

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

IN THE MATTER OF

OSPI CAUSE NO. 2020-SE-0164

OAH DOCKET NO. 10-2020-OSPI-01192

PENINSULA SCHOOL DISTRICT

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

A due process hearing in this matter was held before Administrative Law Judge (ALJ) Pamela Meotti by video conference on March 29 through April 1, 2021. The Parent¹ of the Student whose education is at issue² appeared and represented herself. She was accompanied and advised by her advocate, Helen Caldart. The Peninsula School District (District), was represented by Carlos Chavez, attorney at law. Also present was John Yellowlees, District Executive Director of Special Education. 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 October 23, 2020. OSPI assigned Cause No. 2020-SE-0164 and forwarded the Complaint to the Office of Administrative Hearings (OAH). OAH assigned the matter to ALJ Jacqueline Becker. The District filed a response on November 19, 2020. ALJ Becker granted the Parent's request to file an amended complaint on November 25, 2020. The District filed an amended response on March 3, 2021. ALJ Becker issued prehearing orders on December 1, 2020, and January 27, 2021. The matter was reassigned to ALJ Pamela Meotti on March 17, 2021. ALJ Meotti issued a prehearing order on March 24, 2021.

¹ References to the Parent are to the Student's Mother.

²To ensure confidentiality, names of parents and students are not used.

Decision Due Date

The due date for a written decision in this case was extended at the District's request to thirty (30) days after the record of the hearing closes. See Second Prehearing Order dated January 27, 2021. The hearing ended on April 1, 2021, and the record closed on May 3, 2021, when the parties timely submitted post-hearing briefs. Accordingly, the due date for a written decision in this case is June 2, 2021.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: P1; P9 through P32; P34 through P42; P44; P50 through P52; P56; P57; P59 through P65.³

District Exhibits: D1; D2; D7; D8; D12.

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

Kathy Soden, District Para educator;
Laurie Kinner, District Para educator;
Alona Carlos, District Para educator;
Katie Wright, Parent of another student in the Options program;
Tammy Croissant, District Para educator;
Nicole Senon, District General Education Teacher;
Teasha Buckland, District General Education Teacher;
Gillian Brandt; District Occupational Therapist (OT);
Lauren Rollins, District OT;
Elizabeth Comstock, District Speech and Language Pathologist (SLP);
Elizabeth Shanshala, PhD, District School Psychologist;

³ The Parent's closing brief mistakenly indicates that Exhibit P44, a report by Sonja Hemmerling PhD, was not admitted into evidence. Parent's Closing Brief at 4-5.

The District objected to the admission of Exhibit P48, an IEP Amendment from February 24, 2021, as being outside the scope of the hearing. The Parent sought to admit P48 regarding the District's error in labeling the Student's communication SDI as a related service, and for no other reason. The District's objection was sustained because a District witness had already admitted to the error and that the error persisted until the week before the hearing, and the Parent did not seek to admit P48 for any other reason. T239-41.

Elise Bullinger-Sandstrom, District Vision Teacher;
Lynne Truitt, District Director of Special Education;
John Yellowlees, District Executive Director of Student Services;
Abigail Waite, District Special Education Teacher;
Sonja Hemmerling, PhD, Hemmerling and Dunn, owner;
Maria Zaldivar, BCBA; Family Applied Behavioral Services, LLC, owner;
The Parent.

ISSUES

The issues for the due process hearing are whether the District violated its obligations under the Individuals with Disabilities Education Act (IDEA) and the IDEA's implementing regulations as follows:

- a. Failing to provide the services listed in the Student's November 18, 2019 Individualized Education Program (IEP) from March 13, 2020, through June 19, 2020, and from September 8, 2020, to November 25, 2020⁴ by failing to provide all the service minutes listed for communication, para educator services, occupational therapy, adaptive behavior, math, reading, social/emotional/behavioral, and written language.
- b. Failing to offer an appropriate education that was accessible to the Student from March 13, 2020, through June 19, 2020, and September 8, 2020, to November 25, 2020.
- c. Predetermining the outcome of the Parent's request for in-person services during the September 2020 IEP meeting when the District representative insisted no other options existed to consider, including, but not limited to, services "could not be provided in the home" and IEP minutes did not need to be conducted in-person.
- d. Failing to attend the September 2020 IEP meeting with an open mind, as shown by the District representative stating to the Parent that she needed to "step up" and "be more of a teacher" to the Student.
- e. Failing to involve the Parent in decisions for the Student during the September 2020 IEP meeting, by the District stating at the meeting that the

⁴ The Parent's Complaint was amended on November 25, 2020. Therefore, this order addresses the time period up to that date.

Student would begin attending school four (4) days a week, full days, starting September 21, 2020, and then the Parent receiving a communication later that night stating that in-person services would not start until September 28, 2020, and then receiving a communication later stating that in-person services would not start until October 1, 2020.

f. Failing to provide the Student's Supplementary Aid and Service of a full-time 1:1 para educator as listed in the Student's IEP dated November 18, 2019, from March 22, 2020, to November 25, 2020, which resulted in the Student being left unsupervised in the classroom at times.

g. Failing to follow the IDEA's requirements for excusing a mandatory IEP team member by excusing occupational therapist Lauren Rollins from the November 2020 IEP meeting without the Parent's consent.

h. Failing to provide accurate and up-to-date information about the Student's present levels of academic performance and functional performance, including the impact the Student's disabilities have on her ability to learn, from November 2019 to November 25, 2020.

i. Failing to assess the Student in all areas of suspected disability during the evaluation conducted on November 18, 2019, including the areas of cognitive, assistive technology, gross motor, vision/orientation and mobility, functional academic, and functional vision, thereby leading to the inability to write appropriate present levels of academic performance and functional performance.

j. Failing to address the Student's behavioral concerns that inhibited the Student's academic success, including engagement, in the IEP dated November 18, 2019, and failing to develop an appropriate Functional Behavior Assessment that addressed the target behaviors.

k. And, whether the Parent is entitled to her requested remedies, or other equitable remedies, as appropriate, including:

1. Student will begin in-person learning, full time, in a school building.
2. In the event of in-person learning closure(s) due to guidelines from the health department and District decisions, the District will agree to contract

with an outside provider, chosen by the Parent and District, to provide education services to the Student, in the Student's home environment, not through virtual means, for two (2) hours a day, eight (8) hours per week, providing continuity and lack of regression of skills for the Student.

3. The District will agree to add to the Student's current IEP, under Supports for School Personnel, with hours agreed upon between Parent and District, training in the Student's Augmentative Alternative Communication (AAC) Device.

4. The District will provide the Student with compensatory education services for eight (8) weeks during the summer of 2021, for eight (8) hours each week, providing services in all areas of specially designed instruction and related services.

5. The District will contract with an outside provider, or providers, chosen by the Parent, to conduct an assessment of the Student in all areas the provider identifies, including the District contracting with any additional providers if determined necessary by the outside provider. The scope of the assessment(s) will include, but not be limited to, file review, clinical intake with Parent, interviews with school staff and outside providers, psychological testing, interpretation and report writing, IEP team and Parent feedback meeting, and travel for meetings.

6. The District will contract with an outside provider, or a group or organization of the Parent's choosing, to develop or review and/or update the Student's Functional Behavior Assessment, and a subsequent Behavior Intervention Plan, to be used across all environments (school, community, home), to include: 1) school and home observation, assessment and development (working side-by-side with the Student), 2) modeling strategies for family and staff involved with Student (full-time 1:1 registered behavior technician, transportation, occupational therapist, speech language pathologist, etc.), 3) training of all school support staff, community support and family support, 4) development and staff training of data tracking system, and 5) fidelity checks.

7. In the event of in-person learning closure(s) due to guidelines from the health department and/or District decisions, the District will contract with Behavior Cusp to provide IEP special education services to the Student, in

the Student's home environment (excluding virtual engagement), for a minimum of three (3) hours daily, providing continuity and lack of regression of skills for the Student; the only exception would be at the discretion of Behavior Cusp out of a concern for safety.

