at TOPS K-8. (Tr., pp.69-75 (Krefft)). Ms. Krefft did not observe the Student receiving SLP services from Ms. Russell, and Ms. Krefft did not follow up on a December 2, 2019, request from Ms. Russell to exchange information or consult. (Tr., pp 76-78 (Krefft); pp.181, 238 (Russell).) Ms. Ting, Ms. Eastman, and Ms. O’Donnell of STS did not observe the Student in the special education classroom at TOPS. (Tr., pp.556-557 (O’Donnell).)

39. Ms. Stern and Ms. Russell conducted an assessment revision in the areas of SLP and OT between October 16, 2019 and December 4, 2019. (D5, pp.6-15; Tr., pp.185-188 (Russell); 263 (Stern).) On November 26, 2019, Mr. Bylsma emailed the IEP Team and informed them that the assessment revision (“Assessment Revision”) was complete and that the IEP Team would reconvene on December 4, 2019 “to discuss the findings and amend [the Student’s] IEP.” (D13, p.1.) The Mother agreed to attend on December 4, 2019. (D13, p.1.)

December 4, 2019 Assessment Revision and IEP

40. On December 4, 2019, Ms. Stern, Ms. Russell, and the Mother met to discuss the December 4, 2019, Assessment Revision. (D5, pp.1-4; Tr., pp.181-182 (Russell); 263-265 (Stern).) The Assessment Revision relied on information from the 2017 Evaluation and the following records: SLP IEE; STS classroom observation report; OT IEE; Dr. Vannice’s August 23, 2019, letter; information from the Parent, Ms. Bertel’s “Strategies for Supporting [the Student]” document, and a full record review including review of standardized assessments. (D5, pp.5-13; Tr., pp.181-182 (Russell); 263-265 (Stern).)

41. The District issued an "Assessment Revision Prior Written Notice" on December 4, 2019, describing the proposed actions based on the assessment revision:

It was proposed to change the service delivery model for occupational therapy services from support for school personnel to a related service. It was proposed to add speech therapy as a related service in addition to specially designed instruction in communication.

The proposal was made because:

Based on the [OT IEE], [the Student] is demonstrating participation restrictions due to activity performance challenges in functional fine motor skills, school based self-care skills, functional play skills, school – classroom skills, and sensory processing skills. [The Student], therefore, requires occupational therapy services as a related service to support his school participation. Speech therapy was added as a related to (sic) service to support consultation with the team and generalization of skills.

(D5, p.16 Tr., pp.181-182 (Russell); 263-265 (Stern).)

42. The IEP Team, including the Mother, convened on December 4, 2019 to review and discuss a proposed IEP ("December 4, 2019 IEP") based on the Assessment Revision. (D6, pp.1-5; Tr., pp.181-182 (Russell); 263-265 (Stern); 414-416 (Mother).)

43. The IEP Team modified the Student's communication goals to include the following:

By 06/24/2020, when given a visual and verbal cue, [the Student] will increase joint attention when responding to bid for communication from 0% of opportunities to 70% of observed opportunities over each of the 2 data days as measured by SLP data collection.

By 06/24/2020, when given therapist designed and classroom based activities [the Student] will one-step directions improving receptive communication skills from 0% of observed opportunities to 80% of observed opportunities over each of 2 data days as measured by SLP and classroom data.

By 06/24/2020, when given therapist designed and classroom based activities [the Student] will request using spoken language or other AAC system (iPad, picture cards, visual schedule) improving expressive language from 40% of opportunities to 70% of opportunities observed across 2 data collection days as measured by SLP data collection.

(D6, pp.11-12; Tr., pp.191-192 (Russell).)

44. The IEP Team modified the Student's other goals as follows:

Adaptive / Life Skills: When given a need to void [the Student] will void in the toilet (rather than a diaper) improving his adaptive / life skills from voids in the toilet on

0% of opportunities to voids in the toilet on 100% of opportunities as measured by general education teacher and special education staff collected data.

New proposed cognitive / pre-academic writing goal: When given a model for pre-writing strokes / shapes (vertical line, horizontal line, diagonal line, circle, cross X, square, triangle) [the Student] will copy pre-writing shapes improving pre-writing skills from 0/8 shapes to 8/8 shapes as measured by staff collected data.

D6, p.12; Tr., pp.264-267, 279-280 (Stern.)

45. The IEP Team recommended adding 30 minutes weekly of OT in the special education setting as a related services¹⁷. (D6, p.20; Tr., pp.266-270, 280-281 (Stern).)

46. The IEP Team also recommended changing the Student's communication services, by increasing SLP delivered by an SLP in the special education setting to 180 minutes per month from 120 minutes per month. (D2, p.19; D6, p.20; Tr., pp.189-190 (Russell).) The IEP Team also recommended adding 90 minutes per month of SLP by an SLP as a related service in the general education environment. (D6, p.20; Tr., pp.189-190 (Russell).) However, the IEP Team recommended discontinuing the delivery of 150 minutes of SLP by an IA in the special education environment. (D6, p.20.) Ms. Russell believed that, given the opportunities for indirect SLP services to be delivered during the delivery of the Social-Emotional Behavior services, Ms. Krefft's recommendation of 50 minutes per day 4 days per week "seems like a large amount," as SLP does not "necessarily have to be done by a speech pathologist in a pull-out setting." (Tr., pp.181-185 (Russell).)

47. The IEP Team did not recommend any changes in the areas of Adaptive / Life Skills, Cognitive-Pre-Academics, and Social-Emotional Behavior at 400 minutes per week in each area. (D2, p.19; D6, p.20; Tr., pp.279-283 (Stern).) Ultimately, the Student would be in the general education setting 27.14% of the time and served 72.86 percent of the time in the special education setting. (*Id.*)

48. On December 4, 2019, all the members of the IEP Team, including the Mother, signed the December 4, 2019, IEP that included the IEP Team's recommendations. (D6, p.1.) On December 6, 2019, the District issued a PWN. (D6, pp.23-24.)

49. On December 5, 2019, the District issued a progress report, reflecting the goals contained in the December 4, 2019, IEP and the Student's current abilities in relation to the goals. (D7, pp.1-5; Tr., pp.190-191 (Russell).) In the area of Adaptive / Life Skills, the Student had made "some progress" towards in the area of transitions, but the Student made little or no progress in the other areas of concern. (*Id.*) After December 5, 2019, the Student continued to attend TOPS K-8, and received the SLP and OT services as the attendance schedule allowed.

50. The District was in session the weeks beginning December 9, 2019, December 16, 2019, as well as the following weeks in 2020: January 6, January 13, January 20, January 27, February 3, February 10, February 24, March 2, March 9, March 10, March 16, March 23, March 30, April 6, April 20, April 27, May 4, May 11, May 18, May 25, June 1, June 8, and June 15. (D16, p.1.)

¹⁷ Occupational Therapy as a "related service" is a combination of direct services to the student, as well as consultation, collaboration, equipment preparation, and observations. (Tr., pp.267-269; 271-272 (Stern).)

Clinical SLP and OT Services and Progress Reporting January 7, 2020 to April 28, 2020.

