

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

IN THE MATTER OF:

OSPI CAUSE NO. 2020-SE-0133

OAH DOCKET NO. 09-2020-OSPI-01148

BELLEVUE SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Dana Diederich by video conference on March 3 through 5, 2021. The Parent of the Student whose education is at issue¹ was accompanied and advised by Helen Caldart. The Bellevue School District (District) was represented by Lynette Baisch, Elizabeth Robertson, and Felipe Mendez, attorneys at law. Also present for the District was Melissa Schweitzer, Director of Special Education.² The following is hereby entered:

STATEMENT OF THE CASE

Procedural History

The Parent filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on September 10, 2020. The Complaint was assigned Cause No. 2020-SE-0133 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was issued on September 11, 2020, which assigned the matter to ALJ Dana Diederich. The District filed its Response to the Complaint on October 14, 2020.

The issues for hearing were stated in the Prehearing Order issued on October 19, 2020. The Fourth Prehearing Order, dated January 14, 2021, set the due process hearing for March 3 through 5, 2021.

¹In the interests of preserving the family's privacy, this decision does not name the parents or student. Instead, the decision refers to the Mother as "Parent," and also refers to "Father," and "Student."

²Attorney Jessica Jensen, counsel for Overlake Specialty School, attended the hearing when Overlake Specialty School staff testified. She observed and did not participate in the hearing. Neither party objected to her attending the hearing.

Due Date for Written Decision

As set forth in the October 19, 2020 Prehearing Order, the due date for a written decision in this matter was continued to thirty days after the record of the hearing closes. The record of the hearing closed on April 12, 2021, with the filing of the parties' post-hearing briefs. Therefore, the decision due date is May 12, 2021.

EVIDENCE RELIED UPON

Exhibits Admitted:

District's Exhibits: D1 – D12, D14 - D15, D21, D24, D27, D29 – D30, D34, D39 – D42, and D43;

Parent's Exhibits: P1, P2 (pages 10 – 12 and 15 - 27 only), P3 – P6, P8 – P18, P20 – P23, P25 – P28, and P30.

Witnesses Heard (in order of appearance):

Cari Kennedy, teacher at Overlake Specialty School
Amy Marshall, teacher at Overlake Specialty School
Angela Emmett, Vice Principal at Overlake Specialty School
Greg Frentzen, Behavior Intervention Specialist at Overlake Specialty School
Kelley Clevenger, Executive Director of Special Education at the Everett School District³
Melissa Odegaard, Special Education Coordinator for the District
Eryn Kruk, Student's WISE team care coordinator
Vidya Subramanian, Board Certified Behavior Analyst at Kids and Family Counseling
Han Jin, Behavior Technician at Kids and Family Counseling
Kristen DeAlteriis, School Psychologist at the District
Darcy Newby, School Counselor at Overlake Specialty School
Melissa Schweitzer, Director of Special Education for the District
Sonja Hemmerling, PhD, Independent Educational Evaluation Provider

Post-Hearing Briefs

The parties' post-hearing briefs were timely filed on April 12, 2021.⁴

³ Ms. Clevenger was the Director of Special Education in the District prior to July 2020. T191.

⁴ The post-hearing briefs were due by 5:00 p.m. on April 12, 2021. The District filed its post-hearing brief at 5:04 p.m. on April 12, 2021. Because it was submitted only four minutes late and did not prejudice the Parent's case, it was still considered timely filed by the ALJ.

ISSUES

As set forth in the October 19, 2020 Prehearing Order, the issues 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) from September 10, 2018, through September 10, 2020, by:
 - i. Failing to provide special education services and related services at the start of the 2018-2019 school year with indifference to the needs of the Student who was already discharged from the Children's Long-Term In-Patient Program;
 - ii. Failing to have a general education teacher present at the 9/14/2018 Individualized Education Program (IEP) meeting when determining a therapeutic day school placement;
 - iii. Failing to provide a prior written notice as to why the District was denying Parent's request for extracurricular services and activities to the Student with supplementary aids and services appropriate and necessary for the Student to participate;
 - iv. Failing to have an IEP in place for the 2018-2019 and 2019-2020 school year that was ambitious enough for the Student to make appropriate gains in academic goals and was reasonably calculated to enable the Student to receive educational benefit;
 - v. Failing to provide special education service minutes and related service minutes listed in Student's IEP during the Covid school closure beginning March 13, 2020, to present, and failing to make appropriate education accessible to the Student during the Covid school closure;
 - vi. Failing to conduct a functional behavioral assessment (FBA) in April 2020 when the Student's behaviors, school anxiety, confusion about how to access school, and refusal to participate resulted in missed school days;
 - vii. Refusing to address the bullying and harassment of the Student by older students during transportation for the 2019-2020 school year, taking no steps to address the issues either in the IEP, create a plan, establish guidelines for bullying for transportation, offer immediate support, etc. The bullying and harassment was reported by the Parent and the Student's outside Board Certified Behavior Analyst (BCBA) as it impacted the Student's Applied Behavior Analysis (ABA) therapy;

- b. And, whether the Parent is entitled to her requested remedies:
- i. Immediate placement, at public expense, in a Therapeutic Boarding School (residential placement), agreed upon by the Parent and District, in a program similar to Maple Lake Academy for boys or Daniels Academy. District will be responsible for all expenses for the Student, including Transportation;
 - ii. The District will enter into a separate transportation contract with the family, to include travel, room and board and expenses while visiting the Student and participating in required parent/family training and support.
 - iii. Or other equitable remedies, as appropriate.

FINDINGS OF FACT

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

Background Information

1. The Student was initially found eligible for special education services under the Developmental Delay category on March 12, 2013, prior to starting kindergarten in the District. P22p3-4.⁵ The Student was diagnosed with autism in September 2014, and the Student's special education eligibility category was changed to Autism in May 2015. *Id.*
2. The Student's family has resided in the District during the Student's entire educational career. D1p5-6; T468.⁶ The Student lives with the Parent and a younger sibling. P22p2. The Student attended Medina Elementary school for kindergarten through part of second grade. D1p6. The Student transferred to Woodridge Elementary in December 2015 to complete his second-grade year. *Id.* The Student attended Woodridge Elementary for his third grade school year until May 2017. *Id.*

⁵ Citation to the exhibits of record is by exhibit number and page number, e.g. P22p3-4 is a citation to Parent's exhibit 22 at pages 3 and 4.

⁶ Citation to the transcript is by the letter "T" followed by the transcript page number.

3. In February 2017, Eryn Kruk⁷ became the WISE wraparound⁸ care coordinator for the Student and his family. T242. WISE is “an intensive care planning process for youth and families where youth have pretty extreme behaviors or mental health issues that are disrupting their lives in home, community, school.” T243. Ms. Kruk coordinated team meetings and also worked one-on-one with the Student. *Id.* The WISE meetings were attended by members of the District. T244. WISE teams typically meet for six months to a year depending on the needs of the student. The Student’s WISE team continued to meet for two and a half years until October 2019. T248.

Placement at Child Study and Treatment Center

4. Due to the Student’s escalating aggressive behavior, the Student’s IEP team changed the Student’s placement from Woodridge Elementary to Oak Grove Elementary School (Oak Grove) in the Clover Park School District (Clover Park) on May 31, 2017. D1p5; P8p1. Oak Grove is the educational component to the Child Study and Treatment Center (CSTC), which is the state psychiatric hospital for children. *Id.* CSTC is a residential treatment facility and students at CSTC have no exposure to general education peers. *Id.*

5. While at CSTC,⁹ Ms. Kruk observed the Student to have less anxiety overall and to have positive interactions with peers and with his family. His self-regulation was better while at this program. T248.

6. In April 2018, the Student began receiving applied behavior analysis (ABA) services from Kids and Family Counseling. T258. Services were provided by board certified behavior analyst (BCBA) Vidya Subramanian and various behavior technicians (BTs) employed by the agency. *Id.* The Parent’s private health insurance pays for these services. T262. Initially, the Student was receiving approximately twenty hours of services per week. T267.

May 2018 IEP

7. The Student was reevaluated by Clover Park on May 17, 2018, at the request of the Parent, CSTC staff, and Oak Grove staff. D1p5. The purpose of the reevaluation was to help determine the Student’s placement and educational programming as part of his discharge from CSTC. *Id.* The evaluation team found the Student continued to qualify for special education under the Autism category. *Id.* at 7-8. The team recommended the Student receive specially designed instruction (SDI) in the areas of social/emotional, social skills, organizational skills, written expression, and math calculation, and that he receive occupational therapy as a related service. *Id.* at 10-11. A prior written notice (PWN) was issued on May 17, 2018, that addressed the reevaluation recommendations. D1p25.

⁷ Prior to serving as the care coordinator, Ms. Kruk acted as a behavior specialist for the Student. T242-43.

⁸ The term “wraparound” and “WISE” are used interchangeably in the record, but refer to the same service. T242.

⁹ In testimony, CSTC and CLIP are used interchangeably, but refer to the same program.

8. The Student's IEP team met and created a new IEP for the Student on May 17, 2018. D2. The IEP team meeting was attended by many people, including the Parent and general education teacher Alex Martinez. D3p1. Goals were developed for the Student in the following areas: organizational skills, social/emotional, social skills, written expression, and math calculation. D2p16-17. The math goal stated:

By 05/21/2019, when given 2-digit addition and subtraction with regrouping [Student] will accurately solve math problems using place value chart or algorithm improving his ability to accurately solve addition and subtraction problem [sic] that require regrouping from 0% accuracy independently to 50% accuracy independently as measured by student work, teacher-made test, and teacher observation.

Id. at 17. The written expression goal stated:

By 05/21/2019, when given a writing prompt [Student] will use a visual organizer to organize his thinking and begin the writing process, to compose a 1st draft, self-edit, and to compose a final draft improving his ability to independently write a coherent paragraph from 2 out 5 [sic] opportunities with support to 2 out 5 [sic] opportunities independently as measured by writing samples and teacher observation.

Id.

9. The following service matrix was developed:

Services 05/22/2018 - 05/21/2019

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Related							
No	Occupational Therapy	COTA/OT	OT	80 Minutes / Monthly	Special Education	05/22/2018	05/21/2019
Special Education							
No	Math Calculation	Special Education Staff	Special Education Teacher	325 Minutes / Weekly	Special Education	05/22/2018	05/21/2019
No	Written Expression	Special Education Staff	Special Education Teacher	200 Minutes / Weekly	Special Education	05/22/2018	05/21/2019
No	Organizational Skills	Special Education Staff	Special Education Teacher	359 Minutes / Weekly	Special Education	05/22/2018	05/21/2019
No	Social Skills	Special Education Staff	Special Education Teacher	358 Minutes / Weekly	Special Education	05/22/2018	05/21/2019
No	Social/Emotional	Special Education Staff	Special Education Teacher	358 Minutes / Weekly	Special Education	05/22/2018	05/21/2019

Total minutes per week student spends in school: 1620 minutes per week
 Total minutes per week student is served in a special education setting: 1620 minutes per week
 Percent of time in general education setting: 0% in General Education Setting

D2p25.