8. The District will contract with a speech-language pathologist, chosen by the Parent, to determine the assistive technology needs of the Student, in particular, the Augmentative and Alternative Communication (AAC) device for the Student.

9. Other equitable remedies as appropriate.

See Second Prehearing Order dated January 27, 2021.

FINDINGS OF FACT

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

1. The Student is ten years old and resides in the District with her family. P9pp5, 9.⁵
2. The Student first qualified for special education in preschool under the developmental delay category. In 2015, she was diagnosed with Autism Spectrum Disorder (ASD) and global developmental delays. P9p5. The Student currently qualifies for special education under the category of Autism. P9pp6, 30.

2019-2020 School Year (3rd Grade)

3. During the 2019-2020 school year, the Student attended third grade at Harbor Heights Elementary School (Harbor Heights) in the District. Abigail Waite⁶ was the Student's special

⁵ Citation to the exhibits of record are by the party ("P" for the Parent; "D" for the District) and page number. For example, a citation to P20p1 is to the Parent's Exhibit 20 at page 1.

⁶ Ms. Waite has two bachelor's degrees, one in health education and the other in special education with an emphasis in severe and profound disabilities. T409; P63p1. She is also a licensed behavior specialist and a

education teacher in the Options program, which serves students with severe and profound disabilities. P9p5; Waite T408.⁷ Ms. Waite previously worked with the Student during the Fall of 2017.

4. The Student requires a para educator throughout her day due to a history of behaviors that included swiping,⁸ scratching, biting, kicking, hair-pulling, and throwing items. T412.

5. Nicole Senon⁹ was the Student's general education teacher. The Student sometimes engaged in swiping in Ms. Senon's class, but never hit, bit, or scratched anyone. T132. Ms. Senon considered the Student well behaved. T138. The Student always had a para educator with her in Ms. Senon's classroom. T133.

6. In September 2019, Maria Zaldivar,¹⁰ a Board Certified Behavior Analyst (BCBA) employed by Positive Behavior Support, started providing Applied Behavioral Analysis (ABA) to support the Student at home. T553. Positive Behavior Support had been providing support to the Student in her home since 2016, paid for by the Parent's insurance. T569-70.

7. The Student's only form of communication is an alternative/augmentative communication (AAC) device. T618. The term "AAC" encompasses all supports provided to students who are nonverbal or minimally verbal to augment communication. It could include sign language, pictures to interact with staff and others students, or devices such as the AAC device used by the Student. T263. The Student used a dedicated AAC device that the Parent obtained. Additionally, the District provided an iPad with a "Snap + Core" application to be used at school as a backup device. T244-48; P41p15.

registered behavior technician (RBT), and has experience working with children with autism as an RBT. T410; P63p1. She is a certificated special education teacher and has been employed by the District since 2017. T410.

⁷ Citations to the hearing transcript are to T. followed by the page number(s) on which the testimony appears. For example, a citation to T661 is a citation to page 661 of the transcript.

⁸ Swiping is reaching out as if to scratch the person who is making a demand. P10p4.

⁹ Ms. Senon has a master's degree in teaching and has been employed by the District for seven years. T118-19.

¹⁰ Ms. Zaldivar has a bachelor's degree in psychology and a master's degree in education. She started working as a Behavior Technician (BT) in 2010, and became a BCBA in 2015. Ms. Zaldivar worked as a BCBA for Positive Behavior Supports from 2017 until May 2020, when she started her own ABA practice. T551-52; P64.

November 2019 Reevaluation

8. On October 22, 2019, the Parent consented to a triennial reevaluation of the Student in the areas of social/emotional/behavioral, adaptive, math, writing, reading, fine motor, and communication. The Parent also consented to a functional behavioral assessment (FBA) and “possible cognitive testing.”¹¹ The Parent did not request that the Student be reevaluated in any other areas. D1pp3-4; T307.

9. District school psychologist Elizabeth Shanshala¹² assessed the Student in social/emotional/behavioral using the Behavior Assessment System for Children, 3rd Edition (BASC-3). D1p10. Ms. Waite completed the teacher rating scale and the Parent completed the parent rating scale. P9pp10-12. Dr. Shanshala also administered the Autism Spectrum Rating Scale (ASRS) to assess the Student’s social/emotional development. Both Ms. Waite and the Parent completed rating scales for this assessment. P9p12. Based on the results, Dr. Shanshala recommended that the Student continue to qualify for specially designed instruction (SDI) in social/emotional/behavioral. P9p12.

10. To assess the Student in the area of adaptive, Dr. Shanshala administered the Adaptive Behavior Assessment System, Third Edition (ABAS-III). Ms. Waite completed the ABAS-III teacher form, and the Parent completed the ABAS-III parent form. P9pp13-15. The Student obtained a General Adaptive Composite score of 64 on the teacher form, and 60 on the parent form, indicating that the Student’s overall level of adaptive behavior is in the Extremely Low range. P9pp13-14. Dr. Shanshala recommended that the Student continue to qualify for SDI in the area of adaptive behavior, with goals focusing on building independence and safety. P9p15.

11. The reevaluation also included an assessment of the Student’s math, reading, and written language skills using the K-12 Life Skills Curriculum, which is an academic assessment created by a collaboration of school districts based on essential academic learning standards. T517, 521-22. Dr. Shanshala provided Ms. Waite with a rating checklist that Ms. Waite used to observe and determine what skills the Student could perform, could not perform, or could perform with support. P9pp16-18; T456. Based on the assessment

¹¹ The Student’s November 2019 reevaluation is contained in Exhibits D1 and P9. Both exhibits were admitted into the record because Exhibit D1 contains the reevaluation consent form and signature page.

¹² Dr. Shanshala has a PhD from the University of Pittsburgh and is a nationally certified school psychologist. She is a licensed psychologist in Washington and Pennsylvania and has been employed by the District as a school psychologist for eight years. T298.

results, Dr. Shanshala recommended that the Student continue to qualify for SDI in all three areas. P9pp17-19.

12. Elizabeth Comstock,¹³ a District speech and language pathologist (SLP), evaluated the Student in the area of communication. Ms. Comstock started working with the Student when she was in first or second grade. T286-87. She administered the Peabody Picture Vocabulary Test – IV to assess the Student’s receptive language skills. The results, which indicated that the Student had an age equivalency of less than two years of age, were questionable because the Student tended to double and triple tap on a picture on her AAC device, impulsively pointed at pictures before the question was posed, and often chose another picture instead of the first picture she chose. P9p19; T252.

13. Ms. Comstock used the Puyallup School District Life Skills Curriculum Checklist to assess the Student’s functional communication skills. P9p20. Additionally, she evaluated the Student’s functional communication skills with her AAC device using the Dynamic AAC Goal Grid, which is a checklist of skills. The Student had learned multiple new skills since the 2017 evaluation and Ms. Comstock believed she “definitely benefits” from use of her AAC system at school. T264; P9pp20-21. She recommended that the District continue to provide a backup iPad. P9p21. Ms. Comstock believed that the Student had an appropriate AAC device to use at school, whether it was her dedicated device or the backup device at school, which used the same software. T280.

14. To evaluate the Student’s language comprehension, Ms. Comstock administered the Oral and Written Language Scale – II (OWLS II). The Student’s score was in the range of less than 0.1 percentile. Ms. Comstock found the results of this assessment questionable as well because the Student needed frequent prompts to wait to answer the question, often chose the picture in the top right corner to answer, and often tapped on more than one picture. P9pp19-20; T253.

15. Ms. Comstock noted that the Student’s behaviors were more significant when she was younger and were much improved since her previous evaluation. P9p19; T281-83. Ms. Comstock did not notice any difference in the Student’s behaviors when she was using her dedicated AAC device as compared to when she was using the backup iPad. T283.

¹³ Ms. Comstock, who has a master’s degree in science, holds the necessary qualifications to work as a speech and language pathologist for the District. She also has a Certificate of Clinical Competence from the American Speech and Hearing Association. T234, 259-60. Ms. Comstock has worked for the District since 2005 or thereabout. T234, 260.