51. The Student started attending STS for SLP and OT services on January 7, 2020. (P27, p.2; P28, p.2; P24, pp.3-4; Tr., pp.45-48 (Kreffft); 531 (O'Donnell).) Between January 7, 2020 and April 28, 2020, the Parents paid STS for SLP services in a clinical setting. (P24, pp.1-26; Tr., pp.439-441 (Mother).) Ms. Krefft's rate for SLP services is \$138.00 per one hour session. (P24, p.3; Tr., pp.438-440 (Mother).) Ms. Krefft worked with the Student on transitioning, pragmatic/social communication, expressive language, following verbal directions, vocal imitation, sharing, and name recognition. (P8, pp.1-8; Tr., pp.54-55 (Kreffft).)

52. On March 12, 2020, Ms. Krefft created a progress monitoring report accounting for the Student's SLP progress between February 4, 2020, and March 10, 2020. (P8, pp.1-8; Tr., pp.54-55 (Kreffft).) Ms. Krefft reported that the Student had made progress in the area of communication, expressive language and the use of AAC. (P8, p.1; Tr., pp.54-55 (Kreffft).) Ms. Krefft specifically reported that all of the Student's goals remained "in progress" and that the Student should continue SLP services in the clinical setting with STS. (*Ids.*)

53. On March 12, 2020, Ms. O'Donnell created a progress monitoring report accounting for the Student's OT progress between February 4, 2020 and March 2, 2020. (P8, pp.9-11; Tr., pp.532-533.) Ms. O'Donnell reported that the Student has shown "increased shared attention, tolerance of sharing and turn taking, and more imitation and play expansion." (*Ids.*) Ms. O'Donnell reported that the Student was progressing on his goals, and had met the goal of "demonstrating greater regulation and tolerance with turn-taking with therapists." (*Ids.*)

54. The District also created a Progress Report regarding the Student's progress between December 4, 2019, and April 7, 2020. (D8, pp.1-6.) The Student made "some progress" in the area of communication regarding joint attention (D8, pp.4-5; Tr., pp.192-194 (Russell), but had made "little or no progress" all other areas. (D8, pp.1-6; Tr., pp.270-271, 280-282 (Stern).)

Dr. Enns' Evaluation February 20, 2020.

55. The Parents requested Dr. Lionel Enns, PhD¹⁸ perform an IEE ("Dr. Enns' IEE") in the areas of social performance, behavior, and academics. (P2, pp.1-19; Tr., pp.87-88 (Enns); 438 (Mother) 502-503 (Bylsma).) Dr. Enns reviewed the 2017 Evaluation, the December 4, 2019, IEP and Assessment Revision, and the SLP IEE and the OT IEE from STS. (Tr., pp.88; 110; 129 (Enns).) Dr. Enns evaluated the Student on December 19, 2019, December 30, 2019, and February 13, 2020, before issuing a report on February 20, 2020. (P2, pp.1-19; Tr., pp.87, 128 (Enns).) On December 19, 2019, Dr. Enns observed the Student for 2.5 hours at TOPS K-8 during recess, in the general education classroom, and while receiving SLP services in the special education classroom. (P2, pp.2-9; Tr., pp.87, 133-136 (Enns).) Dr. Enns recommended "added/increased support" in the following areas: ". . . speech, play, pre-academics, and social engagement . . . representational / symbolic play . . . [and] intentional planned programming . . ." (P2, p.10; Tr., pp.104-107 (Enns).)

56. After observing the Student in the general education classroom, Dr. Enns noted:

¹⁸ Dr. Enns has a PhD in Philosophy-School Psychology and is trained to administer a variety of cognitive, academic, adaptive, and social emotional measures. (P1, pp.1-4; Tr., pp.85-87, 126-127 (Enns).) He is also experienced in the BCBA / ABA therapy field and is a Nationally Certified School Psychologist. (*Ids.*)

there was a disconnect between very substantial needs and rudimentary interventions . . . [the Student's] [IA] . . . requires intensive training. Further, there is concern that [the Student] becomes overstimulated in the busy classroom, which might elicit social disengagement . . . While [the Student] withdrew frequently in the form of solo play or sequestering himself in the library, affect remained neutral / euthymic.

(P2, p.10; Tr., pp.105-108; 133 (Enns).) Dr. Enns was aware that the Student was not receiving all the services in the December 4, 2019, IEP because the Student only attended TOPS K-8 part of the day. (Tr. pp.132-133 (Enns).)

57. Dr. Enns also visited Lowell with the Mother on December 30, 2019, and observed the general education classrooms, special education classrooms, and facilities. (P2, pp.11-12; Tr., pp.100, 136-138 (Enns); 419-428 (Mother).) Dr. Enns concluded that the special education teacher is “clearly a skilled teacher and was able to teach a variety of students with the support of aides,” and that “children appeared comfortable and the climate of the classroom was warm and welcoming.” (P2, p.12; Tr., pp.104, 136-138 (Enns).) The Lowell staff informed Dr. Enns and the Mother recess had been temporarily suspended due to an incident with an aggressive child and that the available playground structures¹⁹ were temporarily unavailable. (P2, pp.11-12; Tr., pp.108-109, 136-138 (Enns); 419-428 (Mother).)

58. Dr. Enns also met with Ms. Krefft and other staff at STS and discussed the SLP and OT services the Student received in the private clinical setting. (P2, pp.12-13; Tr., pp.139-142 (Enns).)

59. Dr. Enns administered the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), a questionnaire completed by the Mother, to gauge adaptive levels of the Student. (P2, pp.14-15; Tr., pp.130-131, 145 (Enns).) The test results are as follows: Communication = 59 (below the 1st percentile); Daily Living Skills = 70 (at the 2nd percentile); Socialization = 74 (at the 4th percentile); and Motor = 73 (at the 4th percentile). (*Ids.*) The Student received an Adaptive Behavior Composite score of 68, or within the 2nd percentile / low range. (*Ids.*) The Student received a v-scale score of 19 on the internalizing measure and an 18 on the externalizing rating, suggesting a moderately high level of concern. (P2, pp.15-16; Tr., pp.130-131 (Enns).)