10. The Student's treatment team at CSTC emailed a letter to the District on August 28, 2018, providing recommendations for the Student upon his discharge from CSTC. D5p1. The letter was signed by Lee Carlisle, MD, Sharon Kelley, MSW, and Jeremy Norris, PsyD. *Id.* at 3. The letter stated that the Student "requires a high level of supervision and support across all environments." *Id.* at 2. They recommended a clinically intensive day placement with extended school year services throughout the summer. *Id.* at 3. They also recommended that behavioral modification staff be present in the Student's home during non-school hours. *Id.*

11. In August 2018, the Parent emailed the District to see if the Student could attend the afterschool childcare program at Medina Elementary school in the District once he was discharged from CSTC and enrolled back in the District. P11p2. After many emails and phone calls with District staff, the Parent was informed that the Student could not attend this afterschool program because he was not enrolled at Medina Elementary school. P11p4-13; T192-93. No PWN was issued related to this request. T173.

12. The Student was discharged from CSTC on August 31, 2018. P8p1. The Student was considered a Student of Clover Park until his discharge from CSTC, at which time he could then enroll in the District when he resided there again. T185.

Placement at Overlake Specialty School

13. Overlake Specialty School (OSS) is "a highly structured year-round alternative school specifically designed to serve students in special education who are significantly impacted by academic, social, emotional and/or behavioral disabilities." D12p3. OSS is not a District school. In order to enroll at OSS, students are required to first take a tour of the school. T187.

14. The first day of school for the 2018-2019 school year at OSS was September 4, 2018. D44p6. The school year at OSS is divided up into four quarters between September and June, as well as a summer or extended school year program. T46.

15. On September 5, 2018, District special education director Kelley Clevenger¹⁰ emailed the Parent stating that there were three options for the Student's school placement: Children's Institute for Learning Differences (CHILD), OSS, or Woodridge Elementary. D6p6. She noted that a decision needed to be made by September 7, 2018, so that the Student could start school on September 10, 2018. *Id.* Ms. Clevenger also asked whether the Parent had completed the District's registration paperwork for the Student. *Id.*

16. The Parent responded by email on September 6, 2018, that she would be touring OSS the next day and would make a decision at that point about which school she wanted the Student to attend. D6p5.

¹⁰ Ms. Clevenger has bachelor's degrees in biology and education and an endorsement in special education. T191. She has a master's degree in child development and an administrator certificate. *Id.*

17. At 9:19 p.m. on September 6, 2018, the Parent emailed paperwork to District staff to enroll the Student back in the District. D6p7. The paperwork was received by the District on September 7, 2018. *Id.*

18. The Parent and Student met with staff at OSS on September 7, 2018. D6pp5, 9. After this tour, the Parent and District agreed the District would place the Student at OSS. *Id.*

19. The Student was enrolled at OSS on September 14, 2018. D34p1. He was initially placed in the primary classroom. *Id.* He was later moved up to the middle school classroom in the fall of 2019. *Id.* at 2. The Student did not have access to general education peers at OSS. D12p4.

20. On September 14, 2018, a meeting was held with District school psychologist, Kristen DeAlteriis;¹¹ District special education teacher, Tracy Bates; Ms. Clevenger; and the Parent. D8p5. The team conducted an “Assessment Revision,”¹² in which they accepted the Student’s most recent special education reevaluation that had been conducted by Clover Park and found the Student remained eligible for special education under the Autism category. *Id.* at 3.

21. At this meeting the team also conducted a “Transfer Review.” D9p2. The team agreed to accept the Student’s current IEP goal areas and determined the Student’s educational placement should be a therapeutic day school. *Id.*

22. A PWN was issued on September 14, 2018, proposing the District accept the Student’s reevaluation from Clover Park. D10p1.

23. The staff at OSS was involved in the Student’s WISE wraparound team and regularly attended the meetings. T375. The Student’s private BCBA and BTs also joined the WISE meetings from time to time. T376.

24. The Student’s progress on his IEP goals was measured for the period of September 4, 2018, through November 16, 2018. D11. His progress report rated him at a “4” for all goals measured, indicating “Progress made—objective not yet met.” *Id.* It also noted that it was anticipated he would meet the goals, but more time was needed. *Id.*

¹¹ Ms. DeAlteriis has been a school psychologist at the District for nineteen years. T320. Prior to that she worked as a school psychologist in two different school districts. *Id.* She has a master’s degree in education and school psychology. She is a certificated school psychologist in Washington State. *Id.*

¹² When a student reenters the District, the District conducts an “assessment revision” to ensure a special education evaluation done out-of-district is in compliance with the law and District policies. T319.

25. Soon after the Student started at OSS, the Parent began participating in weekly parent support meetings with OSS staff. T104, 107, 133, 159. Greg Frentzen,¹³ the behavior intervention specialist at OSS, and Darcy Newby,¹⁴ the school counselor at OSS, regularly participated in these meetings with the Parent, and other OSS or District staff attended meetings periodically. T133, 151-52, 223.

26. Ms. Newby is available to students at OSS for regular counseling sessions. The Student visited Ms. Newby periodically when issues arose, but he did not regularly meet with Ms. Newby for counseling during his time at OSS. T365-66.

27. Based on conversations during parent support sessions, Mr. Frentzen opined that the method by which the Student's in-home behavior supports were being delivered by his ABA provider was inadvertently reinforcing some of the Student's disruptive and aggressive behaviors in the home. T149-52; T378-79. Mr. Frentzen shared this concern with the Parent early on during parent support sessions. T151-52.

January 2019 IEP

28. On January 16, 2019, the Student's IEP team met and drafted a new IEP for the Student. D12p1. The meeting was attended by the Parent, special education teacher Kara Glassman, OSS Vice Principal Angela Emmett,¹⁵ Ms. Bates, and Mr. Frentzen.¹⁶ *Id.* The IEP noted the Student had met his goals in the areas of organizational skills, social/emotional, social skills, and math calculation. D12p5-10. The Student had not met his written expression goal and it was noted that he still could not independently write a paragraph. D12p8. The IEP included new goals working on the following skills: peer interactions; staff and peer interactions; accepting feedback; coping skills; home/school communication; task completion; written expression; and addition and subtraction. *Id.* at 11-13. The new written expression goal stated:

By 01/15/2020, when given a writing prompt/assignment, [Student] will independently write a one paragraph essay (with a topic sentence, 3 detail sentences that support topic sentence and a conclusion) and containing correct capitalization, punctuation, and spelling improving written expression skills from 0 out of 5 opportunities to 4 out of 5 opportunities as measured by monthly student writing samples.

¹³ Mr. Frentzen has been a behavioral intervention specialist at OSS for eighteen years. T156. Prior to that, he had his own business as a behavior intervention consultant for school districts. *Id.*

¹⁴ Ms. Newby has a master's degree in counseling psychology with an emphasis in child, couple, and family therapy. T381. She has worked at OSS for eight years. *Id.*

¹⁵ Ms. Emmett is a dual certified special education and general education teacher. T117. She has worked at OSS for sixteen years and has a master's degree in teaching English. *Id.*

¹⁶ The District and Parent agreed to excuse the participation of an occupational therapist at the meeting. D12p3.

Id. at 15. The new math goal focusing on the skill of addition and subtraction stated:

By 01/15/2020, when given worksheet featuring 25 problems with 3 digit addition and subtraction problems with regrouping [Student] will accurately solve math problems using a place value chart or algorithm improving his ability to solve math calculation problems from accurately solving 5 out of 25 problems to accurately solving 22 out of 25 problems as measured by monthly curriculum based measurements or work samples.

Id.

29. The IEP team developed the following service matrix for the Student:

Services 01/23/2019 - 01/15/2020

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Math Calculation	Special Ed Teacher	Special Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	01/23/2019	01/15/2020
No	Written Expression	Special Ed Teacher	Special Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	01/23/2019	01/15/2020
No	Study Skills	Special Ed Teacher	Special Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	01/23/2019	01/15/2020
No	Social	Special Ed Teacher	Special Ed Teacher	111 Minutes / 5 Times Weekly	Special Education	01/23/2019	01/15/2020
No	Social-Emotional	Special Ed Teacher	Special Ed Teacher	107 Minutes / 5 Times Weekly	Special Education	01/23/2019	01/15/2020
Related							
No	Occupational Therapy (RS)	Special Ed Teacher	Special Ed Teacher	80 Minutes / 1 Times Monthly	Special Education	01/23/2019	01/15/2020

Total minutes per week student spends in school: 1710 minutes per week
 Total minutes per week student is served in a special education setting: 1710 minutes per week
 Percent of time in general education setting: 0% in General Education Setting

Id. at 18.

30. The IEP team also determined the Student's extended school year (ESY) program and the created the following service matrix:

ESY Services:

Concurrent	Service(s)	Service Provider	Service Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Math Calculation	Special Ed Teacher	Special Ed Teacher	35 Minutes / 4 Times Weekly	Special Education	07/01/2019	08/23/2019
No	Study Skills	Special Ed Teacher	Special Ed Teacher	35 Minutes / 4 Times Weekly	Special Education	07/01/2019	08/23/2019
No	Written Expression	Special Ed Teacher	Special Ed Teacher	35 Minutes / 4 Times Weekly	Special Education	07/01/2019	08/23/2019
No	Social	Special Ed Teacher	Special Ed Teacher	125 Minutes / 4 Times Weekly	Special Education	07/01/2019	08/23/2019
No	Social-Emotional	Special Ed Teacher	Special Ed Teacher	125 Minutes / 4 Times Weekly	Special Education	07/01/2019	08/23/2019
Related							
No	Occupational Therapy (RS)	Occupational Therapist	Special Ed Teacher	80 Minutes / 1 Times Monthly	Special Education	07/01/2019	08/23/2019

Total Minutes per week of ESY Services: 1440 minutes per week

Transportation Consideration: Regular Special

Id. at 26.

31. OSS conducted a functional behavior assessment (FBA) for the Student and developed a Behavioral Intervention Plan (BIP) as part of his IEP. D12p31-36. They noted the Student has the following behaviors:

- [Student] periodically demonstrates difficulty initiating or joining activities/conversations with peers during unstructured time.
- [Student] periodically demonstrates difficulty communicating with peers and staff without making noises, making faces, and maintaining a boundary of an arm's length away.
- [Student] periodically demonstrates difficulty accepting feedback about his performance (academic or non-academic) without arguing, yelling, or interrupting the person giving feedback and apply it to his performance.

D12p32.

32. On May 2, 2019, the Parent and Ms. Subramanian, the Student's private BCBA, reported to OSS staff by email that the Student was having incidents during his bus ride to and from school. D15p3-4. The Student reported being subjected to verbal and physical aggression as well as profanity and threats from other students. *Id.* Ms. Newby responded that same day that OSS would follow up with the bus driver to get his or her narrative, and noted that this information could be used to intervene directly with the students at school. *Id.* at 3.