16. The Student demonstrated severe speech apraxia, which is difficulty with motor programming “where you know the word that you are trying to say and . . . you have the strength and movement ability with your muscles, but you have difficulty programming your muscles to say the words.” T253-54; P9p20. Ms. Comstock did not consider it necessary to conduct a separate assessment in the area of speech apraxia because she had assessed the Student’s functional communication skills as well as her ability to communicate at school and to access her education. T255, 284. Additionally, the Student’s IEP team had made a decision to move away from speech production goals toward functional communication with the use of the AAC device. T256, 265. The team made this decision because when Ms. Comstock had worked on production goals, the Student had made limited progress toward producing vowel sounds to expand speech output. T 265, 286-87. Although speech production is still important and encouraged, the Student’s goals focused on functional communication. T264-65. Ms. Comstock considered her evaluation to be a comprehensive review of the Student communication needs. T262.

17. Gillian Brandt,¹⁴ an occupational therapist (OT) employed by the District, evaluated the Student in the area of fine motor. Ms. Brandt worked with the Student at Harbor Heights starting in August 2019.

18. Ms. Brandt administered the Educational Assessment of School Youth (EASY), which is an informal assessment of a student’s fine motor, visual motor, visual perceptual, sensory, and self-help skills. P9p25. As part of the EASY, Ms. Brandt looked at the Student’s ocular motor skills and noted that the Student cannot track objects without moving her head, which affects her ability to focus on them. Additionally, her amblyopia, which means that one eye is more dominant than the other, can impact depth perception. The Student also has a tendency to look at her AAC device to find something, but then looks away to the person she is communicating with, which results in missing the target on the AAC device. P9p25; T169-170. These issues impact the Student’s ability to access her education. T170.

19. The EASY also contains a gross motor component that considers the Student’s ability to access her environment safely. The Student is able to physically navigate the school environment independently but requires constant supervision. P9p26; T173. In using the phrase “constant supervision,” Ms. Brandt meant that the Student required assistance from her para educator to engage in some of her educational activities and needed to be

¹⁴ Ms. Brandt has a bachelor of science degree in occupational therapy. She has been an occupational therapist for 23 years, and has worked in a school setting throughout her career. She regularly evaluates students in the area of fine motor. T193-94.

supervised by an adult to keep her safe because she did not understand certain things, such as cars. T173-74; P9pp26-27.

20. Ms. Brandt did not consider the gross motor component of the EASY to be a formal assessment of the Student's gross motor skills. Additionally, the information Ms. Brandt obtained through the EASY assessment did not lead her to refer the Student for an evaluation of her gross motor skills. T187-88. Neither Ms. Brandt nor anyone else on the Student's IEP team identified gross motor as an area that required assessment during the Fall of 2019. T175; 184.

21. Ms. Brandt also administered the School Functional Assessment (SFA). T187; P9p26. The SFA measured the Student's ability to participate in the school environment, including the special and general education classrooms, the playground, hallways, and other areas, as well as her need for assistance in performing tasks and activities. P9p26. In conducting her evaluation, Ms. Brandt also reviewed the Student's records and observed the Student. P9p24. Based on the reevaluation, Ms. Brandt recommended that the Student continue to receive occupational therapy (OT). T188; 194.

22. In the area of cognitive, Dr. Shanshala attempted to administer two nonverbal subtests of the Wechsler Nonverbal Test of Cognitive Ability (WNV), and subtests of the Cognitive Test of Nonverbal Intelligence - Second Edition (CTONI-II). She was unable to successfully administer the assessments due to the Student's receptive and expressive language delays and attention deficits. T311-12; P9p15-16. Dr. Shanshala reviewed prior evaluations conducted in 2013, 2015, and 2017. P9pp15-16. In 2017, the Student's school psychologist was unable to administer the Early Years Battery of the Differential Abilities Scale, Second Edition (DAS-II) in a standardized manner because the Student had trouble focusing and engaging. P9p16. Dr. Shanshala paid special attention to an observation by Steven Glass, MD, of Northwest Child Neurology, who evaluated the Student in 2013. T311. He observed that "the exact measure of [cognitive delay] at this point in time . . . is next to impossible, and in fact, any standardized measurement of cognition is likely to be problematic in that it could easily overestimate the degree of cognitive deficit present." P9p16. In 2015, the University of Washington successfully evaluated the Student's cognitive functioning using the Mullen Scales of Early Learning - AGS Edition. The Student's Early Learning Composite Score fell in the very low range, or first percentile. P9p16. Dr. Shanshala concluded that previous evaluative data and the Student's current performance suggested that the Student's cognitive abilities were significantly delayed, despite a lack of standardized data. P9p16. She recommended that a standardized assessment be administered in the future, when the Student's attention span and ability to understand language were likely to have improved.

P9p15. T311-12. She further recommended including goals related to acquisition of basic concepts in the academic sections of the Student's IEP. P9p16.

23. The District's reevaluation also included an FBA of the Student. P10. Ms. Waite, who has work experience as a registered behavior technician (RBT), drafted the FBA.¹⁵ Dr. Shanshala assisted by observing the Student and collecting data. T413-14; 315.

24. The District had previously performed an FBA of the Student in 2017. P1. The behavioral concerns listed in the 2017 FBA were hair-pulling and noncompliance leading to unsafe climbing on furniture. P1p1. When Ms. Waite prepared the FBA in 2019, she referred to and incorporated the 2017 FBA to provide a "global picture of who the Student is and where she has come from and the original FBA of where we started." T421.

25. During the hearing, Ms. Waite explained that her impression in 2019 "was that an FBA was done once, so I was thinking that – in 2019 that there is one FBA. Now I know that you do it every year, but at the time in 2019, I was under the impression that there was one FBA and then we just update the behavior plan on an annual basis based on the Student's growth and behavior. T419. Ms. Waite clarified that when she said "one FBA," she meant that once a school psychologist conducted an FBA to determine the function of the behavior, the FBA was "done," and in subsequent years the BIP would be updated to address any new behaviors. T485-86.

26. In conducting the 2019 FBA, Ms. Waite created data sheets to track the frequency of the Student's behaviors. T414, 487. Because the Student was "growing and improving," Ms. Waite figured out which behaviors were still a concern in 2019, and needed to be addressed. T487. The 2019 FBA focused on two target behaviors. The first was noncompliance "defined as a demand is stated and [the Student] refuses to do [a] task or does the opposite." P10p3. The second was swiping, which occurred after the Student was asked to do something and responded by reaching out as if to scratch at the person making the demand. P10p4.

27. The FBA described where, when, and with whom the behaviors were likely to occur, antecedent events, conditions that made the behaviors less likely to occur, consequences that occurred after the behaviors that might encourage them, and the function of the behaviors. The FBA recommended a BIP for the Student and suggested replacement behaviors, setting event strategies, antecedent strategies, teaching strategies, and consequence strategies. P10pp4-5. As a replacement behavior for noncompliance, the FBA recommended that the Student pause and think, take a breath, and make a good choice.

¹⁵ As an RBT, Ms. Waite provided in-home ABA therapy to children with autism. P63p1.

T423; P10p4. As a replacement behavior for swiping, the FBA recommended that the Student use her AAC device to express her emotions appropriately. P10p6; T426.

28. Ms. Zaldivar did not attend the November 2019 IEP meeting and did not review the FBA and BIP (Exhibits P10 and P12) in November 2019. T574-75; 601. She did, however, review these documents in November 2020, at the Parent's request. Ms. Zaldivar testified during the hearing that she believed these documents did not appropriately address the function of the Student's behaviors – to escape – and did not provide appropriate replacement behaviors. T554-56. She opined that the BIP did not provide specific instructions for staff to deescalate swiping behaviors. T556-57. I give little weight to Ms. Zaldivar's opinion because she has never observed the Student physically in a school setting, and Ms. Waite credibly testified as to the effective implementation of the FBA and BIP.