60. Dr. Enns concluded that the Student “struggles so significantly with verbal communication that we can’t really gauge other behaviors very well . . . [The Student] is a very impacted kid . . .” (Tr., p.89 (Enns).) Dr. Enns diagnosed the Student with Autism Spectrum Disorder Level 3 with accompanying language impairment (requiring very substantial support) and repeated a previous diagnosis apraxia of speech. (P2, p.17; Tr., pp.85-90, 132 (Enns).) Dr. Enns made nine recommendations, three of which impacted the SLP and OT services provided by the District and the Student’s placement at TOPS K-8:

¹⁹ The Lowell play structure was the “first ADA-accessible playground in the nation that is used by preschoolers through fifth grade students with various needs . . . and students have access to the playground.” (Tr., pp.615-616 (Pelland).)

a. *ABA Support in School: . . . It is critical that [the Student] be supported by an aide who is either licensed as or in the process of training up to a behavior technician (BT). The BT must be supervised by a Board Certified Behavior Analyst (BCBA).*

b. *Intensive Speech-Language Therapy and Occupational Therapy Services: . . . [The Student] has not been receiving adequate support in this regard, and current needs are now only being met by private services with Seattle Therapy . . . [the Student] is receiving approximately 2 hours per day of combined therapy. This level of support appears appropriate.*

c. *Maintain Current Placement at TOPS: . . . One, due to the lack of appropriate support at TOPS currently, there is no real data on how [the Student's social, speech, and pre-academic behaviors might improve with push-in ABA therapy and increased speech and language therapy. Two, [the Student] is currently experiencing significant change in his life due to the new intensive private treatment . . . Three, there are concerns on a more granular level that a lack of access to an appropriate outdoor space [at Lowell] and special education teacher's upcoming maternity leave.*

(P2, pp.18-19; Tr., pp.90, 95, 104 (Enns).)

61. Dr. Enns did not recommend that the Student receive services only in a private clinical setting, but instead recommended provision of SLP and OT services “across settings.” (P2, pp.18-19; Tr., pp.152-154.) Dr. Enns also did not recommend placement of the Student in the general education setting a majority of the time, or that Lowell Elementary could not provide the Student with the services recommended. (*Ids.*)

62. Ms. Krefft reviewed Dr. Enns’ report and discussed the Student with Dr. Enns, and thereafter recommended that the Student “receive clinic based SLP services with ABA support in school.” (P28, p.4; Tr., pp.209-215 (Krefft).) Ms. Krefft also reviewed the December 4, 2020, IEP and concluded that the 180 minutes per month of SLP services were inadequate to assist the Student in making educational progress. (P28, p.4; Tr., pp.61-62 (Krefft).) Ms. Krefft recommended 50 minutes per day 5 days per week either in the private clinical setting or in a “fifty percent push in, fifty percent pull out model” at the District. (Tr., pp.207-210 (Krefft).)

63. Ms. O'Donnell similarly reviewed Dr. Enns report and recommended that the Student receive OT in a “hybrid educational program with clinic-based services.” (P27, p.2; Tr., p.562-563 (O'Donnell).) Ms. O'Donnell reviewed the December 4, 2019, IEP and concluded that the 90 minutes per month of OT delivered as a related service was inadequate to assist the Student in making educational progress. (P27, p.2; Tr., pp.562-563.) Instead, Ms. O'Donnell recommended at least 30 minutes per day of direct OT treatment. (*Id.*)

64. In May 2020, Dr. Vannice reviewed Dr. Enns’ report and issued a letter in which agreed that “continuation of [the Student's] part-time clinic based intensive occupational and speech therapies” would be effective. (P12, p.1; Tr., pp.709-710 (Vannice).) Dr. Vannice also continued to recommend that the Student receive “one-on-one” instruction “in either setting, general ed or special ed, but especially in a general ed setting.” (Tr., p.710 (Vannice).) Dr. Vannice did not recommend that the Student receive services in any particular environment, just that the services

provided by STS were appropriate and that placing the Student in the general education environment for some period was appropriate. (Tr., pp.714-716 (Vannice).)

CONCLUSIONS OF LAW

Jurisdiction

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

Burden of Proof

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 and FAPE

3. School districts "shall provide every student who is eligible for special education between the age of three and twenty-one years, a free appropriate public education program (FAPE) . . . A FAPE is also available to any student determined eligible for special education even though the student has not failed or been retained in a course or grade and is advancing from grade to grade." WAC 3927-172A-2000; RCW 28A.155.090 and 34 C.F. R. Part 300.

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

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

Rowley, supra, 458 U.S. at 206-07 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a “potential-maximizing” education, but rather a “basic floor of opportunity.” *Id.* at 200-01.

5. First, it must be determined whether the District complied with the procedures established by the IDEA. *Id.* at 206-07. Procedural flaws do not automatically require a finding of a denial of a FAPE. However, “procedural inadequacies that result in the loss of educational opportunity, *Burke County Bd. of Educ. v. Denton*, 895 F.2d 973, 982 (4th Cir. 1990), or seriously infringe the parents' opportunity to participate in the IEP formulation process, *Roland M.*, 910 F.2d at 994; *Hall*, 774 F.2d at 635, clearly result in the denial of a FAPE.” *W.G. v. Bd. of Trustees of Target Range School Dist.*, 960 F.2d 1479, 8 IDELR 1019 (9thCir. 1992.)

6. Next, it must be determined whether the District engaged in a substantive violation of the IDEA. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

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

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

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

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 583 U.S. ____, 138 S. Ct. 556 (2017). The determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is “a snapshot, not a retrospective.” *Id.*

The District Proposed and Considered an Educational Placement Other than 0-39% General Education Participation

7. The first issue presented is whether the District violated the IDEA and denied the Student FAPE in the June 21, 2019, IEP and December 4, 2019, IEP by failing to raise or consider any educational placement other than the 0-39% general education participation. Thus, the Parents have alleged a procedural violation of WAC 392-172A-02050 because the District “predetermined” the Student's placement.

8. A district violates a parent's right to meaningfully participate in the IEP process if it predetermines a student's placement, such as when it “independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). An IEP Team cannot

enter a meeting with a “take it or leave it” position, and conversely the IDEA does not grant a parent veto power over IEP provisions. *Ms. S.*, 337 F.3 at 1131. Predetermination may also occur when a District makes a placement determination prior to an IEP meeting and is unwilling to consider other alternatives. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

9. The Parents assert that the District predetermined the Student’s placement in the general education environment 0-39% of the time. The District asserts that the IEP Team considered placement other than 0-39% of the time in general education.

10. The Parents rely on the Mother’s testimony and the last two pages of the June 21, 2019, IEP and December 4, 2019 IEPs, showing that only the “0-39%” box was checked.

11. However, Ms. LaRosa testified that the failure to check the other boxes was an administrative oversight. Further, as pointed out by the District, the June 21, 2019, PWN and December 6, 2019, PWN reflect that the team considered other options and rejected the options at the June 21, 2019 IEP and December 4, 2019, IEP meetings. Importantly, Ms. Stern, Ms. Russell, Ms. LaRosa, Mr. Mundell, and the Parent all testified that the IEP Team discussed the Student’s present levels of educational performance, IEP goals, potential services, IEP Team recommendations, staffing, and the Parent’s concerns at both the June 21, 2019, IEP meeting and the December 4, 2019, IEP meeting.

12. The record, then, contains sufficient testimony and documentary evidence that the District followed the requirements of WAC 392-172A-02050 and did not predetermine the Student’s placement in 0-39% general education environment prior to the June 21, 2019 IEP meeting or the December 4, 2019 IEP meeting. The Parent has not carried her burden and shown otherwise. Therefore, it is concluded that the District did not violate the IDEA and did not fail to provide the Student with FAPE by predetermining the Student’s placement or failing to consider placement other than 0-39% of the time in the general education environment.

13. The next issue is whether the June 21, 2019 IEP placed the Student in the least restrictive environment. It appears from the record that the Parents also challenge the placement of the Student as per the December 4, 2019, IEP for the same reason.