33. Ms. Emmett responded by email later the same day stating that OSS would initiate a bus plan for the Student which involved the loss of safety days for students with verbal/physical safety concerns. *Id.* at 1. The bus plan put into place required the bus driver to provide input on whether the Student was acting physically safe and having respectful social interactions. T367-68. If he was able to demonstrate that for five straight days, the Student would be able to access off-campus recreation activities known as "safety days." *Id.* Ms. Emmett reported that the bus plan would operate for an interim period, and if concerns continued, OSS would follow up with the District to discuss transportation options. The plan was scheduled to be implemented beginning May 6, 2019. D15p

34. The staff at OSS felt the bus plan worked well for the Student. T374. The Parent did not feel that the bus plan solved the problem based on reports she received from the Student. T525. The Student was able to continue taking the bus. *Id.*

35. Starting in the fall of 2019, the Student's classroom teacher at OSS was Cari Kennedy.¹⁷ T29.

¹⁷ Ms. Kennedy has a master's degree in teaching kindergarten through eighth grade. T65. She is not a certificated special education teacher. She has been employed at OSS for six years and started there as an instructional therapist before working as a paraeducator and then as a classroom teacher. T64-65.

36. In September 2019, the Parent reached out to Ms. Clevenger about enrolling the Student in an after or before school club in the District. P12. After discussion with other members of the Student's wraparound team, the Parent withdrew her request to have the Student participate in after or before school programs with general education peers. P12p5. At that point, the school year had already begun and the Parent felt it would be awkward and embarrassing for the Student to join a club late. T514.

37. On October 23, 2019, Ms. Subramanian emailed Melissa Schweitzer, the District's director of special education, to inform her that the Student had been reporting that he was having negative experiences on the bus to and from school. P5p5. She stated that he was reporting bullying, verbal abuse, and profanity directed towards him and his family. *Id.* The Parent was included on this email and replied stating she was including District special education coordinator Melissa Odegaard,¹⁸ on the email because she had met with her about bus issues twice during that past week. *Id.*

38. OSS staff scheduled a meeting for November 1, 2019, to discuss the Student's bus issues. P5p8. Ms. Odegaard emailed Ms. Kennedy the day of the meeting stating she would not be able to attend due to an emergency. P5p7. She further stated that she had reviewed videos from the bus and talked with the bus driver and learned that the Student was "saying inappropriate things that were triggering other students on the bus." P5p7. She also stated that the driver could "be more engaged with [the Student] and converse with him in an effort to prevent him from saying things to other students." *Id.*

39. In December 2019, the Student's Father passed away, unexpectedly. T496.

January 2020 IEP

40. On January 16, 2020, the Student's IEP team met to create a new IEP for the Student. D27. The meeting was attended by the Parent, Ms. Emmett, Ms. Kennedy, Ms. Odegaard, Mr. Frentzen, and Ms. Newby.¹⁹ D27p1. The present levels of performance section of the IEP noted that the Student met seven of his eight previous IEP goals. *Id.* at 10-16. The only goal the Student did not meet was his task completion goal and it was noted that the Student still had difficulty completing work accurately. *Id.* at 13. The IEP included new goals in the following skill areas: independent coping skills; peer interactions; task completion; addition and subtraction; and written expression. D27p12-15. The new written expression goal stated:

By 01/08/2021, when given a writing prompt/assignment, [Student] will independently write a three paragraph essay (introduction paragraph, body paragraph, conclusion, and 5 sentences per paragraph) improving written

¹⁸ Ms. Odegaard has a master's degree in social work. She has worked for the District for twenty years, first as a behavior specialist before moving to her current role as a special education coordinator for middle school and choice schools. T218-19.

¹⁹ The parties agreed to excuse the presence of an occupational therapist at the IEP meeting. D27p2.

expression skills from 2 out of 5 opportunities to 4 out of 5 opportunities as measured by weekly teacher collected data and writing samples.

Id. at 15. The new addition and subtraction goal stated:

By 01/08/2021, when given 20 single digit by single digit division problems, [Student] will solve problems accurately improving his division fluency skills from accurately solving 10 out of 20 problems to accurately solving 16 out of 20 problems as measured by weekly teacher collected data and work samples.

Id.

41. The new IEP included the following service matrix:

Services 01/16/2020 - 01/08/2021

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Math Calculation	Special Ed Teacher	Special Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	01/16/2020	01/08/2021
No	Written Expression	Special Ed Teacher	Special Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	01/16/2020	01/08/2021
No	Study Skills	Special Ed Teacher	Special Ed Teacher	32 Minutes / 5 Times Weekly	Special Education	01/16/2020	01/08/2021
No	Social	Special Ed Teacher	Special Ed Teacher	113 Minutes / 5 Times Weekly	Special Education	01/16/2020	01/08/2021
No	Social-Emotional	Special Ed Teacher	Special Ed Teacher	107 Minutes / 5 Times Weekly	Special Education	01/16/2020	01/08/2021
Related							
Yes	Occupational Therapy (RS)	Special Ed Teacher	Special Ed Teacher	30 Minutes / 3 Times Monthly	Special Education	01/16/2020	01/08/2021
Transportation							
No	Transportation					01/16/2020	01/08/2021

Total minutes per week student spends in school: 1710 minutes per week
 Total minutes per week student is served in a special education setting: 1710 minutes per week
 Percent of time in general education setting: 0% in General Education Setting

Id. at 21.

42. The IEP team also determined the Student qualified for ESY services to be provided by OSS, which has a year-round program. D27p29. The following service matrix was developed for the Student's ESY program:

Concurrent	Service(s)	Service Provider	Service Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Social-Emotional	Special Ed Teacher	Special Ed Teacher	360 Minutes / 4 Times Weekly	Special Education	07/06/2020	08/21/2020
Yes	Math Calculation	Special Ed Teacher	Special Ed Teacher	45 Minutes / 4 Times Weekly	Special Education	07/06/2020	08/21/2020
Yes	Written Expression	Special Ed Teacher	Special Ed Teacher	45 Minutes / 4 Times Weekly	Special Education	07/06/2020	08/21/2020
Yes	Study Skills	Special Ed Teacher	Special Ed Teacher	45 Minutes / 4 Times Weekly	Special Education	07/06/2020	08/21/2020
Related							
No	Occupational Therapy (RS)	Occupational Therapist	Special Ed Teacher	30 Minutes / 4 Times Weekly	Special Education	07/06/2020	08/21/2020
Transportation							
No	Transportation						

Total Minutes per week of ESY Services: 1560 minutes per week

Transportation Consideration: Regular Special

Description of Services:

D27p30.

43. The Student's IEP included an FBA and BIP completed by OSS. D27p33-39. They noted the Student exhibited the following behaviors:

- [Student] periodically demonstrates difficulty reading all directions and completing prompts accurately (following all directions before turning in his assignments).
- [Student] periodically demonstrates difficulty communicating with peers and staff without making noises, making faces, and maintaining a boundary of an arm's length away.
- [Student] periodically demonstrates difficulty implementing coping skills while remaining within the classroom setting (ask for help from staff or peer, review notes or previous work, take a 1-2 minute break at desk).

D27p34, 37.

44. PWNs were issued on January 16, 2020, proposing to implement the new IEP and BIP on the same date. *Id.* at 24-25, 32.

45. The Student's progress toward his IEP goals was measured on February 14, 2020. P16p2. Progress on the Student's goals related to independent coping skills and peer interactions were rated as "2," which means "If maintained, current rate of progress is sufficient to achieve annual goal." *Id.* Progress on the Student's goals in the areas of task completion, written expression, and addition and subtraction were rated as "3," which means "Progress demonstrated but annual goal may not be achieved." *Id.* at 3.

46. On March 6, 2020, Ms. Newby emailed the Parent to inform her that the Student had spoken with Ms. Newby that day and reported having difficulty with other students during transportation to and from school. D29p1-2. Ms. Newby also reported the issue to Ms. Odegaard because the District handles the Student's transportation. *Id.* at 1. Ms. Newby reported that she would follow up with the bus driver to ensure bus reports were still being utilized. *Id.*

47. By March 2020, the Student's team at OSS had begun discussing whether the Student was ready to begin transitioning back to an in-District placement. T157. The staff at OSS thought it would be helpful to gradually expose the Student to a less supportive, less structured, and less predictable environment to see if it caused any problems for the Student. T349. They felt this was appropriate because the Student was making progress at school and was not having any safety concerns during the school day. *Id.*

COVID-19 School Closure

48. In-person school was suspended at OSS on March 16, 2020, due to the COVID-19 pandemic. D30p1; T29-30.

49. The school closure occurred during the third quarter of the 2019-2020 school year, which started on February 24 and ended on April 10, 2020. D44p5.

50. During the third quarter of the 2019-2020 school year, the Student received in A in recreation, a B- in Science, a C+ in History, and a C in Language Arts and Math. D30. It was noted that the Student had an increase in work completion and participation in Language Arts and Math. *Id.*

51. After in-person school was suspended, the Student's teacher sent home a packet of work for the fourth quarter of the school year. P13p8; T29-30. The packets included work in the areas of math, reading, and writing. T66. Students also had the option to set up video conferencing sessions with the teacher as needed. *Id.* The Student did not have any contact with his teacher, Ms. Kennedy, during the period of remote learning. T30.

52. The fourth quarter of the school year ran from April 20, 2020, through June 26, 2020. D44p5.

53. The Parent attempted to get the Student to do the work packets sent home by OSS. T491. On one occasion, she had to pay him money in order to get him to do the work. T491-92. When the Parent tried to get the Student to do school work after that without paying him, the Student exhibited aggressive behaviors and "things began to become severely dangerous at home." T493. The Student would also "barricade his room and put his dresser up against the door and slam the door" when the Parent tried to get him to engage in remote learning. T520.

54. The Parent sent OSS the work the Student completed on the day she paid him. T491-92. She also provided the school with some worksheets the Student had completed with his BTs. *Id.* These worksheets were given to the Student by his BTs and BCBA and were not part of his remote work packets from OSS. T287-88. This was the only work submitted for the Student for the remainder of the 2019-2020 school year. T492.

55. The Student's in-home ABA services were increased from twenty hours to between thirty-five and forty hours per week after the COVID-19 school closure. T267. Since the change, the Student usually receives services from 2:00 p.m. to 8:00 p.m. on Mondays and Tuesdays, from 12:30 p.m. to 8:00 p.m. on Wednesdays, and from 10:00 a.m. to 8:00 p.m. on Thursdays and Fridays. T267-68. Services are delivered at the provider's clinic until 6:00 p.m. when the Student and provider transition home for dinner and the Student's bedtime routine. T268-69.

56. Transitions are difficult for the Student. T261. The Student is either transported to the ABA clinic by his Parent or by one of the BTs. T269. When being transported by the Parent, the Student makes a phone call to the clinic and speaks with his BCBA or BT during the drive in order to help with his transition from home to the clinic. T272-73.

57. The Student's in-home ABA services focus on teaching functional life skills, social skills, emotional regulation, behavior management, and some functional academics. T271. They do not work on the Student's school refusal behaviors. *Id.* The ABA provider is not allowed to provide support to the Student to access his online or remote learning from OSS due to restrictions from the Parent's private insurance, which funds the ABA services. T262; T517.

58. The Student currently works with several in-home BTs, including Han Jin. T275. Mr. Jin has worked with the Student for just over one year and works with him thirty to thirty-two hours per week. T276. In working with the Student in the home, Mr. Jin has observed the Student threaten to harm himself, his Parent, and his brother. T278-79. Mr. Jin has also observed the Student exhibit physical aggression toward his Parent and brother. *Id.* Mr. Jin has not observed these behaviors in the clinic setting. T299.