29. The District also reevaluated the Student in the area of Medical-Physical. D1p3. The Parent completed a health and developmental history form. The Student wears glasses, has had eye muscle surgery, and has a history of hyperopia, astigmatism, and right eye amblyopia, as well as right monocular esotropia. The Student was unable to complete school-based vision and hearing screenings. P9p9. Additionally, Dr. Shanshala observed that the Student "had some difficulty focusing," when her teacher was reading a picture book to the Student and asked the Student to look at the pictures. P9p29.

30. Based on her review of the Student's educational records and observation, Dr. Shanshala had concerns that the Student's vision might need to be assessed. T309; 317. She contacted the Parent and Jessica Lundblad, the District's vision specialist, in November 2019. Dr. Shanshala and Ms. Lundblad "were working with the Parent to try to obtain outside medical information to determine whether this is – was an area that needed to be evaluated" Dr. Shanshala's general understanding "is that the vision specialist contacts the parents and tries to obtain all outside medical vision . . . records to determine that we needed to move forward with the functional vision assessment." T304.

31. At Ms. Lundblad's request, Dr. Shanshala included a statement in the evaluation report:

the school vision specialist has been consulted regarding [the Student's] vision history and she is working with the family to assure that [the Student's] vision is not significantly impacting her access to her education. The family plans to share the doctor's report with the District. If at any time it is decided that [the Student's] vision has an adverse impact on her access to education, accommodations can be made. P9p9.

32. Because Ms. Lundblad did not work for the District at the time of the hearing and did not testify, the Parent questioned Elise Bullinger-Sandstrom, the District's current vision specialist. Ms. Bullinger-Sandstrom has been employed by the District as a teacher for students with visual impairments and blindness since the Fall of 2020. T321-22. Ms. Bullinger-Sandstrom explained that a school psychologist will consult with her about a vision assessment when there is a concern that a student may have a visual impairment. T327. The vision evaluation process always starts with a doctor's report "so we know what kind of visual impairment we are starting with" and to identify whether the impairment has been corrected with glasses, surgeries or other interventions. T330-31; 32. Because Ms. Bullinger-Sandstrom did not work for the District in 2019 and has no firsthand knowledge of events at that time, I give no weight to her testimony about events that occurred in 2019. However, since Ms. Bullinger-Sandstrom is the District's current vision specialist, I give weight to her testimony about the District's general process for determining whether to evaluate.

33. During the hearing, the Parent could not recall being asked to provide the eye doctor's report or records to the District, but did recall "signing something for" the Student's eye doctor. T653-54. Based on Dr. Shanshala's understanding that part of the vision specialist's job is to "obtain the vision records from the ophthalmologist," coupled with Ms. Bullinger-Sandstrom's testimony that the process starts with "a doctor's report," and the Parent's recollection that she was asked to "sign something," but not to provide records, I find that the Parent signed a release for the Student's vision records, but was not asked to provide the records or reports to the District.

34. The District did not evaluate the Student's vision as part of the November 2019 reevaluation. There is no evidence in the record as to whether Ms. Lundblad obtained the eye doctor's report or the Student's vision records. There is no evidence in the record as to whether Ms. Lundblad or anyone else ever followed up with the Parent. Additionally, there is no evidence in the record as to whether Ms. Lundblad made a determination whether it was necessary to assess the Student's vision.

November 18, 2019 – Reevaluation, IEP, FBA, BIP Meetings

35. On November 18, 2019, the reevaluation team met to review the results of the reevaluation. That same day, the IEP team met to review the Student's IEP, FBA, and BIP. P11p22. Attendees included the Parents, Dr. Shanshala, Ms. Comstock, Ms. Brandt, Ms. Waite, Ms. Senon, and Hailey Mummert, a student teacher. P11p22; D1p8.

36. The team reviewed the results of the reevaluation and agreed that the Student continued to meet eligibility criteria under the category of Autism. The team recommended SDI in

adaptive behavior, social/emotional/behavioral, written language, math, reading, and communication with related services in fine motor. P9pp6-7, 30.¹⁶

37. The Parent did not request a vision orientation and mobility assessment (vision assessment) at that time.¹⁷ T188-89; 632. The record does not contain evidence that the Parent or other team members requested an evaluation in any other area. P9p30; T184; T632.

38. After the reevaluation meeting, the IEP team met on November 18, 2019, to review the Student's IEP (November 2019 IEP). The team discussed the Student's present levels of performance in reading, math, writing, communication, social/emotional/behavioral, adaptive behavior, and fine motor, which are contained in approximately eight single-spaced pages in the November 2019 IEP. The present levels section of the IEP also included information from the medical evaluation. T134, 495, 636. P11pp7-15, 22. In drafting the November 2019 IEP, Ms. Waite talked with Ms. Senon about the Student's present levels of performance. T123.

39. With respect to reading, the IEP noted the Student:

can identify her first name when there are limited distractors present. She has been working so hard and adding to her core word vocabulary base. [The Student] loves having books read to her. She can identify characters in a story using picture cards. She correctly identified 3/26 letters. She can sequence events in a story with 20% accuracy. Her reading comprehension accuracy varies depending on the day, her mood, who she is working with, if she is working individually or in a small group and what she is earning. Her comprehension oscillates between 20% - 60% accuracy. When asked to sequence, she was able to put 1/5 events in order. P11p11; T439.

The team set the following goal: "By 11/24/2020, when given an individual or small group setting and a literary text [the Student] will sequence 5 events in a story improving her ability to comprehend and retell a story from 1/5 events correct to 4/5 correct as measured by Teacher Data sheet." P11p11. Team members felt it was too soon to

¹⁷ During the hearing, Ms. Waite was certain that the team discussed referring the Student for a vision assessment at some point, but was not certain whether that occurred in November 2019 or November 2020. T457, 491. Given Ms. Waite's uncertainty, I give no weight to her testimony suggesting that the matter may have been discussed in 2019.

remove formal instruction in foundational reading skills and added a sight word goal. P11pp12, 22.

40. With respect to math, the IEP noted the Student:

can match 10 colors and identifies 8/10 colors. She counts out up to three items when presented with a written number and matches the numbers 1-5, 5/5 measured opportunities. . . . [S]he has learned to identify a circle and several positional words such as top, bottom, middle, over, under, and next to. She identifies big, little, short, long, more, and less. She can sort items based on what they are. P11p10.

The team set the following goal: “By 11/24/2020, when given an individual setting, an equation using numbers 1-5 and manipulatives, [the Student] will count out items to match the numerals in the equation and find the solution improving her ability to recognize numbers and their values while gaining exposure to written math equations from 1/5 to 3/5 as measures by teacher data sheets.” P11p11.

41. The IEP noted writing is difficult for the Student, who previously refused to do any writing or to hold a writing instrument. She “has gone from hand over hand guidance to light physical assistance when tracing shapes and her name,” which was “a great gain for her.” P11p12. The team set the following goal:

By 11/24/2020, when given an individual or small group setting, her AAC device and someone to scribe,¹⁸ [the Student] will dictate a story that includes: ‘who, what, when, where, how or why’ improving her ability construct a written work from 12 verbal and gestural prompts to 4 verbal and gestural prompts as measured by work samples and teacher data sheet[s]. P11p12.

42. The IEP indicated the Student had met her previous social/emotional/behavioral goal to reduce incidents of aggression.¹⁹ The number of occurrences varied depending on the day. Swiping ranged from no instances on certain days, to 7 - 10 instances other days. P11p8.

¹⁸ The word “scribe” referred to Ms. Waite or a para educator at school, or whoever was working with the Student at home during the COVID-19 pandemic. T443-44.

¹⁹ Aggressive behavior included biting, kicking, hair pulling, hitting, and swiping. T412.

43. In adaptive behavior, the IEP noted the Student had improved her ability to attend to a task from two to four minutes. Her performance was influenced by her interest in the task and whether she liked the person with whom she was working. Navigating the school environment was the focus for the upcoming year. The IEP discussed the Student's existing skills and set a goal focused on the Student's ability to carry a lunch tray. P11pp9-10.