14. The IDEA requires that school districts educate students with disabilities in the least restrictive environment, with removal from regular education environment occurring only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. Section 1412(a)(5)(A). “The IDEA’s preference for mainstreaming is not an absolute commandment, and must be balanced with “its requirements that schools provide individualized programs tailored to the specific needs of each disabled child[.]” *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir. 1995).

15. A student eligible for special education shall receive those services “to the maximum extent appropriate in the general education environment with students who are nondisabled.” WAC 392-172A-02050. Further, “special classes, separate schooling or other removal of students eligible for special education from the general educational environment [shall] occur only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.*

16. WAC 392-17A-02060(1) and (2) requires that an IEP team, including the parents, to make a decision about the educational placement of a student after formulating the IEP and based on the following criteria:

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

See 34 CFR 300.116(b)(2).

17. In *Sacramento City Unified School District Bd. of Education v. Rachel H.*, 14 F.3d 1398 (9th Cir.1994) the Ninth Circuit concluded that school districts must consider four factors when making a decision about a student's least restrictive environment:

- 1) *the educational benefits of placing a student with a disability in regular classrooms,*
- 2) *the nonacademic benefit of such placements,*
- 3) *the effect that the presence of students would have on teachers and other children in the general education class,* and
- 4) *the cost of inclusionary placements.*

See *Clyde K. v. Puyallup School Dist. No. 3*, 35 F.3d 1396 (9th Cir. 1994) adopting the four part *Rachel H.* test. "While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals. *City of San Diego v. California Special Education Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996).

18. Whether an IEP placed a Student in the least restrictive environment is subject to the "snap shot" rule of *Adams* that an IEP is "not retrospective" and reasonableness is determined at the time of the development of the IEP. 195 F.3d at 1149. Additionally, the *Rowley* rule that a District is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity" also applies. 458 U.S. at 206-07.

a. The June 21, 2019, and December 4, 2019, IEPs Comply with the Requirements of WAC 392-172A-02050 and 02060.

19. It is important to note that while the Parents challenge the appropriateness of the Student's IEP in regards to the SDI in the areas of SLP and OT (discussed below), the Parents do not argue that the Student's IEP should provide for less than 1275 minutes per week of SDI services across the identified areas of concern. The Parents assert that the Student will derive educational benefit from interacting with his peers in the general education classroom 100% of the time with curriculum modification and supplementary aids and services from a 1:1 trained behavior technician under the supervision of a BCBA. The Parents, then, believe that the District did not comply with WAC 392-172A-02050 and 02060 and *Rachel H.* by placing the Student in the special education environment 73% of the time, and instead should deliver the 1275 minutes of SDI in the general education classroom.

20. In support of their position that the Student would receive an educational benefit and a nonacademic benefit in the general education environment 100% of the time, the Parents presented the testimony of Dr. Stephen Camarata, Dr. Vannice, and Dr. Enns. Regarding the testimony of Dr. Camarata he did not observe or assess the Student, did not consult with District personnel, and only reviewed the statements and reports of other individuals to form his opinions. His opinions, then, while admissible, are based on hearsay evidence and entitled to very little weight. Moreover, Dr. Camarata's area of expertise is limited to SLP and not to the other areas of concern, not to the Student's ability to obtain an educational benefit in the general education environment. Similarly, Dr. Vannice also did not observe the Student in the general or special education environments, did not consult with District personnel, and his primary duty is assisting the Mother with skills and not addressing the educational needs of the Student. Therefore, Dr. Vannice's testimony is also based on primarily hearsay evidence and is entitled to very little weight.

21. Regardless, neither Dr. Camarata nor Dr. Vannice testified that placing the Student in the general education environment with a trained 1:1 behavior technician 100% of the time was the Students' least restrictive environment, but only that the Student needed a high level of service and could be served in a combination of general education, special education, and clinical settings.

22. Dr. Enns did testify based on his personal observations and experience that the Student could access educational benefits in the general education classroom 100% of the time with a 1:1 behavior technician under BCBA supervision, and that placement with the Student's general education peers would provide the Student with educational and non-academic benefits. Importantly, however, Dr. Enns did not testify that placing the Student in the special education environment for delivery of SDI was not the Student's least restrictive environment. Ultimately, Dr. Enns recommended that the Student receive SDI in a combination of special education, general education, and/or clinic based settings.

23. Additionally, the "snap shot" rule requires assessment of the reasonableness of the placement decision at the time of the decision, in this case June 21, 2019, and December 4, 2019. As of these dates, Dr. Camarata, Dr. Vannice, and Dr. Enns had not observed or assessed the Student and therefore the District did not have the benefit of their opinions at the time the IEPs were developed.

24. Certainly the Mother's testimony that she believed from her own observations that the Student could access educational and non-academic benefits in the general education setting with a high level of support provides context and is informative. Ultimately, though, the Mother's testimony carries less weight because she does not possess the specific education, qualifications, or experience to present an informed opinion about whether the District placed the Student in his least restrictive environment.

25. It is also worth mentioning that while Ms. O'Donnell and Ms. Krefft testified to the importance of the Student accessing the general education environment for SLP and OT purposes, neither testified nor recommended placement of the Student in the general education environment 100% of the time.

26. Conversely, the District's witnesses all testified, based on the available information and their professional expertise, that the placement in the special education environment 73% of the time for delivery of SDI was the Student's least restrictive environment. Ms. LaRosa, Ms. Bernal, and Mr. Mundell, testified that the Student's would be isolated from his general education peers with the adult aide a majority of the time. The IEP goals developed by the IEP Team reflect that the Student would be working on tasks and skills that varied significantly from his general education peers such that the curriculum could not be modified to accommodate the Student. Additionally, the District personnel expressed deep concern over how far the Student was behind his peers in the areas of transitions, toileting, and communication, and that it was necessary to address the Student's levels of proficiency in a small group setting.

27. Ms. LaRosa, Ms. Bernal, and Mr. Mundell also persuasively testified that teaching the Student would be exceptionally difficult and could impact the other students because the classroom was busy and transitions happened frequently, which overwhelmed and distracted the Student. All of the District's witnesses also consistently testified that the Student did not engage with other peers in the general education classroom such that he would receive a direct or indirect educational benefit.

28. Dr. Enns, the Parents' expert, notably expressed concern that the Student became overstimulated in the general education classroom, withdrew frequently, did not interact with other Students, and needed a high level of adult support in the general education environment. In addition, the Mother initially acknowledged the need to place the Student in a specialized setting and requested at the June 21, 2019, IEP Team meeting that the Student be placed in the general education setting at least 90 minutes per day, and the June 21, 2019, IEP is reflective of the Parent's request.