59. Prior to Mr. Jin, eleven other BTs worked with the Student and left the position due to the Student's challenging behaviors or because they were not a good fit for the Student. T485.

60. Mr. Jin and the other BTs who work with the Student use a point system to help incentivize the Student to maintain appropriate behavior. T289-92. The Student is awarded points based on his ability to maintain appropriate behavior, and then, based on the number of points received each week, he can earn money to be used during outings. The outings are generally to places such as Goodwill, dollar stores, grocery stores, or fast food restaurants. *Id.* This point system was used with the Student both prior to and after the COVID-19 school closure. T306.

61. On April 13, 2020, the Parent emailed Ms. Odegaard to request a laptop from the District and inquire what other supports were available to the Student to assist with the remote learning setting. P13p4. Ms. Odegaard emailed the Parent on April 20, 2020, letting her know a laptop was available for the Student and it could be picked up at a District building. P13p3. On May 17, 2020, the Parent emailed and explained to Ms. Odegaard that she had not picked up the District laptop because OSS was not providing any online learning for the Student and the laptop was not necessary. *Id.* On May 18, 2020, Ms. Odegaard requested a meeting be set up with OSS, the District, and the Parent to address the remote learning issues raised by the Parent. P13p6.

62. On April 14, 2020, the Student's IEP Progress Report noted that he was making progress toward all of his IEP goals. His independent coping skills, peer interactions, and task completion goals were rated as "2" indicating "If maintained, current rate of progress is sufficient to achieve annual goal." P16p13-15. His written expression and addition and subtraction goals were rated as "3" indicating "Progress demonstrated but annual goal may not be achieved." P16p13-16. However, it was noted that the Student's "teacher was unable to observe and gather behavior data for [the Student] during this grading period due to remote learning." *Id.*

63. The Student's teacher, Ms. Kennedy, went on maternity leave in May 2020. T31. Sara Murphy was the Student's substitute teacher at OSS until September 14, 2020, when Ms. Kennedy returned from leave. *Id.*

64. Beginning June 17, 2020, OSS began hosting group "Class Time" sessions for students via video conferencing. P13p10. The sessions involved an activity for students to participate in and an opportunity to interact with peers. *Id.*

65. Ms. Odegaard attended OSS parent support meetings with the Parent in April, May, and June in which the group discussed ways to get the Student to engage in remote and online learning. T223. As a way to help with the Student's behaviors, the team recommended the Parent manage the tone of her voice and try not to react in a way that let the Student know he was causing the Parent distress. T144.

66. The Student's Quarterly Progress Report for the fourth quarter of the 2019-2020 school year indicated that he had not engaged in his Language Arts class and his grade for history and science was listed as "N/A" due to the COVID-19 closure. P16p5. He received an A in Math and recreation.²⁰ *Id.* The notes stated the Student "completed alternative work during the closure—including math and social studies." *Id.* It also stated he had "Room for growth" in "Staying on task/engaged in work while working on the computer." *Id.*

Summer 2020

67. On June 26, 2020, OSS announced it would be using Google Classroom as part of distance learning for its ESY programming. ESY was set to involve assignments via Google Classroom as well as weekly video conference sessions for social group, language arts, and math. P13p15. Weekly drop-in time either by video or phone was available to students as well. *Id.* As part of ESY, students could also access other academic computer programs that focused on typing, math, and reading fluency and comprehension. *Id.* at 15-16.

68. The ESY program at OSS began on July 7, 2020, and ran through August 20, 2020. D44p5. The program is full-time and has similar programming as that available to Students during the school year. T356. However, during a typical summer the programming involves more social outings and students do not attend school on Fridays. D44p5; T356.

69. At some date between July 17 and July 23, 2020, the Parent emailed the Student's teacher at OSS, Ms. Murphy, letting her know the Student was still refusing to do any schoolwork and was exhibiting unsafe behaviors when the Parent tried to get him to do school work. The Parent reported the Student "hits me, postures [sic] is verbally aggressive and threatening." P13p23-24.

²⁰ No evidence was provided to explain how the Student earned an A in Math and recreation given his remote school refusal or what "alternative work" he completed during this quarter.

70. On July 23 and 24, 2020, Mr. Frentzen emailed the Parent and Ms. Newby informing them that he had reached out to the Medina Police Department to discuss having them help provide safety support in the home. P13p27. The Parent responded on July 27, 2020, to follow up on whether contact was made and to ask that she be involved in discussions with the police. P13-26-27. The Parent also reported she had considered calling the police that same day due to the Student being “in a rage” but that she was still hesitant to do so. *Id.*

71. On July 27, 2020, the Parent emailed several people including Ms. Schweitzer, Ms. Odegaard, Ms. Newby, Mr. Frentzen, Ms. Subramanian, and Ms. Clevenger stating the Student “continues to refuse to participate in school programming and threatens harming self and others when presented with a school task at home.” P13p25.

72. On July 28, 2020, Mr. Frentzen sent an email to the Parent and other people working with the Student and stated, “While we recognize increased supports at home may be helpful, Overlake Specialty School staff members are not allowed to provide in-home services.” P13p21.

73. At some point in the summer of 2020, during a meeting between the Parent, OSS staff, and District staff, the Parent talked about the Student’s unsafe behaviors in the home. T516. This information was shared with Ms. Clevenger who then made a report to child protective services due to concern for the safety of the Student’s younger brother. T180-81; T516.

74. The Student’s Quarterly Progress Report for the ESY program during the summer of 2020 indicates the Student did not engage in any work during that time. P16p6.

2020-2021 School Year

75. The first day for the 2020-2021 school year at OSS was September 1, 2020. D44p4.

76. In September 2020, OSS moved to a hybrid teaching model and offered the Student in-person classes two days per week with remote learning three day per week. D39p19. However, the Student initially refused to attend in-person classes. T48; 329. The Student also continued to refuse remote learning. The remote learning offered for the Student involved a combination of synchronous classes and asynchronous assignments.²¹ D39p6. During the in-person days, some free time was built into the end of the day where staff could work one-on-one with students on any work on which they were behind. *Id.*; T83-84.

77. On September 10, 2020, the Parent filed the Complaint at issue.

78. On September 14, 2020, the Parent emailed Ms. Murphy asking how much instruction the Student had missed since the school closed due to the COVID-19 pandemic. P13p30-31.

²¹ Testimony was not provided about the meaning of these terms. However, it is the ALJ’s understanding that synchronous classes are online classes conducted in real-time, whereas asynchronous assignments are those that can be done independently on the student’s own schedule.

The Parent stated that, from her records, the Student had only participated in (1) two phone calls with Ms. Murphy where the Parent did most of the talking, (2) two to three web meetings where the Student refused to participate, and (3) two social group web meetings with the Student's private BT facilitating. *Id.* Ms. Kennedy, who had just returned from leave, replied to the Parent on September 16, 2020, indicating that despite OSS sending work home and offering online support, the Student had been refusing all options. She confirmed that the Parent's records of the Student's participation were correct. P13p30. Ms. Emmett, Ms. Newby, and Mr. Frentzen were included on these emails. *Id.* Ms. Emmett then forwarded this email to Ms. Odegaard at the District. *Id.*

79. On September 16, 2020, the Parent emailed Heather Edlund, Executive Director of Teaching and Learning at the District, and stated that the Student was not accessing his remote education, and that, since the pandemic, the Student had missed 106 days of school at OSS. P2p12. The Parent reported that when she tried to get the Student to participate in remote learning, the Student,

has done things like 1) threatened to hang himself by grabbing a belt and trying to hook it to his neck and the overhang of our roof 2) getting a knife out of a locked cabinet and putting it to his neck and chest threatening to self harm 3) barricading himself in his room by moving the dresser against his door 4) hiding under his sheets and refusing to get dressed or join video calls.

Id. She also reported that the Student was refusing to attend in-person classes as well as remote learning. She reported "he said that he would beat me up 100 times if I make him attend school. He also told me he would whip me and make me cry over and over if I have the bus come." *Id.* Ms. Edlund responded that she was adding Kristen Callisto²² to the email and that this information should be shared during the upcoming resolution session.²³ P2p11.

80. On September 24, 2020, the District agreed to fund an Independent Educational Evaluation (IEE) for the Student. P26p5; T395-96.

81. On October 8, 2020, Ms. DeAlteriis was the District school psychologist assigned to the Student. T312. Ms. DeAlteriis met with the Parent at some point in October to discuss a reevaluation of the Student to include the IEE results. An FBA was intended to be part of this reevaluation. T334. Initially, Ms. DeAlteriis was going to do some of the assessments as part of the reevaluation. T333. However, it was later agreed by the Parent and the District that all assessments of the Student would be done by the IEE provider. T333. The Parent did not sign a reevaluation consent form at this time because she did not feel the consent form accurately reflected that the IEE provider would be the only person assessing the Student. T470.

²² Ms. Callisto is the special education director for the District. D39p3.

²³ Because this email was sent after the Parent filed her Complaint, it is assumed the resolution session mentioned in this email relates to the resolution process mandated under WAC 392-172A-05090.

82. The District can conduct an FBA separate from a reevaluation. T317-18.

83. The Student began attending in-person classes at OSS starting on October 13, 2020. T48; P16p7. He attended all four remaining in-person school days in October, six in-person school days in November 2020, six in-person school days in December 2020, and one in-person school day in January 2021. D42p1. The Student again refused to attend in-person classes starting in January 2021. *Id.*; T329.

84. On October 21, 2020, Ms. Kennedy emailed the Parent regarding the Student's lack of participation in any remote learning provided by the District on the days when he was not attending in person at OSS. P13p34. She noted that OSS has not seen the Student in any of the remote learning sessions. *Id.* Mr. Frentzen and Ms. Newby were included on this email. *Id.* Mr. Frentzen replied that any support for the Student to participate in remote learning would need to come from OSS because the Student's reaction to "being directed at home are too unsafe--and have not resulted in the desired outcome." *Id.*

85. The first quarter of the 2020-2021 school year ended on November 20, 2020. D44p4.

86. The Student's Quarterly Progress Report for the first quarter of the 2020-2021 school year indicated the Student was receiving no credit for classes as "a result of low attendance on campus and remote learning refusal." P16p7. It noted the Student refused to participate in all remote learning during the quarter. *Id.* The report listed several achievements for the Student including "[a]dvocating for needs" and "managing materials independently." *Id.* These achievements were based on observations during the Student's attendance during in-person classes in October and November 2020. T49.

87. Ms. Kennedy did not observe the Student to have any unsafe behaviors in her classroom. T62.

88. In November 2020, the Student transitioned from Ms. Kennedy's classroom to Amy Marshall's²⁴ classroom at OSS. T29, 51. Ms. Kennedy's classroom includes sixth and seventh grade students and Ms. Marshall's²⁵ room includes seventh and eighth grade students. T51-52, 64. It was determined by OSS staff that the Student was engaging socially at a level that made it appropriate to move him into a classroom with older students that lined up with his age. T51. The Student's performance prior to the COVID-19 shutdown was considered as well as observations of the Student from his October in-person school days in making the determination to move the Student into the classroom with older students. T68.