44. Ms. Brandt discussed the Student's present levels of performance in OT during the IEP meeting. T193. The team set a goal to open containers at mealtimes to help the Student become more independent and to develop her hand strength and use. T179-80.

45. The IEP noted the Student had met both of her communication goals. P11p13. The team discussed whether the Student was ready to learn the word "when," and decided to include it in her communication goal. P11p22. The Parent did not raise concerns about the present levels of performance during the IEP meeting. T193, 495, 655-57.

46. The IEP provided the following SDI and related services:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Related							
Yes	Communication	Paraeducator	Sp/Lang Path	30 Minutes / Daily	Special Education	11/25/2019	11/24/2020
No	OT	OT	OT	90 Minutes / Monthly	Special Education	11/25/2019	11/24/2020
Yes	Communication	Sp/Lang Path	Sp/Lang Path	15 Minutes / 3 Times Monthly	General Education	11/25/2019	11/24/2020
No	Communication	Sp/Lang Path	Sp/Lang Path	30 Minutes / 3 Times Monthly	Special Education	11/25/2019	11/24/2020
Special Education							
No	Adaptive Behavior	Sp Ed Teacher	Sp Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	11/25/2019	11/24/2020
No	Math	Sp Ed Teacher	Sp Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	11/25/2019	11/24/2020
No	Reading	Sp Ed Teacher	Sp Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	11/25/2019	11/24/2020
No	Social Emotional/Behavioral	Sp Ed Teacher	Sp Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	11/25/2019	11/24/2020
No	Written Language	Sp Ed Teacher	Sp Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	11/25/2019	11/24/2020

Total minutes per week student spends in school: 1740 minutes per week
Total minutes per week student is served in a special education setting: 945 minutes per week
Percent of time in general education setting: 45.69% in General Education Setting

Supplementary Aids and Services:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
No	Communication	Sp/Lang Path	Sp/Lang Path	20 Minutes / Monthly	General Education	11/25/2019	11/24/2020
No	Paraeducator	Paraeducator	Sp Ed Teacher	1740 Minutes / 1 Times Weekly	Special Education	11/25/2019	11/24/2020

47. The IEP provided that the Student would be served in the special education setting a total of 945 minutes per week, comprised of 900 minutes of SDI per week in adaptive behavior, math, reading, social/emotional/behavioral, and written language, plus 22.5 minutes per week in communication and 22.5 minutes per week in OT.

48. The IEP provided: “Due to [the Student’s] behaviors, she requires a para educator throughout her day.” P11p19. The Parent interpreted this to mean that the IEP provided a full-time 1:1 para educator. T637.

49. The team also discussed extended school year (ESY) services. The Parent did not believe ESY would benefit the Student because the teachers and para educators were not the same as during the school year, ESY was in a different building, and the program was only four weeks for three hours per day, which made the transition too difficult for the Student. The team agreed to discuss ESY at another time. T637-38, 650; P11p23.

50. After the IEP meeting on November 18, 2019, the team met to review the FBA. The team also drafted a BIP targeting swiping and non-compliance behaviors. P11; P12. Ms. Zaldivar did not attend the meeting. T635. The Parent did not raise concerns about the FBA or BIP at that time. T459; 635.

Implementation of the November 2019 BIP

51. When the Student was beginning to become aggressive, staff would implement the BIP by taking a deep breath and looking at the Student to model that she should do the same. Initially, the Student would still do the behavior. As time went on, she would pause, get control of her body, and comply or ask for help. T423-24. When the Student was calm, staff would present her with the activity that initially started the aggression to teach her that aggression would not lead to escaping the activity. If the Student was too upset to finish the activity, staff would start with an easier task to help her succeed before presenting the original task. T424-25.

52. Ms. Waite and staff also taught the Student about emotions “all day every day.” T426. They used the zones of regulation method, which categorizes emotions by color. In addition to asking the Student to choose a color to show what she was feeling, staff talked about emotions when they were reading books, and modeled emotions on the Student’s AAC device. Ms. Waite considered the Student learning to use the AAC device to express her emotions to be an appropriate replacement behavior for swiping. T427.

53. Ms. Brandt provided OT services to the Student until January 2020. T190; p41P16. The Student did not exhibit behavioral issues except for occasionally folding her arms and turning away from Ms. Brandt to avoid a task. T183. A para educator was not always present during OT sessions. T181. There is no evidence in the record as to how many times a para educator did not attend.

COVID-19 Pandemic

54. On March 13, 2020, Governor Inslee issued Proclamation 20-09,²⁰ closing schools statewide to prevent the spread of COVID-19. The District did not provide educational services to any students between March 13, 2020, and March 17, 2020. P19p1; T384, 392.

55. On or about March 25, 2020, Ms. Waite and Ms. Senon started providing families in the Options program with educational materials for use at home. Ms. Waite prepared distance learning materials and recorded videos and posted them on an online platform called Schoolology but the Parent did not receive the access code until April 10, 2020. P14p1; P19p1; D7; T466, 468-69; T620. Schoolology also contained resources in other areas, including OT and SLP. D7; T269, 271-72.

56. By email, the Parent told Ms. Waite she was feeling overwhelmed by another District resource – the News2You website – and because she was receiving at least four messages a day from Ms. Senon. P13p2. Ms. Waite advised the Parent that Zoom video conference meetings would be best for the Student, and did not think other resources would fit the Student’s needs. P13p1.

57. In early April 2020, Ms. Waite started holding Zoom sessions for students in the Options program. T484; P13p2. Para educators in the Options program joined the Zoom sessions remotely. T74, 88, 108. The Zoom sessions occurred on Fridays and provided 30 minutes per week of social/emotional/behavioral instruction. T480-81; P19p2. During the 10-week period between April 3 to June 19, 2020, not counting the District’s school break from April 13 to April 17, 2020, this totaled 300 minutes. D12p1.

58. Ms. Zaldivar’s home ABA sessions with the Student were cancelled for approximately two weeks due to COVID-19, and for another two weeks because Ms. Zaldivar had surgery. T588; 591. Starting in mid-April, Ms. Zaldivar provided ABA services in the Student’s home

²⁰ This this tribunal may take official notice of the Governor’s proclamation pursuant to Revised Code Washington (RCW) 34.05.452(5). See Proclamation 20-09: *Statewide K-12 School Closures*, March 13, 2020, available at: <https://www.governor.wa.gov/office-governor/official-actions/proclamations> (last visited May 21, 2021).

between 4 to 6 hours per week, or approximately one hour per day. T588-89, 591, 624. Ms. Zaldivar attended some school Zoom sessions with the Student but has never observed the Student working with her teachers in person at school. T563, 597.

59. On April 20, 2020, Ms. Waite emailed the Parent to coordinate dropping off a picture schedule for the Student, a video on how to use it, and some file folder activities. T461-62. Ms. Waite asked about the Student's behaviors. The Parent responded that her behaviors had spiked "when everything started," but improved when the Student stopped using a new allergy medication. The Parent noted that the Student was continuing ABA therapy at home with Ms. Zaldivar and had "seen a real spike in behaviors with ABA since January, but there are few factors we have seen with the behavior spike (school, less/more time with dad)." P16pp1-2.

60. Starting on April 23, 2020, Ms. Comstock held 1:1 Zoom meetings with the Student for 30 minutes per week. D8p1. Ms. Comstock also joined weekly 30-minute Zoom meetings for students who had AAC devices. D8p2; P19p2; T272-73, 257; T464, 484. In total, this amounted to 60 minutes of SDI in communication per week. T286. During the approximately nine-week period between April 23, 2020, and June 19, 2020, this amounted to 540 minutes. D12p1.

61. In late April 2020, Ms. Senon started providing Zoom sessions twice weekly for her general education classroom. Each session lasted 40 minutes, with the Student spending 20 minutes with the entire classroom and 20 minutes in a breakout room with Ms. Waite and a para educator reading a book or working on math. These Zoom sessions totaled 80 minutes per week. T482, 89. During the approximately nine-week period between April 20 and June 19, 2020, this amounted to 720 minutes.