29. The educational benefit a child derives from a 1:1 aide in a general education environment with curriculum modifications verses placement in a special education classroom is frequently addressed by tribunals because placement of students with severe disabilities requires a difficult and complicated analysis. *Las Virgenes Unifice Sch. Dist v. S.K.*, No. CV-05-8467-GAF, Dkt No. 151, 54 IDELR 289 (C.D. June 14, 2010) (working with a one-to-one aide in the general education environment "mistakes proximity for participation"); *Hollister Sch. Dist.*, 60 IDELR 172 (CA SEA 2013) ("Student and her aide would have to work separately from the rest of the class to access her education and this is not meaningful inclusion"); *Clovis Unified Sch. Dist.*, 114 LRP 548 (CA SEA 2013); *Patterson Joint Unified Sch. Dist.*, 110 LRP 28776 (CA SEA 2010); *Glendale Unified Sch. Dist.*, 54 IDLER 306 (CA SEA 2010).

30. On balance the evidence presented shows that the nature or severity of the Student's disabilities is such that placement in the general education environment with the use of supplementary aids and services, as well as curriculum modifications, cannot be achieved satisfactorily. Most likely, adopting the Parents' request would place the Student in proximity of his general education peers, but the Student would not receive an educational or non-academic benefit.

31. The Parents have not carried their evidentiary burden on this issue. Therefore, it is concluded that placement of the Student in the special education environment 73% of the time as set forth in the June 21, 2019, and December 4, 2019, IEPs is the Student's least restrictive environment and the District did not violate the IDEA or WAC 392-172A-02050 or -02060.

b. Assignment of the Student to Attend Lowell Instead of TOPS K-8 Does Not Violate the Requirements of WAC 392-172A-05050 and -02060

32. The Parents also argue that placement of the Student at Lowell violates WAC 392-172A-02060(3) because the placement is not at the Student's "neighborhood school." It is not disputed that the Student would attend TOPS K-8 if the Student was not disabled; the dispute is the reassignment of the Student to Lowell for provision of the services set forth in the June 21, 2019, and December 4, 2019, IEPs.

33. "[U]nless the IEP of a student requires some other arrangement; the student shall be educated in the school that he or she would attend if nondisabled. In the event the student needs other arrangements, placement shall be as close as possible to the student's home." WAC 392-172A-02060(3). School districts are generally entitled to deference in deciding what programming is appropriate for a student. *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1031 n.5 (9th Cir. 2009). For that reason, IEPs need not address the instructional method to be used unless a specific methodology is necessary for a student to receive an appropriate education. See *id.* at 1039; see also *Department of Education, Analysis of Comments and Changes to IDEA Regulations*, 71 Fed. Reg. 46665 (2006) (nothing in the IDEA requires IEP to include specific methodology; methods may be addressed in IEP if necessary for child to receive FAPE).

34. The District's witnesses presented credible, comprehensive testimony regarding the necessity of placing the Student in the focus method based program at Lowell to allow for flexible, intensive, individualized delivery of the recommended SDI services. Moreover, Mr. Bylsma thoroughly explained that the decision to place the Student at Lowell in order to provide the benefit of the focus method based program complied with the District's student services and programs delivery matrixes and policies. Importantly, Ms. LaRosa, Mr. Mundell, and Ms. Pelland all testified that the resource method based programming at TOPS K-8 could not effectively deliver the IEP services and SDI. Ms. Bernal, Ms. Russell, and Mr. Mundell offered consistent testimony based on their personal experience that the Student was not progressing at TOPS K-8.

35. The Parents, however, presented the testimony of the Mother and Dr. Enns in support of their argument that placement at TOPS K-8 was appropriate. The Mother testified that she believed that placement at TOPS K-8 is appropriate because her other child attended the school, the school is in the family's neighborhood, and TOPS K-8 could provide the Student with the services in the IEP if the Student was placed in the general education environment with a 1:1 behavioral technician under the supervision of a BCBA. Certainly, the Mother's desire to keep her children together at the same school is understandable from a convenience and shared-experience perspective. However, as discussed above, placing the Student in a general education classroom with high levels of supports and curriculum modifications is not the Student's least restrictive environment. Also, the Mother did not testify that the physical location of the Lowell school was outside her neighborhood or located farther away from the Student's home than another school with a focus method based program.

36. While Dr. Enns performed his evaluation months after the decision to place the Student at Lowell, Dr. Enns did present credible testimony about his personal observations and concerns about placing the Student at Lowell. Dr. Enns' concerns, however, appear to reflect temporary environmental changes at Lowell that were either not present on June 21, 2019, or directly

implicated the ability of Lowell to provide the Student with an education in his least restrictive environment. Moreover, Dr. Enns concluded that the Lowell staff was capable, the facilities were appropriate, and that the general nature of the Lowell culture did not significantly differ from TOPS K-8.

37. The evidence in the record, then, weighs heavily in favor of the District's decision to place the Student at Lowell so that the Student could attend school in his least restrictive environment and receive the SDI recommended in the June 21, 2019, and December 4, 2019, IEPs. Therefore it is concluded that, by a preponderance of the evidence, the District's decision to assign the Student to Lowell, did not violate the IDEA or WAC 392-172A-02050 or -02060.

The District Violated the IDEA and Failed to Provide the Student with FAPE Because the June 21, 2019, IEP and December 24, 2019, IEPs Were Not Reasonably Calculated to Enable the Student to Make Progress in Light of the Child's Circumstances in the Area of Speech-Language

38. The next issue is whether the District violated the IDEA and failed to provide the Student with FAPE because the June 21, 2019, IEP and December 4, 2019, IEP did not provide appropriate levels of SDI in the areas of SLP such that the Student could make progress in light of the Student's circumstances.

39. An IEP must include a statement of the program modifications and supports that will be provided to enable the student to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students, including nondisabled students. WAC 392-172A-03090(1)(c)-(d); 34 CFR 300.320(a)(4)(ii)

40. In developing a Student's IEP, WAC 392-172A-03110(1) requires the IEP team to consider:

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

Subsection (2)(a) of the rule requires the IEP team to consider special factors unique to the Student:

(i) Consider the use of positive behavioral interventions and supports, to address behavior, in the case of a student whose behavior impedes the student's learning or that of others; and

...

(iv) Consider the communication needs of the student, and in the case of a student who is deaf or hard of hearing, consider the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode,

academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode; and

(v) Consider whether the student needs assistive technology devices and services.

41. An IEP Team must "revise the IEP, as appropriate, to address: (i) Any lack of progress toward the annual goals . . . ; (ii) the results of any reevaluations; (iii) information about the student provided to, or by the parents, as described under WAC 392-17A-03025." WAC 392-172A-03110.

42. School districts are generally entitled to deference in deciding what programming is appropriate for a student. *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1031 n.5 (9th Cir. 2009). For that reason, IEPs need not address the instructional method to be used unless a specific methodology is necessary for a student to receive an appropriate education. *See id.* at 1039; see also *Department of Education, Analysis of Comments and Changes to IDEA Regulations*, 71 Fed. Reg. 46665 (2006) (nothing in IDEA requires an IEP to include specific methodology; methods may be addressed in an IEP if necessary for child to receive FAPE).

43. Specially designed instruction (SDI) means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction to address the student's unique needs that result from the student's disability and to ensure access of the student to the general education curriculum. WAC 392-172A-01175; 34 CFR §300.39(b)(3).