²⁴ The witness originally stated the Student transitioned into "Amy Tenny's" classroom, but later testimony made clear she misspoke, and the Student was moved into Amy Marshall's classroom. T29, 33, 51, 68.

²⁵ Ms. Marshall has a master's degree in teaching kindergarten through eighth grade. T91. She is not a certificated special education teacher. *Id.*

89. Ms. Marshall has not observed any unsafe behaviors from the Student while in her classroom. T90. Ms. Marshall had been told by the Parent that the Student was being unsafe in the home setting. T93. The Student did not attend any remote learning while in Ms. Marshall's classroom. T92.

90. On November 24, 2020, Ms. DeAlteriis emailed the Parent a new reevaluation consent form for her signature. D43p3. The reevaluation was intended to include the results of the IEE as well as an FBA to address the Student's physical and verbal aggression and unsafe behaviors in the home, and school refusal. T323-24, 333.

Independent Educational Evaluation

91. In November and December 2020, the Student underwent an IEE with Dr. Sonja Hemmerling.²⁶ P22. Dr. Hemmerling interviewed the Parent, the Student, and the Assistant Principal and classroom teachers at OSS who worked with the Student. *Id.* at 20-25. Dr. Hemmerling also reviewed the Student's school records, psychiatric records, and previous assessments in the areas of cognitive, executive functioning, and academics. *Id.* at 25-34, 43-45, 55-56. Dr. Hemmerling noted the Student has been diagnosed with Disruptive Mood Dysregulation Disorder, Autism Spectrum Disorder, and Attention Deficit Hyperactivity Disorder, and that the Student's psychiatrist is looking into whether the Student also has an Anxiety Related Disorder. P22p29.

92. Dr. Hemmerling also performed her own assessments of the Student. The assessments of the Student were done in person, at the family home. T420. Dr. Hemmerling met with the Student seven or eight times. *Id.* She administered ten subtests of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) to measure the Student's cognitive functioning. P22p34-43. She also administered the Delis-Kaplan Executive Functioning System (D-KEFS) which is used to measure skills associated with executive functioning. P22p45-55. Dr. Hemmerling administered the Wechsler Individual Achievement Test-Third Edition, to assess the Student's academic skills and problem-solving abilities. P22p56-59. Dr. Hemmerling also administered the VINELAND-3 to measure the Student's adaptive behavior. P22p59-77. The Student also took the Millon Pre-Adolescent Clinical Inventory (M-PACI). P22p77.

93. Based on her evaluation, Dr. Hemmerling recommended the Student continue to qualify for special education services, but that the IEP team should consider whether to change his eligibility category from Autism to Multiple Disabilities due to his combined autism and emotional behavioral disability. P22p85. She also noted that the Student's processing

²⁶ Dr. Hemmerling has a bachelor's degree in developmental psychology, a master's degree in special education and educational leadership, and a doctorate degree in educational leadership. P23p1. Dr. Hemmerling is the owner of Hemmerling and Dunn, a private business that conducts IEEs. She also currently works as a school psychologist in another school district. *Id.* She previously worked for several other school districts as a school psychologist, education specialist, assistant director of special services, and director of special services. *Id.*

speed was in the very low range, which impacts his overall cognitive functioning and may lead him to work more slowly than his peers. *Id.* at 86-87. Academically, Dr. Hemmerling noted the Student is in the below average to average range. P22p89. Dr. Hemmerling further noted the Student demonstrated very low levels of adaptive skills within the home, and that he demonstrated social emotional concerns in multiple domains. P22p93. Dr. Hemmerling recommended mental health services as a related service for the Student due to his mental health diagnoses and safety concerns. P22p96.

94. Dr. Hemmerling noted that the Student “has been most successful in his education when he has been provided a highly structured, rule-based program with consistent expectations and consequences.” P22p96. Dr. Hemmerling made several recommendations regarding the least restrictive environment or placement for the Student. She noted the Student “requires a high level of supervision and support across all environments” and recommended the Student’s placement have comprehensive supports to address the home, school, and community domains. P22p97. She also noted that he “functions best with routine, stability and consistency” and that he “does not do well with changes in routine, or inconsistencies between locations.” *Id.* Dr. Hemmerling noted the Student has not been accessing the home portion of his educational programming and recommended that the Student’s IEP team “consider not having the home setting be part of his educational programming.” *Id.*

95. Dr. Hemmerling opined that based on her interviews with the Student, even if OSS were to resume full-time, in-person instruction, the Student would likely still refuse to attend school. T431. She also opined that, given the Student’s current behavioral needs, it would be “difficult to imagine him being able to successfully participate in extracurricular activities.” T432. She noted “the [S]tudent is in need of an intensive environment to focus on the social, emotional, and mental health components of his programming.” T434. In Dr. Hemmerling’s opinion, the biggest obstacles for the Student in accessing his education are his social and behavioral issues. T435. She did not believe he would be able to safely engage in school within the home setting. *Id.*

96. Dr. Hemmerling also opined that a therapeutic day school like OSS was not an appropriate placement for the Student. She recommended instead that he be placed in a therapeutic boarding school. T445-46, 456. Dr. Hemmerling, who has previously worked at a therapeutic boarding school, stated that the purpose of the therapeutic boarding school would be for the Student to receive needed treatments and ultimately to return home. T458. In her experience, the amount of time a student needs at a therapeutic boarding school varies, and some students are able to make a “quick turnabout.” T458. She stated that typically students require approximately fifteen to twenty-four months at a therapeutic boarding school. *Id.*

97. Dr. Hemmerling opined that because of the Student’s regression since March 2020, the Student would need compensatory education in the area of behavior and social/emotional. T427, 459-60. That could be provided through SDI in the areas of

social/emotional or behavior skills. T460. She also stated that placement at a therapeutic boarding school would be an appropriate way to compensate for the Student's loss of services. T460-61.

98. Dr. Hemmerling did a thorough evaluation of the Student. She reviewed extensive records, performed new assessments, and interacted with the Student on seven or eight occasions. Further, Dr. Hemmerling has over twenty years of experience working in a public school setting as a school psychologist, assistant director of special services, or director of special services. As such, Dr. Hemmerling's opinions are accorded significant weight.

99. On December 7, 2020, the Parent sent an email to Ms. Marshall, Mr. Frentzen, and Ms. Newby. P13p35. She noted that she has been meeting regularly with Mr. Frentzen and Ms. Newby to work on the Student's school refusal, but the Student is still struggling and exhibiting unsafe behaviors at home when pushed to do school work. She stated, "This morning I almost didn't get him on the bus, he was dead-set on not attending and it took some bribery. I'm glad he is being pushed academically in the classroom, but am definitely seeing push-back at home." *Id.* at 25-29.

100. On December 21, 2020, the Parent emailed Ms. Newby, Mr. Frentzen, and Ms. Marshall to inform them the Student refused to go to school that day. P13p43. She stated that she was not able to convince him to go and was not sure what to do in these instances. *Id.*

101. On December 22, 2020, the Parent emailed Mr. Frentzen, Ms. Newby, Ms. Marshall, Ms. Callisto, and Ms. Schweitzer. P13p44. She again reported the Student was refusing to attend school. *Id.*

102. On January 6, 2021, the Parent emailed Ms. DeAlteriis to request changes for the reevaluation consent form previously emailed on November 24, 2020. D43p2-3. An updated consent form was sent to the Parent in response to this email. T324-35.

January 2021 IEP

103. On January 8, 2021, the Student's IEP team met to discuss his new IEP and the recent IEE conducted by Dr. Hemmerling. D39p3. The meeting was attended by the Parent, Ms. Callisto, Ms. DeAlteriis, Ms. Emmett, Ms. Marshall, Ms. Schweitzer, Ms. Odegaard, Dr. Hemmerling, WISE Parent Partner Kim Runge, and occupational therapist Nicole Eccles. *Id.* The IEP noted that the Parent expressed significant concerns about the Student during this meeting. It stated:

[Parent] has reported concerns around [Student's] safety in the home, specifically around his brother. She has communicated to [the District] and OSS she is concerned [Student] is not in an appropriate placement for his current needs and has not, and does not, have access to FAPE. She is

concerned [Student's] lack of school engagement has not been addressed, not allowing access to his educational, social and emotional needs. [Parent] shared [Student] is extremely vulnerable at the time of this IEP and is unable to make good (safe) decisions on his own. [Parent] also shared concern that collaboration between agencies (school, community, outside support) is not occurring with [the Student] changing his behavior in different settings and with different people.

Id. at 5.

104. A PWN was issued on January 8, 2021, proposing to continue the Student's eligibility for special education services and to maintain his placement at OSS. D39p18. The PWN noted that the IEP team did not reach a consensus on the Student's placement. It stated,

the [Student] has become increasingly unsafe in the home, demonstrating home behaviors which include refusal to engage in remote learning activities. Since OSS has resumed a partial schedule of in-person instruction in fall 2020, [Student] has attended school in-person on this partial schedule and OSS staff have not observed similarly escalated unsafe behaviors on site.

Id. The PWN stated that it considered the Parent's request for a change of placement to a residential placement, but rejected that request because the Student was making progress and unsafe behavior was not seen in the educational setting. *Id.* It further noted that IEP team members did not feel the change of placement would effectively address the Student's maladaptive behavior in the home over the long term. *Id.* The team felt "coordinated cross-systems interventions" would be effective to address the Student's at-home school refusal and agreed to revisit the request for residential placement after eight to twelve weeks of this support. *Id.* It noted that the District, OSS, and the Student's WISE team would meet to discuss interventions and that the team hoped "the family's outside service providers (e.g. behavior technician) will agree to participate in this process." *Id.*

105. Parent support meetings were discontinued in February 2021 due to the fact that the Student was no longer attending in-person or remote classes and the Parent was unable to enact any interventions in the home due to safety issues. P27p8; T138-40. While the parent support meetings were productive and helpful to support the Student prior to the COVID-19 school closure, the meetings did not help the Student participate in online or remote learning during the closure. T366-67.

106. Mr. Frentzen did not have significant direct interactions with the Student. He noted the Student "really never got on my radar here at school. His behavior here was very controlled." T157.

107. Ms. Emmett testified that cross-system collaboration had been attempted after the IEP was drafted, but was not successfully executed because OSS had not been able to collaborate with the outside agencies working with the family. T107.

108. Ms. Darcy and Mr. Frentzen had difficulty collaborating with the Student's private BCBA and BTs. T151-52; T376-77. Attempts to reach out to Kids and Family Counseling were often unsuccessful. *Id.* The OSS staff felt collaboration with the BCBA and BTs was important because the Student's behavior was different in the home and school settings and the BCBA and BTs were providing services in the home. T377.

109. On February 1, 2021, the Student was admitted to Seattle Children's Hospital for evaluation due to increased aggressive behavior in the home. P25p1; T488. The Student was hospitalized for six days. T490.

110. The District received the Parent's signed consent form for the proposed reevaluation on February 2, 2021. As of the date of the hearing, the District is working on the reevaluation and accompanying FBA to address school refusal, physical aggression, and threatening behavior in the home. T219, 323, 547.