62. Via email to the Parent on May 1, 2020, Ms. Waite noted that it had been difficult for the Student to stay engaged during the previous two Zoom meetings. P17p1. The email reflects that the Student's AAC device was not working at that time. P17p1.

63. On May 15, 2020, Ms. Waite provided the Parent with a Continuous Learning Plan (CLP) that documented the remote learning the District was providing during the school closure. T463. Ms. Waite informed the Parent that OSPI was recommending 60 minutes of instruction per day. T464-65. She believed the recommendation was being met by the ABA services Ms. Zaldivar was providing at home and the Zoom meetings, along with reading books and the file folder activities Ms. Waite had provided. She offered more support if the Parent wanted it. P18p1; T654. In her email, the Parent responded that Ms. Waite had been an amazing support. P18p2. Subsequently, during the hearing, the Parent expressed concern that Ms.

Zaldivar’s ABA services, which had supplemented the Student’s school minutes prior to the pandemic, had become her school minutes during the school closure. T624.

64. The CLP provided the following SDI and related services:

Special education and related services to be provided through continuous learning instruction:					
Service	Initiation Date	Frequency	Modality (e.g., worksheet, platform, program, etc.)	Duration	Staff Delivering Service
Specially Designed Instruction:					
Communication	4/20/2020	1xweekly	AAC group with SLP and sped teacher	6/19/20	SLP and sped teacher
Communication	4/20/2020	1xweekly	1:1 zoom session with SLP	6/19/20	SLP
Reading	4/20/2020	2xweekly	Small group Zoom reading a book	6/19/20	Sped Teacher & Paraeducator
Math	4/20/2020	1xweekly	File Folder Work: colors, shapes, identify numbers	6/19/20	Sped Teacher
Social/Emotional /Behavioral	4/20/2020	1xweekly	Class Zoom Meetings	6/19/20	Sped Teacher
Related Services:					
Motor	4/20/20	weekly	newsletter with motor activities for home along with access to goal targeted printables, parent resources, and zoom links for group student session and parent session on Schoology.	6/19/20	OT

P19p2.

65. The SDI and related services listed in the CLP were delivered as follows:

Communication – As discussed in FOF 60, the District provided 60 minutes weekly between April 23 and June 19, 2020, for a total of approximately **540 minutes**. T483-83; P19p2; D8; T286; P41p15.

Reading – as discussed in FOF 61, the District provided 80 minutes weekly between April 20 and June 19, 2020, for a total of approximately **720 minutes**.²¹ T482; P19p2.

Math – Ms. Waite dropped off materials at home and posted them on Schoology. T481-82.

Social/emotional/behavioral – as discussed in FOF 57, the District provided 30 minutes weekly between April 3 and June 19, 2020, for a total of approximately **300 minutes**. T480-81; P19p2.

²¹ Ms. Waite testified that the Student spent some time in these reading breakout sessions working on math. T482. The record does not establish how much time was spent on math versus reading.

Motor – There is no evidence in the record that the Student was provided any Zoom sessions with an OT.

Adaptive Behavior and Writing – The Student did not receive any instruction in these areas. T483-84.

66. In total, the District provided **1,560 minutes** of SDI via Zoom per week (540 + 720 +300) between early April 2020, and June 19, 2020.

Zoom Meetings

67. The Student requires an adult to sign onto and participate in Zoom sessions. The Parent, the Student's Grandparent, or her sibling usually attended Zoom sessions with her. It was necessary for them to work with the Student throughout the session. T292, 619.

68. Ms. Comstock observed the Student asking for a lot of kisses from whomever was helping her attend the sessions. The Student's attention varied and she was sometimes unable to continue with the Zoom meeting. The record does not establish when Ms. Comstock observed these behaviors or how often they occurred. Prior to the school closure, the Student did not make frequent requests for kisses at school. She had engaged in that behavior in the past, but the behavior had been addressed and was not a problem at school. T289-90.

69. Ms. Comstock did not consider Zoom sessions to be equivalent to working with the Student in person. T257. During in-person sessions, Ms. Comstock was able to model where to point on the AAC device. Over Zoom, the Student was being asked to look at the device and find the icons, or Ms. Comstock was coaching the person who was working with her. T291-92.

70. Ms. Senon observed that Zoom sessions were challenging for the Student at times and she was showing interest elsewhere. T135. The Student's participation was similar to her in-person participation in the general education classroom because she had a shorter attention span there as well. T140.

71. In Ms. Waite's opinion, the Student performed better during Zoom sessions when she worked with Ms. Zaldivar, the Grandmother, or her sibling, in that she was able to stay on task, look at the screen, and look at the AAC device when asked a question. T473-74; P25p4. With the Parent, the Student would not touch the AAC device or answer questions, and she was distracted and seeking hugs and kisses. T474; 618.

72. At times, the Student became frustrated with the computer and would throw it or anything else she could get her hands on. T623. The record does not contain evidence of how often this behavior occurred and does not contain evidence that the Parent raised a concern about this behavior with Ms. Waite or other District staff between March 18 and June 19, 2020.

73. Ms. Zaldivar believed the Student performed better when she was present to prompt and redirect her. When Ms. Zaldivar stepped back to let the Grandmother work with the Student, the Student would “just sit there.” T564. In Ms. Zaldivar’s opinion, the Student was unable to access her education through Zoom without appropriate support from someone who was qualified to redirect her and use strategies to enable her to attend. T564-65. Additionally, because the Student is socially motivated and constantly seeks one-on-one attention, it is difficult for her to engage in online schooling and prerecorded videos. T566.

The Student’s Progress and Behavior

74. In June 2020, the Student’s progress report indicated she made insufficient progress, as noted by the code “IP,” on both of her communication goals. P20pp1-2. She also made insufficient progress on her OT goal. P20p5. The Student did not receive instruction, as noted by the code “NI,” related to her social/emotional/behavioral and adaptive behavior goals because she was unable to eat with her peers or practice carrying her lunch tray due to the school closure. T472; P20pp2-3. The Student showed emerging skills, as noted by the code “ES,” on her math goal and her reading goal focused on sequencing. P20pp3-4. She made sufficient progress, noted by the code “SP,” toward her sight word goal. P20p4.

75. Although the progress report also indicated that the Student received remote instruction in written language during the school closure and showed emerging skills, Ms. Waite testified that the Student did not receive any instruction in this area, which is consistent with the CLP. P20p5; Waite T484; P19p2. I therefore give no weight to the part of the progress report indicating that the Student showed emerging skills in written language.

76. Ms. Zaldivar regularly collected data about the Student’s behaviors. During the hearing, Ms. Zaldivar initially opined that problem behaviors increased between March 2020 through October 2020, and that the Student started spitting, which was a new behavior. T553. During cross-examination, she clarified that self-injurious behaviors increased from mid-June to August 2020, when school was not in session. T577; P32p5. After a big escalation in spitting in early March, spitting stabilized by May, with upticks in July and August 2020. T578-79; P32p9. Aggression and tantrums started in February through April 2020, then stabilized somewhat, and then increased again during June and July 2020. T580-81; P32p9.

2020-2021 School Year – Fourth Grade

77. On August 26, 2020, Ms. Waite sent the Parent a proposed schedule for the 2020-2021 school year. The schedule proposed 1) in-person learning on Tuesday and Friday afternoons from 12:30 to 3:30 p.m.; 2) small-group Zoom meetings on Monday and Thursday at 1 p.m.; 3) large-group Zoom meetings on Wednesday at 11 a.m. or 1 p.m.; and 4) learning using Schoolology and materials that been sent home. P21p1.

78. In planning the schedule for the start of the school year, the District relied on guidance from the Tacoma-Pierce County Health Department (Health Department) and OSPI. P27p1; T385, 388-89; P51pp1-2. At that time, the Health Department was “requiring all schools to begin the school year using distance learning” until COVID-19 levels decreased, with an exception for limited in-person learning in small groups, meaning five or less. P51pp1-2.