44. Related services are transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education, including SLP and OT services and parent counseling and training. WAC 392-172A-01155(1).

45. Assistive technology devices would include any items used to increase, maintain, or improve the functional capabilities of a student eligible for special education. The term would include wiggle chairs, puzzles, fidgets and other items used as positive behavioral supports or rewards. WAC 392-172A-01025.

46. The District correctly points out that tribunals cannot assess the educational benefits flowing from an IEP from a single component. *See, e.g., Karl by Karl v. Bd. of Educ. of Geneseo Cent Sch. Dist.*, 736 F.2d 873, 877 (2nd Cir 1984) (The educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole"); *Palo Alto Unified Sch. Dist.*, 118 LRP 21969 (CA SEA 2018) (citing *J.M v. New York City Dep't of Education*, 171 E. Supp. 3d 236, 247-48 (S.D.N.Y. 2016) ("An IEP must be considered as a whole; its individual parts cannot be judged in isolation.") Thus, the tribunal must assess the entire June 21, 2019, IEP to determine whether the level of SLP and OT services are appropriate for the Student.

a. Speech Language SDI in the June 21, 2019 IEP

47. The June 21, 2019, IEP called for the Student to receive 120 minutes per month of SLP from an SLP, and 150 minutes per month of SLP from an IA in the special education environment. The Parents argue that the number of direct services minutes are inadequate. The District defends the service minutes in the June 21, 2019, IEP, asserting that the combination of direct

and indirect SLP services amounted to a sufficient combination of SLP services for the Student.

48. At the time the June 21, 2019, IEP was developed, the IEP Team obtained and reviewed all available information: the Parents' input, the Student's preschool teacher Ms. Gallagher's recommendations, and the 2017 Evaluation results. It does not appear from the record that other information was either unavailable or disregarded at the time. Additionally, the June 21, 2019, IEP provides for a combination of SLP services through direct services from an SLP and an IA, as well as services in combination with SDI in the area of Social Behavioral, using the ACT model. Notably, the Parent does not appear to challenge the goals established in the June 21, 2019 IEP.

49. However, the record shows that the Mother and the Student's preschool teachers identified communication as the highest priority because the Student is mostly non-verbal. As these individuals had the most experience with the Student at the time the June 21, 2019, IEP was developed, their input has great weight. More importantly, however, while Ms. Russell was able to describe the general framework for providing the SLP services in combination with other services, the District's witnesses were not able to offer a sufficient explanation regarding why it was appropriate to use an IA to deliver SLP services. The record lacks information regarding the SLP training IAs receive and how 150 minutes of SLP delivered by an IA benefits the Student. Also, the District's witnesses did not sufficiently describe delivery of SLP services during the Social-Emotional Behavior services, or whether the SLP services would be meaningful.

50. At the time the June 21, 2019, IEP was developed, the information available supported an SLP delivering the SLP SDI to this highly impacted Student. The record does not reflect that it was appropriate for an IA to deliver the SLP SDI to the Student.²⁰ As a result, it is concluded that the June 21, 2019, IEP was not reasonably calculated to enable the Student to make progress in the area of SLP. Therefore, beginning June 25, 2019, when the IEP took effect, the Student was at least entitled to 270 minutes per month of SLP SDI from an SLP in the special education environment.

51. As the academic year began on September 4, 2019, the Student should have received 270 minutes per month of SLP SDI from an SLP for the months of September, October and November 2019. The record reflects that the Student received 120 minutes of SLP per month from an SLP during this period. Therefore, the Student did not receive 150 minutes per month of services from an SLP for three months, or for 450 total minutes.

b. Speech Language SDI after the September 12, 2019 IEE

52. The Parents also argue that the District delayed timely implementing the recommendations of Ms. Krefft after the District received her September 12, 2019, SLP IEE. The District counters that Ms. Krefft only observed the Student in the clinical setting and did not observe the Student in the school setting until November 2019. Therefore, the District did not have an obligation to implement Ms. Krefft's recommendations.

²⁰ It is notable that the Student did not make progress in the area of communication between June 25, 2019 and December 4, 2019. However, given the Parents' decision to send the Student to TOPS K-8 part-time and the inability of the District personnel to provide the Student with all the services in the June 21, 2019, IEP, the Student's lack of progress in the area of communication was not considered as a factor regarding whether the SLP services called for in the June 21, 2019, IEP were appropriate.

53. While the issue of Ms. Krefft's observation in the clinical verses the educational environment is notable, given the Student's extremely low level of communication (described by witnesses as "non-verbal," "severely impacted," and "limited expressive communication") the environment that Ms. Krefft observed the Student in appears to be a distinction without a difference. The testimony presented by Ms. Krefft and Ms. Russell reflects this analysis because neither witness could definitively describe how or why the environment that Ms. Krefft observed the Student in impacted Ms. Krefft's September 12, 2019, recommendation. What is clear is that as of September 12, 2019, Ms. Krefft observed the Student and provided the District with information that the Student needed daily SLP services to improve his communication and meet the June 21, 2019, IEP goals.

54. Regardless, the Parents have not shown that the District had an obligation to implement the SLP IEE recommendations beginning September 12, 2019. Instead, the District had an obligation to conduct an assessment revision. The District conducted the Assessment Revision between October 2019 and December 4, 2019. Given the circumstances presented, then, it is concluded that the District did not unduly delay in implementing the SLP IEE recommendations, and the District was not obligated to accept an implement the SLP IEE recommendations.

c. Speech Language SDI in the December 4, 2019 IEP

55. After conducting the Assessment Revision, on December 4, 2019, the IEP Team recommended that the Student receive 180 minutes per month of SLP from an SLP, and 90 minutes per month of SLP from an SLP in the general education environment as a related service. The Parents argue that the December 4, 2019, IEP is not reasonably calculated to enable the Student to make progress in the area of SLP because the minutes of service are significantly less than the recommendations of Ms. Krefft, Dr. Enns, and Dr. Camarata. The District argues that the level of SLP services is appropriate and that the Parents have not produced sufficient evidence showing otherwise.

56. Again, the record reflects that the Student not only received the 180 minutes of SLP SDI minutes served by an SLP, but also that the Student would receive SLP during the Social-Emotional Behavior service and indirectly by interacting with his peers in the special education and general education environment. The point of conflict is a substantial difference in the number of recommended minutes of SLP SDI that are appropriate for the Student to make progress towards the December 4, 2019, IEP goals.

57. The Parents presented consistent, credible testimony from Ms. Krefft, based on her observations and work with the Student, that daily, intensive SLP services are required for the Student to make gains in the area of communication. While Dr. Enns is not a trained SLP, it is meaningful that he recommended focusing on communication because of the impact on all other areas and he supported Ms. Krefft's recommendation. Also, while Dr. Camarata provided hearsay testimony, he is trained in the area of SLP and his support of Ms. Krefft's recommendation is persuasive.