111. On February 21, 2021, the Parent submitted notice that she intended to unilaterally place the Student in a private placement and she would be seeking reimbursement from the District. P26p8. She stated in the letter that the Student would be starting at Maple Lake Academy either the week of March 8, 2021, or March 15, 2021. *Id.*; T487. These dates were after the conclusion of the hearing.

112. As of the date of the hearing, the Student had not participated in any of the remote or online learning opportunities provided by OSS since the COVID-19 school closure beyond what was mentioned by the Parent in her September 14, 2020 email. T48, 366, 385. The Student attended seventeen in-person school days during the 2020-2021 school year before he stopped attending altogether in January 2021. D42p1.

113. As part of the ongoing District reevaluation and FBA, the District is looking at coming up with a new location for the Student to access his remote learning through OSS. T544-47. This new setting would involve one-one-one staffing for the Student. *Id.* The intent would be for the setting to replicate a school-type setting even if OSS is not offering full time in-person instruction. *Id.* The new setting would be used to help with the Student's school refusal and at-home aggressive behaviors. *Id.*

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

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

The IDEA

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

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

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

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

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

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

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

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

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

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

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

Failing to provide special education services and related services at the start of the 2018-2019 school year with indifference to the needs of the Student who was already discharged from the Children’s Long-Term In-Patient Program

8. The Parent argues that the District violated the IDEA and denied the Student FAPE when it allowed a gap between the Student’s placement at CSTC and his placement at OSS. The Parent argues that this gap in placement significantly impacted the Student and caused him to lose many of the behavioral gains he received from his stay at CSTC.

9. Washington law specifies the manner in which a school district must handle the transfer of a student eligible for special education within the state of Washington:

If a student eligible for special education transfers from one school district to another school district within Washington state and had an IEP that was in effect in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district either:

(a) Adopts the student's IEP from the previous school district; or

(b) Develops and implements a new IEP that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

WAC 392-172A-03105(4).

10. The Student was discharged from CSTC on August 31, 2018, and enrolled back in the District on September 7, 2018. The Student enrolled at OSS on September 14, 2018. As such, the Student missed roughly a week of instruction between his enrollment back in the District and his enrollment at OSS. While the Student was not provided with special education services for this one-week period, the Parent has not met her burden of proving that this amounted to a denial of FAPE.

11. The Parent argues that this gap in services caused the Student to regress behaviorally, however, the evidence does not support this contention. Progress monitoring from the Student's start at OSS up to November 16, 2018, found the Student to have made progress on all of his IEP goals and noted that it was anticipated he would meet the goals, but would need more time. Further, when the Student's IEP team met in January 2019, they noted that, at that point, the Student had met all of his IEP goals other than his written expression goal.

12. Additionally, in regard to behavioral concerns, evidence does not show the Student had significant behavioral issues at OSS prior to the COVID-19 school closure. The Student was not on Mr. Frentzen's "radar" because his behavior was under control. Also, the Student did not regularly meet with Ms. Newby for mental health counseling during his time at OSS.

13. The evidence does not support a finding that the Student had any behavioral regression as a result of the gap between his enrollment in the District and his start at OSS. No other evidence has been provided to show that the Student was otherwise denied FAPE by this delay. As such, the Parent has not met her burden in regard to this issue.

Failing to have a general education teacher present at the 9/14/2018 Individualized Education Program (IEP) meeting when determining a therapeutic day school placement

14. The Parent argues the District violated the IDEA and denied the Student FAPE by failing to have a general education teacher present during the September 14, 2018 IEP team meeting. She argues that inclusion of a general education teacher was important in determining the appropriate placement of the Student.

15. A school district must ensure a student's IEP team includes a "general education teacher of the student if the student is, or may be, participating in the general education environment." WAC 392-172A-03095(1)(b). The United States Court of Appeals for the Ninth Circuit has held that this requirement is mandatory. *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 643 (9th Cir.), cert. denied, 545 U.S. 1128, 125 S.Ct. 2941 (2005). In *M.L.*, the court emphasized that

Congress, in defining the necessary members of an IEP team, recognized that “[v]ery often, regular education teachers play a central role in the education of children with disabilities . . . and have important expertise regarding the general curriculum and the general education environment.” (Citations omitted.) *Id.* at 643.

16. The meeting on September 14, 2018, was attended by Ms. DeAlteriis, Ms. Bates, Ms. Clevenger, and the Parent, none of whom are general education teachers. However, there is no evidence that the Student had been participating in the general education environment or that he would be going forward. Prior to the meeting, the Student had been placed at CSTC, a residential treatment program with no access to general education students. The Student’s treatment team at CSTC recommended that, upon discharge from CSTC, the Student be placed in a clinically intensive day placement. As of the date of the meeting, the Parent and Student had already toured OSS and there was no evidence presented that any placements were being considered for the Student other than OSS or other similar clinically intensive day placements. In fact, the Student was enrolled at OSS the same date as the IEP team meeting.

17. Further, the Student’s IEP team met on September 14, 2018, to determine whether to adopt the IEP created by the Student’s previous school district in May 2018. A general education teacher was present at the May 2018 IEP meeting and had input on the Student’s placement.

18. The Parent has not proven that a general education teacher was required at the September 14, 2018 IEP team meeting or that the lack of one denied the Student FAPE. Thus, the Parent has not proven that the District violated the IDEA in regard to this issue.

Failing to provide a prior written notice as to why the District was denying Parent’s request for extracurricular services and activities to the Student with supplementary aids and services appropriate and necessary for the Student to participate

19. The Parent argues the District violated the IDEA and denied the Student FAPE by failing to issue a PWN when it denied the Parent’s requests for the Student to participate in after-school and extracurricular activities. The Parent also argues that denial of these opportunities to the Student violated WAC 392-172A-02025.

20. A district must provide a PWN to the parents of a child eligible or referred for special education a reasonable time before it proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE to the student, or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. WAC 392-172A-05010; 34 CFR 300.503(a).

21. WAC 392-172A-02025 provides:

(1) Each school district must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the student's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford students eligible for special education an equal opportunity for participation in those services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

22. The Parent requested two different types of services for the Student that were outside of the regular school day. In August 2018, the Parent requested the Student be allowed to attend the afterschool childcare program at Medina Elementary. This request was denied because Medina Elementary had a rule that only students who attended Medina Elementary could attend the afterschool program. In September 2019, the Parent requested the Student be allowed to enroll in an after or before school club in the District. After some discussion, the Parent withdrew that request.

23. While no PWNs were issued related to either request, the Parent has not established that a PWN was required in these situations. In regard to the August 2018 request, the childcare program requested by the Parent was not part of the Student's educational placement. Further, no evidence was provided to show that this program was necessary in order for the Student to be provided with FAPE. As such, a PWN was not required.

24. In regard to the September 2019 request, the Parent withdrew that request before a decision was made by the District. A PWN does not need to be issued when the District is not taking or refusing to take action.

25. Limited evidence was provided regarding the programs requested by the Parent. Regardless, if the programs were nonacademic extracurricular activities as addressed in WAC 392-172A-02025, the Parent has not proven that failure to provide these programs to the Student resulted in a denial of FAPE. There was no evidence presented that failure to provide access to these programs impeded the Parent's opportunity to participate in the decisionmaking process for the Student or deprived the Student of an educational benefit. In fact, evidence shows the Student made consistent progress on his IEP goals while at OSS up until the COVID-19 school closure.

26. As such, the Parent has not established that the District violated the IDEA or denied the Student FAPE in regard to this issue.

Failing to have an IEP in place for the 2018-2019 and 2019-2020 school years that was ambitious enough for the Student to make appropriate gains in academic goals and was reasonably calculated to enable the Student to receive educational benefit

27. The Parent argues the District violated the IDEA and denied the Student FAPE by creating and implementing IEPs²⁷ with goals that were not ambitious enough for the Student and did not allow him to receive an educational benefit. The Parent argues that the Student's academic goals in math and written expression were not challenging enough for the Student and resulted in his frustration and work refusal.

28. When determining whether an IEP is appropriate, the "question is whether the IEP is reasonable, not whether the court regards it as ideal." *Rowley*, U.S. at 206-07. 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.*

29. Under WAC 392-172A-03090, the IEP must include "a statement of measurable annual goals" and "how the district will measure the student's progress toward meeting the annual goals." For students who take alternate assessments aligned to alternate achievement standards, the IEP must include a description of benchmarks or short-term objectives. *Id.* There must be a relationship between the present levels of performance and the goals and objectives. *Seattle Sch. Dist.*, 34 IDELR 196, 34 LRP 226 (SEA WA 2001). Goals must be stated with enough specificity that they are understandable and must be measurable in order to determine whether a student is making progress toward the goals.

30. The Parent's primary argument is that the Student's IEP goals, particularly in the areas of math and written expression, were not challenging enough for the Student to make educational progress. However, the evidence does not support this contention. There were three different IEPs in effect during the 2018-2019 and 2019-2020 school years; the May 2018 IEP, the January 2019 IEP, and the January 2020 IEP. All three IEPs include different and increasingly challenging goals in the areas of math and written expression.

31. In regard to the Student's math goals, the May 2018 IEP included a goal targeting two digit addition and subtraction problems and sought to increase the Student's accuracy from 0% to 50%. The January 2019 IEP, less than a year later, noted that the Student met this goal, and a new goal was developed. This new goal involved three digit addition and

²⁷ While the Parent provides argument in her closing brief related to the appropriateness of the January 2021 IEP, the issue statement specifies IEPs in place during the 2018-2019 and 2019-2020 school years. A party requesting a due process hearing may not raise issues during a due process hearing that were not raised in the complaint unless the other party agrees. WAC 392-172A-05100(3). As such, the January 2021 IEP will not be addressed.

subtraction problems and sought to improve the Student's accuracy from 5 out of 25 to 22 out of 25. The January 2020 IEP noted the Student met his math goal and a new goal was developed that involved single digit division problems and increasing the Student's accuracy from 10 out of 20 problems to 16 out of 20 problems.

32. In regard to the Student's written expression goals, the May 2018 IEP goal dealt with improving the Student's ability to write a paragraph independently. The January 2019 IEP noted the Student had not met this goal and was still having difficulty independently writing a paragraph. In response, a new written expression goal was created that aimed to work on the Student's ability to write a single paragraph. The January 2020 IEP noted the Student had met his written expression goal and a new goal was developed related to teaching the Student to independently write a three-paragraph essay.

33. All three IEPs include detailed information about the Student's previous goals, what progress was made and how it was measured, and what the new goal would be. The Student was making steady progress on almost all of his goals throughout the 2018-2019 and 2019-2020 school years up until the point of the COVID-19 school closure.

34. The Parent has not proven that the IEPs were inappropriate or that the goals developed in math and written expression were not adequately challenging for the Student. The Parent's belief that he was capable of performing more challenging academic work is insufficient to prove the IEPs were inappropriate. As such, the Parent has not established that the District violated the IDEA or denied the Student FAPE in regard to this issue.