79. OSPI published *Reopening Washington Schools 2020: Special Education Guidance*, on July 30, 2020, updated September 3, 2020. P52. The guide provided a checklist of considerations, including the question: “How will you ensure students with disabilities receive appropriate services and supports, and make meaningful progress, without relying on parents to deliver or facilitate instruction.” P52p11.

80. On September 1, 2020, the Parent sent an email to John Yellowlees, Executive Director of Student Services, requesting in-person services for the Student. P22p1. In a prior written notice (PWN) issued September 3, 2020, the District proposed an IEP meeting to discuss the request. P23p1.

81. On September 7, 2020, Lynne Truitt, Director of Special Education,²² informed the Parent by email that some students, on an individual basis, would have the opportunity for in-person instruction with peers up to four full days per week effective September 21, 2020. This was based on an announcement by the Health Department that COVID-19 cases had dropped to a moderate level. P24p1. In a responsive email, the Parent requested compensatory education in addition to in-person services. P24p2.

²² Ms. Truitt was hired by the District in August 2020. T340, 348.

82. The 2020-2021 school year began on September 8, 2020. D12p2. The Student's IEP team met that same day (September 2020 meeting).²³ P27p1. The Parent discussed her request for in-person services in place of virtual learning and asked for a plan in the event of additional school closures. She felt that the answer to each question was "No." P24p3; T620-21, 658. The team discussed "virtual learning and why it was not working for [the Student's] needs." P24p3. During the hearing, Ms. Truitt testified that the District was not willing to risk staff health by sending a para educator into the Student's home. T344-45, 353; P27p1. She further testified that the District felt it could not control whether outside providers would follow protocols, which could potentially put students and families at risk. T354. The District offered to provide in-person services from an SLP and OT, in addition to the six hours of in-person services already being provided, because it could do so safely. T363; P24p3; P27p1.

83. During the September 2020 meeting, the Parent was disheartened by Ms. Truitt's statement to "step up" as a Parent. T621, 658; P24p3; T338. During the hearing, Ms. Truitt testified that the District had some expectation that parents would be supporting students at home and would help children access any activities that were being offered remotely. T341, 375. In the Parent's view, she was not just helping the Student access her education, but was the person who was teaching the Student. T619.

84. Between September 8, 2020, and September 30, 2020, a period of approximately three weeks, the Student attended school in person two days per week for three hours. This totaled six hours, or 360 minutes, per week. T448, 624-25; p26p1; P59p4. On days that the Student was not in person, Ms. Waite offered Zoom meetings and asynchronous learning opportunities, meaning "specially designed instruction completed at home" and "implemented by parents, siblings, nannies, day care, ABA therapists, grandparents, etc." P59pp6, 9, 10.

85. During the hearing, Ms. Waite and para educators in the Options program could not recall how long the Zoom sessions lasted. I therefore give more weight to a document Ms. Waite prepared for parents during the Fall of 2020, which indicated the Zoom sessions were held approximately three times per week for a total of three to four hours per week. T498-99, P59p5. This amounted to between nine and twelve hours, or 540 to 720 minutes, between September 8 and September 30, 2020. D12p2.

²³ The Parent's email to Ms. Truitt on September 14, 2020, indicates the IEP meeting took place on September 11, 2020. P24p3. The PWN issued after the meeting lists September 8, 2020, as the meeting date. P27p1. Based on the PWN, which is a more formal document, I find that the meeting occurred on September 8, 2020.

86. The evidence in the record does not establish whether the Parent accepted the District's offer to provide in-person OT and SLP services to the Student. P24p3; P27p1. The record indicates that the Student started to receive in-person communication services "at the start of the school year," but it does not indicate precisely when services started or what exactly the Student received between September 8 and September 30, 2020. P41p15; T274, 277-78. There is no evidence to establish what, if any, OT services the Student received between September 8 and September 30, 2020. See P41p16. Ms. Brandt did not provide any OT services during the 2020-2021 school year. T191-92, 199.

87. By email on September 14, 2020, the Parent told Ms. Waite that she was attempting to have the Student participate in all Zoom classes but felt they were "getting nowhere." She explained that the Student would not touch the AAC device, and that when Ms. Waite asked the Student to respond on the AAC device, the Student would grab the Parent's hand or kiss it to avoid the question or to have the Parent use the AAC. P25p3. Ms. Waite acknowledged during the hearing that the Student's behaviors were affecting her ability to access her education in the home setting. T445.

88. Ms. Waite responded to the Parent's email on September 15, 2020, noting that the Student used the AAC device at school, with modeling and prompting. Ms. Waite discussed the steps they took at school when the Student refused to respond with the AAC device and offered several ideas for addressing the behavioral issues. One idea was to create a behavior plan with input and collaboration with Ms. Zaldivar that targeted the behaviors of non-compliance and attention seeking with the Parent. P25p2; T446. The Parent agreed with the idea of a home behavior plan and stated she would ask Ms. Zaldivar for input. P25p1.

89. Ms. Waite's responsive email also stated she would continue to lobby the District for in-home teaching support, meaning para professionals or others willing to go into the Student's home. She felt this was a way to provide services to students who could not benefit from Zoom or remote learning opportunities. T446, 488-89. Ms. Waite believed that Zoom was not the best venue for the Student's learning and suggested that the Parent forego Zoom meetings and instead work on the Student's IEP goals to the best of her ability. P25p4; T447.

90. In a PWN sent on September 18, 2020, the District denied the Parent's request for in-person services and committed to reviewing recovery services for the Student once she had returned to in-person learning. The PWN did not address the Parent's request for a contingency plan in the event of an additional school closure. P27p1. The PWN noted the District's reopening plan was offering in-person services in accordance with Health Department guidance, would increase the frequency of in-person services as health and

safety conditions permitted, and that the District was not willing to send a para educator or staff member into the Student's home because it could not ensure their safety. P27p1.

91. The District postponed the in-person instruction that was scheduled to begin on September 21, 2020, until September 28, 2020, and then until October 1, 2020, because air quality issues from extensive wildfires led to building closures. P26p1; P28p1; P30p1; T352, 386, 474.

92. On or about September 24, 2020, in an email to Ms. Brandt, Ms. Waite opined that she did not have enough para educators to run her program. Subsequently, the District hired one and one-half para educators, for a total of six full-time and one half-time para educators. T411, 436; P29p2.

Return to In-Person Education

93. On October 1, 2020, the Student returned to daily in-person education at Harbor Heights. The Student attended full-time, except for Wednesday, which was limited to four hours. T475, 478; P28p1.

94. The Student worked with multiple para educators in the Options program, including Kathy Soden, Laurie Kinner, Alona Carlos, and Tammy Croissant. The Student was working in small groups with one to three other students from the Options program who were working on similar skills with a para educator. T476, 494. If the Student needed a break, she and a para educator went to a separate part of the classroom. T476. If the Student was working on individualized goals, she would be working directly with a para educator. T48, 66, 494. The Student did not have an assigned, dedicated para educator. T41.

95. Ms. Soden worked with the Student each morning for approximately one hour. On Wednesday mornings, they worked together for approximately two hours. T44, 53-54. Ms. Kinner worked with the Student in the afternoon. T65. Ms. Carlos worked with the Student during recess. T82. There is no evidence in the record that the Student was ever without adult support. T48, 70.

96. Ms. Waite and para educators in the Options program received training concerning the Student's AAC device from Ms. Comstock approximately three or four times per year. T46, 67-68, 84. Ms. Soden and Ms. Carlos also did training on their own. T46, 85. Para educators were trained to model how to use the AAC device, and teaching the Student how to build sentences and use words together was a "huge part of our day." T68.

97. Teasha Buckland was the Student's general education teacher. Because the Student's general education peers did not return to in-person education until February 2021, Ms. Buckland was teaching her class remotely by Zoom. T145, 387. The Student joined the Zoom session from Harbor Heights, with Ms. Soden by her side. T45, 55, 147, 153.

98. In an email on October 2, 2020, Ms. Waite informed the Parent the Student was doing very well, despite the fact that "we are in quite a state of chaos, short staff[ed] and in two different rooms trying to do everyone's schedule with 6 ft between students. But through it all she is flexible, good attitude, following directions, etc. she is so amazing!" P31p1.