58. On the other hand, Ms. Russell's testimony that daily SLP SDI for 50 minutes is very high and that the Student may not have the focus and attention capabilities for that level of service is also persuasive. Ms. Russell's experience of providing 20 minutes per session of SLP services at a rate of 2 to 3 times per week reflects an understanding of the Student's needs and capabilities.

Additionally, it is notable that Ms. Krefft's recommendation does not account for the SLP services the Student receives during the Social-Emotional Behavior services or the indirect benefits of the Student's time with peers in the special education and general education environment. Also important is that Ms. Russell and Ms. Krefft were not able to consult directly with each other and share their expertise and recommendations.

59. Given the evidence presented regarding the Student's ability to focus, the need for intensive, daily SLP services, as well as the combination of offerings in the IEP, it is concluded that the December 4, 2019, IEP is not reasonably calculated to enable the Student to make progress in the area of SLP. The record reflects a need to increase the frequency of the service to assist the Student in meeting the goals of the December 4, 2019, IEP. Therefore, it is concluded that the December 4, 2019, IEP should have provided the Student at least 20 minutes per day, 5 days per week (100 minutes per week) of SLP SDI from an SLP.

60. The Student, then, should have received 100 total minutes of SLP services for 25 weeks between December 5, 2019 and June 18, 2020, for total of 2500 minutes of SLP services. The Student received approximately 45 minutes of direct SLP services per week during the same period, for a total of 1,125 minutes of SLP services. Therefore, the Student did not receive 1,375 minutes of SLP services between December 5, 2019 and June 18, 2020.

The District Did Not Violate the IDEA and Provided the Student with FAPE Because the June 21, 2019, IEP and December 24, 2019, IEPs Were Reasonably Calculated to Enable the Student to Make Progress in Light of the Child's Circumstances in the Area of Occupational Therapy

61. The next issue is whether the District violated the IDEA and failed to provide the Student with FAPE because the June 21, 2019, IEP and December 4, 2019, IEP did not provide appropriate levels of SDI in the area of OT such that the Student could make progress in light of the Student's circumstances.

62. The statutes, rules, and case law cited above in Conclusions of Law 39 through 46 also apply to this issue.

a. Occupational Therapy as an Accommodation in the June 21, 2019 IEP

63. The Parents argue that the District violated the IDEA and failed to provide the Student with FAPE because the June 21, 2019, IEP, did not provide OT as a related service or SDI. Conversely, the District argues that the June 21, 2019, IEP was reasonably calculated to assist the Student in making progress in the area of OT.

64. Again, the Parent does not challenge the goals in the June 21, 2019, IEP. Moreover, at the time the June 21, 2019, IEP was developed, and it appears from the record that the IEP Team considered all available information about the Student's abilities in the area of OT from the Mother, the Student's preschool teacher, and the 2017 Evaluation. The information provided at the time did not reflect any specific recommendation regarding occupational therapy beyond the statement in the 2017 Evaluation that OT was needed as part of his educational plan as "support for personnel." The information available instead recommended a high level of service in the areas of Adaptive / Life Skills, Cognitive / Pre-academics, and Social-Emotional Behavior. The June 21,

2019, IEP reflects the need for these skills by offering a high level of service in the three areas.

65. As testified to by Ms. Stern, an OT consultation as an accommodation for 30 minutes per month to support the high level of services that the Student would receive in the other areas of concern identified was adequate. Additionally, Ms. Russell, Mr. Mundell, and Ms. LaRosa all credibly testified the combination of offerings in the areas of Adaptive / Life Skills, Cognitive / Pre-academics, and Social-Emotional Behavior would address the Student's functional challenges. Conversely, the Parents did not offer evidence, beyond the Mother's belief, that reflects any need for increased OT at the time the June 21, 2019, IEP was developed, given the high level of services in the areas of Adaptive / Life Skills, Cognitive / Pre-academics, and Social-Emotional Behavior.

66. Therefore, it is concluded that the Parents have not carried their burden and have not shown that the June 21, 2019, IEP was not reasonably calculated to enable the Student to make progress in light of his circumstances in the area of OT.

b. Occupational Therapy after the September 12, 2019 IEE

67. The Parents also argue that the District delayed timely implementing the recommendations of Ms. O'Donnell after the District received the September 12, 2019, OT IEE. The District counters that Ms. O'Donnell only observed the Student in the clinical setting and did not observe the Student in the school setting, and that Ms. O'Donnell's testimony should be given less weight because her staff performed the OT IEE.

68. While the issue of Ms. O'Donnell's observation in the clinical verses the educational environment is notable (see paragraph 54 *infra*), again given the Student's disabilities it appears that the environment that the observation occurred in is a distinction without a difference. The District correctly points out that Ms. O'Donnell relied on her staff members to conduct the IEE and that she supervised the process. However, Ms. O'Donnell personally observed the Student and assisted her staff with the IEE and therefore her testimony is entitled to full weight.

69. As of September 12, 2019, then, the District had information that recommended the Student receive daily OT services to meet the June 21, 2019, IEP goals. However, Ms. O'Donnell's recommendation of 30 minutes per day appears to be a stand-alone recommendation. Further, the OT IEE does not account for the high level of services the IEP provided for in the areas of Adaptive / Life Skills, Cognitive / Pre-academics, and Social-Emotional Behavior. There is no other evidence in the record that corroborates or supports Ms. O'Donnell's recommendation except for Dr. Enns testimony and report that he believed the services provided as of January 7, 2020, by STS were adequate.

70. Regardless, the Parents have not shown that the District had an obligation to implement the OT IEE recommendations beginning September 12, 2019. Instead, the District had an obligation to conduct an assessment revision. The District conducted that assessment revision between October 2019 and December 4, 2019. Given the circumstances presented, then, it is concluded that the District did not unduly delay implementing, and was not obligated to accept, the OT IEE recommendations as of September 12, 2019.

c. Occupational Therapy as a Related Service in the December 4, 2019, IEP.

71. The Parents next claim that the District violated the IDEA and failed to provide the Student with FAPE because the December 4, 2019, IEP did not provide OT as SDI, but only included OT as a related service. It appears that the Parents also contest the number of OT minutes the December 4, 2019, IEP provides. Conversely, the District argues that the December 4, 2019, IEP was reasonably calculated to assist the Student in making progress in the area of OT.

72. The Parents again do not challenge the goals in the December 4, 2019, IEP, and it appears the IEP Team had information about the Student's abilities from multiple sources and the IEP Team reviewed and considered the information.

73. As noted above, Ms. O'Donnell's OT service recommendation does not account for the high levels of service the Student would receive in the areas of Adaptive / Life Skills, Cognitive / Pre-academics, and Social-Emotional Behavior. Additionally, Dr. Enns merely repeated Ms. O'Donnell's recommendation and did not provide his opinion to the District at the time the December 4, 2019, IEP was developed. Conversely, the District's witnesses all credibly testified that the Student would receive many opportunities to work on functional fine motor skills, school based self-care, functional play, sensory processing, and other OT related areas when he received instruction and services in the areas of Adaptive / Life Skills, Cognitive / Pre-academics, and Social-Emotional Behavior.