Failing to provide special education service minutes and related service minutes listed in Student's IEP during the COVID-19 school closure beginning March 13, 2020, to present²⁸ and failing to make appropriate education accessible to the Student during the COVID-19 school closure

35. The Parent argues that the District violated the IDEA and denied the Student FAPE by failing to provide all of the Student's SDI and related services after the COVID-19 school closure. She argues that the minimal services provided were inaccessible to the Student because of his impairments.

36. The District was ordered to stop all in-person educational programs on March 12, 2020, by proclamation from the Governor of Washington State. Governor Proclamation 20-08, 20-09.1. The U.S. Department of Education (DOE) issued guidance that same day stating,

If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, than an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make

²⁸ The Parent's Complaint was filed on September 10, 2020. As such, this issue addresses the time period up to that date.

every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP)

U.S. Dep't of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020) at p. 2.

37. The Washington Office of Superintendent of Public Instruction also issued guidance stating, "There remains an expectation that individualized education program (IEP) services will be delivered to the maximum extent possible during the pandemic while adjusting delivery methods to comply with state and local health/safety restrictions." OSPI, Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in Summer and Fall 2020 (released 3/24/20, last updated 4/12/21). This guidance further recognized that there have been no changes made to the IDEA or its implementing regulations, thus, school districts are not relieved of their obligation to comply with said laws. *Id.*

38. It is clear from the DOE guidance that the District was required to provide special education services to the Student even after the COVID-19 school closure. The question is whether the services provided satisfied the District's obligation to implement the Student's IEP. Only material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007).

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

...

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

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

39. The Student's January 2020 IEP called for 1710 minutes of special education services per week as well as 90 minutes per month of occupational therapy as a related service during the school year. This IEP was in place between March 16, 2020, and June 26, 2020, and between September 1 and 10, 2020. The Student's ESY program for summer 2020 called for 1560 minutes per week of ESY services and the program ran for seven weeks. Altogether, between the school closure on March 16, 2020, and when the Parent filed her Complaint on September 10, 2020, the Student missed 16 weeks of special education services during the school year and 7 weeks of ESY services. This amounted to more than 38,000 minutes of missed services.

40. The District first argues the Student's lack of services did not amount to a material failure to implement the IEP because OSS offered remote learning opportunities and the Student attended some in-person services starting in October 2020. However, while there were different types of remote and online learning available to the Student, it was evident very early on that he was unable to access those services due to his significant behavioral challenges. The Parent attended weekly parent support meetings where the team discussed these challenges. However, there is no evidence in the record that any progress was made toward getting the Student to engage in remote learning. Providing a service in a way the Student cannot access is functionally equivalent to not providing the service at all.

41. The Student did attend in-person classes two days a week between October 2020 and January 2021, for a total of seventeen class days. The District notes that time was allotted during these days to help students one-on-one with work they missed during remote learning days. While this make-up time may have been helpful, it defies logic to think the Student could make up for months of missed services during these brief one-on-one sessions.

42. The District next argues that the Student's maladaptive behaviors were the result of the services the Student received from his private BCBA and BTs. Even if the actions of the BCBA and BTs inadvertently reinforced some of the Student's problematic behaviors, the District does not explain how this relieves the District of its obligation to implement the Student's IEP. The BCBA and BTs were not assisting the Student with his remote learning due to restrictions from the Parent's private insurance. The Student's problematic behaviors were seen when the Parent tried to get the Student to engage in remote learning. Further, the Student had worked with the private ABA provider during his entire career at OSS and Mr. Frentzen testified that his concerns about inadvertent reinforcement were present well before the COVID-19 school closure. Regardless, even if the ABA provider contributed to the Student's behaviors, the District was still obligated to provide the Student with his special education services.

43. The District also appears to argue that its initiation of an FBA in the fall of 2020 mitigates any failure to implement the Student's IEP during the COVID-19 school closure. However, as discussed in more detail in the next section, the FBA was only initiated after the Parent filed her Complaint and was not a timely response to the Student's consistent school refusal, which began in March 2020.

44. Finally, the District argues that it did not violate the IDEA in implementing the Student's IEP after the COVID-19 school closure because it provided services "to the greatest extent possible." The District cites to two cases to support this contention. In *Denver Public Schools District 1*, the Colorado Department of Education found that while the district failed to provide the Student with all service minutes called for in the IEP, the failure to implement was not material and did not constitute a denial of FAPE because the Student demonstrated educational progress. 120 LRP 29273 (2020).

45. Similarly, in *Brookings Sch. Dist.*, it was determined that while the District did not provide all of the service minutes in the Student's IEP, the failure to implement was not material because the Student was provided most of the minutes and the Student made progress towards his IEP goals. 120 LRP 24079 (2020).

46. The case at hand is distinguishable from the two cited by the District. First, in *Denver*, the student missed a total of 260 minutes during the two-month school closure period, whereas, the Student in the present case missed nearly all of his services minutes over a six-month period. Further, while the students in *Denver* and *Brookings* demonstrated educational progress during the school closure, the Student at issue did not. In the present case, there is no evidence to show that the Student made any progress during this time period, particularly because he was not participating in any of the remote or online services and had almost no contact with anyone at OSS or the District. In fact, the evidence demonstrates that the Student's behavior was deteriorating and the family was experiencing significant safety concerns.

47. The District did not fully implement the Student's IEP from March 16, 2020, through September 10, 2020. While some services were provided through remote or online learning, the Student was unable to access them due to his significant behavioral issues. Further, the evidence shows that the Student was not making progress and was behaviorally regressing during this time. As such, the District's failure to implement was material and denied the Student FAPE.

Failing to conduct a functional behavioral assessment (FBA) in April 2020 when the Student's behaviors, school anxiety, confusion about how to access school, and refusal to participate resulted in missed school days

48. The Parent argues the District violated the IDEA and denied the Student FAPE by failing to conduct an FBA in the spring of 2020 when the Student began refusing to participate in remote and online learning.

49. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). A functional behavior assessment is one type of behavioral intervention or strategy that helps identify causative factors and objectionable behaviors. *J.L. v. Manteca Unified Sch. Dist.*, 2016 U.S. Dist. LEXIS 77441 (E.D. Cal. June 14, 2016); see also *S.J. v. Issaquah Sch. Dist.*, 2007 U.S. Dist. LEXIS 67735 (W.D. Wash. Sept. 12, 2007).

50. All of the Student's IEPs in place during his time at OSS included an FBA. However, none of them address the Student's school refusal. The parties agree that a new FBA is necessary to assess these new behaviors, but disagree on when it should have been initiated. The Parent argues that the District should have conducted an FBA in April 2020 when the Student's behaviors began. The District argues that initiation of the FBA in the fall of 2020

was reasonable in light of the uncertainties related to the COVID-19 pandemic and that any further delay was a result of the Parent's refusal to sign a consent form.

51. The District first argues that it would have been unreasonable for them to initiate an FBA related to the Student's school refusal in April 2020 because the District reasonably believed the school closure due to COVID-19 would be temporary. The District was ordered to stop all in-person educational programs on March 12, 2020, by proclamation from the Governor of Washington State. Governor Proclamation 20-08. On March 13, 2020, a new proclamation was issued stating that the closure order would remain in effect until April 24, 2020. Governor Proclamation 20-09. While it was reasonable for the District to wait some time to determine how long remote learning would be necessary, waiting until October 2020 to affirmatively address the Student's school refusal was not reasonable.

52. The Student did not meaningfully participate in any remote or online learning offered by OSS. By the time the District discussed doing an FBA in October 2020, the Student had missed part of the third quarter, all of the fourth quarter, and all of the ESY program for the 2019-2020 school year, as well as part of the first quarter of the 2020-2021 school year. The Parent even emailed the District on September 16, 2020, stating that, by the Parent's calculation, the Student had missed 106 school days.

53. It is clear that the District knew the Student's school refusal behaviors were not a temporary problem well before October 2020. The Parent attended parent support meetings weekly with OSS and District staff to discuss this issue. There is little evidence about any specific strategies discussed during these meetings other than recommendations for the Parent to moderate her tone of voice and not let the Student see he was causing her distress. Regardless, there is no evidence the Student's behavior changed or improved at any point.

54. Further, while the District discussed conducting an FBA in October 2020, it was not initiated until February 2021 and was still ongoing as of the date of the hearing. The District argues the FBA was delayed because of the Parent's refusal to sign the reevaluation consent form. The evidence shows there was a delay in the reevaluation because of the Parent's refusal to sign the consent form until she felt it was accurate. However, the Parent's disagreement with the consent form was not related to the FBA. The Parent's concern with the consent form was related to the scope of the IEE. There was no testimony indicating the Parent or District had any disagreement related to the FBA. Further, Ms. DeAlteriis testified that an FBA can be done independently of the reevaluation. Given the urgent need for an FBA, the District could have initiated the FBA separate from the reevaluation.

55. The District's delay in initiating an FBA or otherwise appropriately addressing the Student's school refusal was not reasonable in light of the Student's consistent school refusal starting in March 2020. Had an FBA been performed earlier, the Student's school refusal behaviors may have been addressed and the Student may have been able to access some of his remote or online services. As such, the District's failure to conduct an FBA denied the Student FAPE.

Refusing to address the bullying and harassment of the Student by older students during transportation for the 2019-2020 school year

56. The Parent argues the District violated the IDEA and denied the Student FAPE by failing to appropriately address incidents of bullying that took place during the Student's bus transportation to and from school. She argues that these incidents led to the Student's negative feelings about OSS resulting in school refusal.

57. In the Ninth Circuit, a three-part analysis applies to the determination of whether harassment or bullying constitutes a denial of FAPE. *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 650 (9th Cir. 2015), *cert. denied*, 454 U.S. 1128 (2015); see also *Kiona-Benton City Sch. Dist.*, 112 LRP 9581 (WA SEA 2012). A parent must prove 1) the student was the victim of bullying; 2) the school district was deliberately indifferent to the bullying; and 3) the bullying was so severe it caused the student to derive no educational benefit from the district's services. *M.L.*, 394 F.3d at 650.

58. In regard to the first prong, the evidence regarding the difficulties experienced by the Student on the bus are limited. The Student reported to his Parent and his BCBA and BTs that he was experiencing harassment during his bus transportation. After reviewing videos from the bus, District staff found the Student to have been the one to say inappropriate things to other students on the bus. Regardless, even if it was found that the Student was the victim of bullying on the bus, the evidence is insufficient to prove prong two and three of the test under *M.L.*

59. The evidence does not support a finding that the District was deliberately indifferent to the bullying of the Student. When Ms. Subramanian notified OSS staff about the Student's reports of harassment on the bus in May 2019, Ms. Emmett responded the same day stating that the bus plan would be initiated four days later. When Ms. Subramanian contacted the District about harassment on the bus on October 23, 2019, a meeting was scheduled for November 1, 2019, to discuss the issue. The Parent stated in the same email chain that she had met with Ms. Odegaard twice in the past week regarding transportation issues. The evidence shows that, when notified of incidents on the bus, the District and OSS staff promptly responded. Further, the bus plan that was implemented for the Student was found to be successful by OSS and District staff and the Student was able to continue taking the bus successfully up until the COVID-19 school closure. The Parent has not proven that the District was deliberately indifferent to the allegations of bullying.

60. Finally, the evidence prior to the COVID-19 school closure indicates the Student was consistently making progress on his IEP goals. He was doing well enough behaviorally that OSS staff had begun discussing slowly transitioning the Student back to a District setting. The evidence does not support a finding that the bullying was so severe that it prevented the Student from deriving an educational benefit.

61. The Parent has not established that the bus incidents amounted to bullying, that the District was deliberately indifferent to the bullying, or that the Student was prevented from deriving an educational benefit because of the bullying. As such, the Parent has not proven that the Student was denied FAPE in regard to this issue.

Whether the Parent is entitled to her requested remedy

62. The Parent has proven that the District violated the IDEA and denied the Student FAPE by failing to implement the Student's IEP between March 16, 2020, and September 10, 2020, and by failing to timely conduct an FBA. As such, the Parent is entitled to remedies.

63. The primary remedy requested by the Parent is residential placement for the Student at a therapeutic boarding school. Specifically, the Parent requested placement in a program similar to Maple Lake Academy for Boys or Daniels Academy.

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

65. A hearing officer may fashion individualized relief for students seeking compensatory education. As noted in *R.P. v. Prescott*:

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

631 F.3d at 1126.

66. The Student missed six months of services between March and September 2020. Further, evidence from the time period after the Parent filed her Complaint shows that the Student's ability to access his education has not improved. Even when in-person learning was provided by OSS, the Student was only able to attend seventeen days before he began

refusing in-person learning in addition to remote learning. Dr. Hemmerling, opined that, even if OSS went back to full-time in-person classes, the Student's school refusal would likely prevent him from accessing his education. In addition to his school refusal, the Student also exhibited significant behavioral regression during this time period. The Student threatened to harm himself and family members when pressed to participate in remote learning, and the Student's parent support team considered involving the local police department to help manage the Student's behaviors. The District even reported the Student's behavior to child protective services due to concern for the Student's sibling. The District's failure to implement the Student's IEP or take steps to mitigate his school refusal and aggressive behavior in the home significantly impacted the Student's ability to derive any educational benefit after the COVID-19 school closure.

67. The evidence supports awarding the Student compensatory education to put him in the position he would have been had the District provided him a FAPE. Dr. Hemmerling opined a therapeutic boarding school is the appropriate placement for the Student and that such a placement would also be an appropriate way to compensate for the Student's missed SDI.

68. The District argues that compensatory education in the form of a private placement is not appropriate in this case. First, the District argues that residential placement is not appropriate because the Student's problematic behaviors are primarily seen in the home rather than the school setting. The Ninth Circuit has made clear that a residential placement is justified under the IDEA when it is "necessary for educational purposes," rather than as "a response to medical, social, or emotional problems ... quite apart from the learning process." *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004, 1010 (9th Cir. 2009) (quoting *Clovis Unified School Dist. v. California Office of Administrative Hearings*, 903 F.2d 635, 643 (9th Cir. 1990)). In the present case, the Student displayed aggressive and unsafe behavior in the home, but did not display the same behaviors during in-person learning at OSS. However, the District's argument ignores the fact that, due to COVID-19, all of the Student's education took place at home from March 16, 2020, through September 10, 2020. Even when OSS began offering in-person instruction, the Student was still expected to engage in remote learning at home three out of five days per week and would continue to do so under the most recent IEP.

69. Further, the Student's unsafe behaviors are not the only reason the Parent has requested residential placement. The Student has been exhibiting school refusal behavior since March 2020, and, despite weekly meetings between the Parent and OSS, no improvements have been made. As such, the request for a residential placement was not merely in response to the Student's unsafe behaviors in the home.

70. The District also argues that a residential placement would counter the gains the Student has made at OSS, noting that the Student did well prior to the COVID-19 school closure, and that OSS was considering slowly transitioning him back to the District. However, this argument ignores the reality of what has taken place over the past year. While the COVID-19 pandemic is in no way the District's fault, the resulting changes in how education was delivered to the Student had a significant negative impact on his functioning. Even if the

Student was doing well in March 2020, prior to the school closure, as of the date of the hearing, he had missed almost an entire year of schooling. To act like that had no impact on the Student's functioning defies logic. The fact that the Student was able to maintain appropriate behavior for the seventeen days he appeared for in-person learning in the fall of 2020 does not prove that the Student maintained any gains he had made prior to March 2020. This is especially true considering the Student has been refusing in-person learning since January 2021. While the Student may have been ready to transition to a less restrictive placement in early March 2020, that is currently not the case.

71. The District next argues that residential placement is not an appropriate form of compensatory education because the District has not been able to complete its reevaluation or develop a new IEP for the Student. The District cites to *P.B. v. Thorp Sch. Dist.*, in which the court upheld the ALJ's decision not to award compensatory education in the form of residential placement despite finding a FAPE denial. 2021 U.S. Dist. LEXIS 59845. However, the facts of the present case are distinguishable from those in *P.B.* In *P.B.* the FAPE denial related to the failure to deliver speech and language services over a four week period, whereas here, the District failed to deliver any services to the Student over a six month period. This difference is especially notable given the significant amount of services called for in the Student's IEP.

72. Further, in *P.B.* the Parent removed the Student from the District after only fifteen days and the District was not given an opportunity to complete the reevaluation the Parent had previously consented to. Here, the Student had been refusing to attend school for six months before a reevaluation was proposed, and that was only after the Parent filed her Complaint. While there was some delay in conducting the reevaluation due to the Parent's refusal to sign the consent form, the District had significant time to remedy the issue and failed to do so. Also, despite the delay in conducting the reevaluation, the Parent continued to cooperate with the District to create a new IEP for the Student in January 2021 after the IEE was completed. Despite the Student having attended only seventeen school days since March 2020, the IEP team continued to propose the Student's current placement at OSS, which calls for remote learning more than 60% of the time.

73. Finally, in its closing brief, the District argues that residential placement should be denied because the District has a "range of interventions and resources that had not yet been utilized to address the Student's recent school refusal, including 1:1 support to help Student engage remotely." Ms. Schweitzer testified that the District was considering options such as setting up a separate location for the Student to engage in remote learning offered by OSS with the help of a 1:1 aide. However, there was no explanation for why something like this was not offered at any point during the past year when the Student was refusing remote learning. Mr. Frentzen even stated in an email that OSS would not be providing any additional in-home supports when requested on behalf of the Parent. Further, as discussed above, the FBA could have been done separately given the serious nature of the Student's behaviors. Despite the District's characterization, the Student's school refusal was not "recent." His *in-person* refusal was new, however, the Student had been refusing remote learning consistently since March 2020. Denying the Parent a remedy in order to allow the District to complete a

reevaluation and develop a new IEP would do nothing but further delay the Student's access to FAPE. While the District is now offering to come up with a plan that may result in the Student reengaging in school, the Student also requires the intensive behavioral support he can receive from a residential placement to address his deteriorating behavior and to compensate for the significant amount of FAPE the District denied him.

74. Courts have found that generally ALJs are not allowed to delegate their duty to determine a remedy back to an IEP team. In *Reid*, a hearing officer ordered 810 hours of compensatory education and gave the student's IEP team the authority to reduce or discontinue that award if the team determined the services were no longer needed. The court determined that, because the IDEA states that due process hearings cannot be conducted by employees of the state educational agency or local educational agency involved in the student's education, "the hearing officer may not delegate his authority to a group that includes an individual specifically barred from performing the hearing officer's functions." 401 F.3d 516, 526 (D.C. Cir. 2005).

75. However, in *Struble v. Fallbrook Union High School District*, the court found that the ALJ's compensatory education award, which ordered the district to hold a new IEP meeting to determine a placement for the student that would allow him to work towards his diploma, rather than ordering the Student be placed in a specific school, was appropriate because the ALJ did not have sufficient evidence to make such a placement. 56 IDELR 4 (S.D. Cal. 2001). The court noted that, in contrast to *Reid*, the ALJ's remedy "did not give the IEP team authority to change or reduce the remedy in anyway [sic]. Rather the remedy forced the parties to develop a new IEP," which gave the Parent what she was requesting, a path for the Student to get his diploma. *Id.*

76. The District did not implement the Student's IEP for six months. As compensatory education, the District shall fund a residential placement for the Student at a therapeutic boarding school for six months. No evidence was provided regarding a specific therapeutic boarding school, thus the Student's IEP team shall meet and select a proper school.

77. The residential placement should be proper for the Student in light of his impairments, specifically including his social/emotional and behavioral issues, which Dr. Hemmerling noted are the Student's primary areas of need.

78. The IEP team meeting shall be held within fifteen days of issuance of this decision unless both parties agree otherwise. The meeting shall include the Parent and Dr. Hemmerling. The District shall pay any fees associated with Dr. Hemmerling's participation in the IEP meeting not to exceed two hours at the customary and prevailing rate in the local and professional community.

79. The IEP team should first consider whether Maple Lake Academy for Boys is a proper placement for the Student if he is currently attending there as stated in the Parent's closing brief. The Student has difficulty with transitions and needs routine, stability, and consistency, so every effort should be made not to move the Student if Maple Lake Academy is able to

properly serve the Student. If the team determines Maple Lake Academy for Boys is not a proper placement, the team may consider other therapeutic boarding schools.

80. If the team agrees on Maple Lake Academy for Boys, the District may reimburse the Parent for the time the Student has already been enrolled at the school, and that time will count towards the six-month compensatory education award.

81. The Student's IEP team should meet prior to the expiration of the six-month period to determine the appropriate placement for him at that time. Providers from the Student's therapeutic boarding school should participate in that IEP meeting. If not covered by the tuition, the District shall pay any fees or costs associated with relevant staff from the therapeutic boarding school participating in the IEP team meeting.

82. The District shall provide transportation for the Student to travel to the therapeutic boarding school at the start of the six-month compensatory education period and again at the end of the six-month period. The District shall also provide transportation for the Parent to accompany the Student on the trips to and from the school. The District will reimburse the Parent for reasonable travel costs at the federal mileage rate or in the amount of reasonable airfare and reasonable hotel costs. The District is not required to fund any additional travel by the Student or family. If the IEP team determines Maple Lake is the proper school for the Student, the District will reimburse the Parent for reasonable travel costs already incurred.

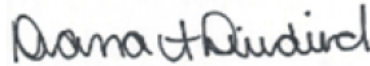
83. As this is a compensatory education award, rather than a prospective educational placement, it is limited to six months and will not be the Student's stay-put placement in the event of any future due process complaint involving the parties. However, nothing in this order prevents the IEP team from placing the Student at a therapeutic boarding school beyond the six month compensatory education award if it determines that is the Student's appropriate placement to receive FAPE.

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

ORDER

1. The Bellevue School District violated the IDEA and denied the Student FAPE by:
 - a. Failing to implement the Student's IEP between March 16, 2020, and September 10, 2020, and
 - b. Failing to conduct a timely FBA.
2. The Parents are awarded the remedies at Conclusions of Law 76-83.
3. All other remedies requested by the Parents are denied.

SERVED on the date of mailing.



Dana Diederich
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

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

Parent



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Dated May 12, 2021, at Seattle, Washington.

Representative
Office of Administrative Hearings
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Seattle, WA 98101-3126

cc: Administrative Resource Services, OSPI