74. The Parents also ask that the OT services classified as SDI in the December 4, 2019, IEP. The Parents did not present any evidence from any witness that OT is classified and / or delivered as SDI except in a rare circumstance. The Parents' witnesses also failed to describe how delivering OT as SDI differed from the anticipated services in the December 4, 2019, IEP. On the other hand, the District's witnesses Ms. LaRosa and Ms. Stern both testified that OT is usually included in IEPs as a related service because the therapy is intended to support the Student and personnel as the Student receives SDI in other areas of concern.

75. The Parents, then, have not carried their burden and have not shown that the December 4, 2019, IEP was not reasonably calculated to enable the Student to make to make progress in light of his circumstances in the area of OT.

The District Did Not Violate the IDEA by Refusing to Incorporate the Recommendations of Dr. Enns

76. Dr. Enns completed his IEE on February 20, 2020, and the Parent amended her due process hearing request to assert that the District should have incorporated his recommendation that "the Student remain at TOPS K-8 with increased speech and language therapy provided by a 1:1 aide who is either licensed as or in the process of training up to a behavior ("BT") supervised by a Board Certified Behavior Analyst ("BCBA") utilizing Pivotal Response Treatment ("PRT")." (See page 2, *infra*.)

77. First, Dr. Enns may have recommended that the Student remain at TOPS K-8, but as concluded above, the placement of the Student at Lowell is appropriate.

78. Next, as found and concluded above, the District was obligated to provide increased SDI

in the area of SLP as of June 21, 2019 and December 4, 2019. Dr. Enns, who is not a trained SLP, simply reiterated the necessity of increased SLP services based on the same information available to Ms. Krefft and Ms. Russell. Dr. Enns recommendation that the services provided by STS “appear appropriate,” does not either change or otherwise inform the level of SLP services the Student should receive.

79. Finally, Dr. Enns recommended that the Student receive support from a trained behavioral therapist under the supervision of a BCBA and it appears that this recommendation is primarily based on the Mother’s desire to place the Student in the general education environment 100% of the time. Weighing Dr. Enns recommendation against the reality that he observed the Student in the part-time general education environment at TOPS K-8, which admittedly did not have the focus method, or the trained staff offered by Lowell, Dr. Enns’ recommendation appears to reinforce the District’s decision to place the Student at Lowell for appropriate services. Additionally, as discussed above, while Dr. Enns recommended PRT as a method of treatment, the law is clear that the District selects the method of delivering SDI to the Student and is not required to designate the method in the IEP.

80. Given the timing of Dr. Enns’ report and recommendations, and the findings and conclusions above, it must be concluded that the District is not obligated to implement Dr. Enns recommendations set forth in the February 20, 2020 IEE.

Remedies

81. As found and concluded above, the District’s June 21, 2019, and December 4, 2019, IEPs violated the IDEA and denied the Student FAPE by failing to provide appropriate SDI in the area of SLP. Therefore the Student is entitled to relief.

82. The Student’s IEP team shall meet within thirty (30) days from the date of this decision (unless this period is extended by agreement of the Parents) to amend the Student’s IEP to include 100 minutes of SLP per week from an SLP.

83. The Parents seek reimbursement for their expenses for obtaining SLP services from a STS. As concluded above, the Student is entitled to 450 minutes of SLP provided by an SLP, not an IA, for the period of June 25, 2019 to December 4, 2020 (150 minutes x 3 months (September 2019, October 2019, November 2019)). Also, the Student is entitled to 1,375 minutes of SLP provided by an SLP for the period of December 5, 2020 to June 8, 2020. The Student, then, is entitled to relief in the form of reimbursement for 1,875 minutes of SLP by an SLP.

84. A review of Ms. Krefft’s testimony and progress report shows Ms. Krefft worked with the Student on transitions, sharing, and making requests, all of which are goals listed in both the June 21, 2019, IEP and the December 4, 2019, IEP. The private SLP services Ms. Krefft provided, appear appropriate to assist the Student in meeting both IEP’s goals. Also, Ms. Krefft’s rate of \$138.00 per hour appears reasonable and there is no evidence otherwise.

85. The District shall reimburse the Parents for 1,875 minutes of SLP services provided to the Student by STS at Ms. Krefft’s rate of \$138.00 per hour, for a total of \$4,312.50.²¹ The District

²¹ Because Ms. Krefft’s invoices for services is part of the record at P8, the Parents are not required to submit to the District additional documentation regarding the services provided or expenses incurred.

shall remit payment to the Parents within thirty (30) days of the date of this order. Because this reimbursement fully compensates the Student for the SLP services he should have received, no further compensatory education is awarded.

86. The Parents' remaining requests for relief are DENIED.

ORDER

Based on the findings and conclusions above, it is hereby ordered that:

1. The District did not violate the IDEA and did not deny the Student FAPE in its June 21, 2019, IEP and December 4, 2019, IEP, because the District proposed and considered an educational placement other than 0-39% general education participation.
2. The District did not violate the IDEA and did not deny the Student FAPE in its June 21, 2019, IEP or December 4, 2019, IEP because the District placed the Student in the Student's least restrictive environment as per WAC 392-172A-02050 and -02060.
3. The District did not violate the IDEA and did not deny the Student FAPE by assigning the Student to attend Lowell because the decision placed the Student in the Student's least restrictive environment as per WAC 392-172A-02050 and -02060.
4. The District did not violate the IDEA and provided the Student with FAPE because the June 21, 2019, IEP and December 24, 2019, IEPs were reasonably calculated to enable the student to make progress in light of the child's circumstances in the area of occupational therapy.
5. The District did not violate the IDEA or deny the Student FAPE after receiving the OT IEE and SLP IEE from Seattle Therapy Skills for Life on September 12, 2019, by failing to increase the Student's speech services based on the recommendations prior to December 4, 2019.
6. The District did not violate the IDEA by refusing to incorporate Dr. Enns' recommendations in the February 20, 2020 IEE.
7. The District violated the IDEA and failed to provide the Student with FAPE because the June 21, 2019, IEP and December 24, 2019, IEPs were not reasonably calculated to enable the Student to make progress in light of the child's circumstances in the areas of speech language.

Therefore, the Parents of the Student are entitled to the following remedies:

1. The District shall reimburse the Parents for 1,875 minutes of SLP services provided to the Student by STS at Ms. Krefft's rate of \$138.00 per hour, for total of \$4,312.50.²² The District shall remit payment to the Parent within thirty (30) days of the date of this order.

²² Because Ms. Krefft's invoices for services is part of the record at P8, the Parents are not required to submit to the District additional documentation regarding the services provided or expenses incurred.

2. The District shall meet within thirty (30) days of the date of this order and amend the Student's December 4, 2019, IEP to include 100 minutes per week of SLP services provided by an SLP.

3. All other remedies requested by the Parent have been considered. Any remedies not awarded above are denied.

Signed on the date of mailing.



COURTNEY E. BEEBE
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

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

Parents

[REDACTED]

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Dated July 31, 2020 at Seattle, Washington.

Ian

Representative
Office of Administrative Hearings
600 University Street, Suite 1500
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cc: Administrative Resource Services, OSPI