99. Ms. Zaldivar drafted a BIP for the Student on October 5, 2020. P32p1. The plan included the original assessment performed by Positive Behavior Supports when they started working with the Student in 2016, which was updated every six months. This made it possible to see differences in the data. T568; P32.

100. Lauren Rollins,²⁴ an occupational therapist employed by the District, started providing weekly OT services to the Student in-person on October 6, 2020. She provided a total of 90 minutes monthly.

101. On October 22, 2020, the Parent emailed Ms. Waite to inquire about the Student's behaviors at school, typical day, progress toward use of the bathroom, and use of the AAC device or school iPad. P34p2.

102. On October 26, 2020, Ms. Waite responded by email that the Student had not shown aggressive behaviors but was having issues with noncompliance. The Student independently asked to use the bathroom on her AAC device. Staff went "back and forth between the iPad and [her dedicated AAC] depending on if [the dedicated AAC] is frozen." P34p1.

November 2020 IEP Meetings

103. The Student's IEP team met on November 16, 2020 (November 16 meeting), to review her IEP and BIP. P41p24. The Parent was concerned that the team would not have time to complete its work and requested an additional meeting, which was scheduled for November 24, 2020. (November 24 meeting). P41p24.

²⁴ Ms. Rollins has a master's degree in OT and has been practicing for five years. She worked as an OT in private practice for two years before starting work for the District. T199.

104. Attendees at both meetings included the Parent, Ms. Caldart, Ms. Comstock, Ms. Waite, Ms. Zaldivar, Ms. Truitt, and Principal David Bentler. Ms. Buckland attended the November 16 meeting, but did not attend the November 24 meeting. P41p24. Ms. Rollins did not attend the November 16 meeting, but did attend the November 24 meeting. P41p24; T200-201, 643. The Parent verbally excused Ms. Rollins from the November 16 meeting, and Ms. Buckland from the November 24 meeting,²⁵ but did not sign an excusal form. T157, 160, 200, 626, 643; P38p2; P41p24.

105. Prior to the November 16 meeting, Ms. Waite sent a draft IEP to the Parent to review, which included input from Ms. Rollins. T203; P38p7. Shortly before the meeting convened on November 16, the Parent emailed to Ms. Waite a nine-page document containing her input. P38.

106. The team discussed the Parent's concerns about the Student's present levels of performance. T495. The Parent contended it was not possible to develop appropriate goals without accurate present levels and sought clarification on how to know if the Student's present levels of performance were accurate. The team discussed that the Student's behaviors make it difficult to obtain accurate information, and that team members "assess [the Student] as they are able and report the results in the performance section of the IEP." P41p24; T453; P41p10.

107. In response to the Parent's concerns, Ms. Waite incorporated the Student's present levels prior to the COVID-19 pandemic into the IEP. P41p25. The team added goals concerning communication with peers, identifying emotions, and handwashing. P41p25; P40p4. The team discussed sight words and agreed to functional words with images associated with them. P41p25. The team also changed the Student's writing goal. P41p25. The team discussed the Student's present levels of performance in math and changed the Student's math goal to focus on telling time. T496; P39p1; P38p6, P41pp10-11.

108. The Parent requested a vision and mobility assessment of the Student, which the District agreed to conduct. T629, 634; P38p7. After the vision assessment was completed in February 2021, the Student's IEP was amended to provide vision services as a related service. T629. The Student's vision has not changed since November 2019. T628; 633.

²⁵ Ms. Buckland recalled being excused from part of an IEP meeting in November 2020, but did not recall which meeting. T157, 160. The PWN, however, clarified that she had been excused from the meeting on November 24, 2020. P41p24.

109. During the hearing, Ms. Waite discussed being “curious” about the Student’s vision because the Student consistently sorted colors into the wrong place during an activity and Ms. Waite was uncertain whether she could distinguish the colors. Ms. Waite also wondered about the Student’s ability to track on a screen, noting that the Student did not care about watching the screen or engaging, in contrast to most students. T490-91. The record does not contain evidence of when these concerns arose. Ms. Waite did not refer the Student for a vision assessment at any point. T457, 490-91.

110. During the November 16 meeting, the team agreed to make changes to the IEP. On November 19, 2020, Ms. Waite sent the Parent an edited draft and noted that the IEP was still in draft form and could be edited by the team. P39p1.

111. At the start of the November 24 meeting, the Parent provided new input to Ms. Waite in an eight-page document. P40p1. The Parent’s input expressed thanks for multiple changes that had been made, and also discussed information the Parent considered inaccurate or concerns that had not been addressed. P40.

112. The Parent requested an iPad with the Snap+Core application in place of the Student’s dedicated AAC device, which the District agreed to provide. P40p3; P41pp15, 24-25.

113. During the November 24 meeting, the Parent asked Ms. Rollins many questions about why the Student was unable to open containers and how to strengthen her hands. Ms. Rollins discussed these concerns, but the Parent did not feel that she answered the questions satisfactorily. T206; 644; P37p1; P41p25. The present levels section of the IEP described the Student’s existing skills in opening various containers in detail and offered multiple activities to strengthen the Student’s hands. P41p16; T645.

114. The Parent also raised concerns about the Student’s behaviors. The targeted behaviors and interventions in the BIP were largely identical to the BIP from November 2019, with a few additions. Compare P36 with P12; T558. The 2020 BIP reflected that the Student had shown growth and rarely swiped at people in the bathroom anymore, being more likely to show “testing” behavior. P36p3.

115. Ms. Zaldivar reviewed the BIP and recommended combining the two targeted behaviors of noncompliance and swiping because they were occurring for the same function – escape. T559-60; P42p1. She did not believe that the replacement strategies in the BIP effectively taught the Student what she should do instead of engaging in the problem behavior. T560. She agreed with the antecedent strategies but would add more and would clarify the consequence strategies to make clear that the Student should not be allowed to escape the

work presented. Overall, she recommended reevaluating the Student's behaviors at school. T560; P42p1.

116. The Parent did not provide the IEP team with Ms. Zaldivar's input until after the November 24 meeting. T576-77, 646; P42p3. Additionally, Ms. Zaldivar did not discuss her specific recommendations with the team. T596. During the hearing, Ms. Waite could not recall if she edited the final BIP to incorporate the feedback, but felt that they were in agreement as to what was best for the Student. T477. The Parent did not provide a copy of Ms. Zaldivar's behavior plan (Exhibit P32) to staff at Harbor Heights or anyone at the District. T636.

117. The November 2020 IEP provided the following special education and related services:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Related							
No	Fine Motor	OT	OT	90 Minutes / Monthly	Special Education	11/30/2020	11/29/2021
No	Communication	Sp/Lang Path	Sp/Lang Path	30 Minutes / 2 Times Weekly	Special Education	11/30/2020	11/29/2021
No	Communication	Paraeducator	Sp/Lang Path	30 Minutes / Daily	Special Education	11/30/2020	11/29/2021
Special Education							
No	Adaptive Behavior	Sp Ed Teacher	Sp Ed Teacher	50 Minutes / 5 Times Weekly	Special Education	11/30/2020	11/29/2021
No	Math	Sp Ed Teacher	Sp Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	11/30/2020	11/29/2021
No	Reading	Sp Ed Teacher	Sp Ed Teacher	45 Minutes / 5 Times Weekly	Special Education	11/30/2020	11/29/2021
No	Social Emotional/Behavioral	Sp Ed Teacher	Sp Ed Teacher	50 Minutes / 5 Times Weekly	Special Education	11/30/2020	11/29/2021
No	Written Language	Sp Ed Teacher	Sp Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	11/30/2020	11/29/2021

Total minutes per week student spends in school: 1740 minutes per week
Total minutes per week student is served in a special education setting: 1332.5 minutes per week
Percent of time in general education setting: 23.42% in General Education Setting

Supplementary Aids and Services:

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
No	Paraeducator	Paraeducator	Sp Ed Teacher	1740 Minutes / 1 Times Weekly	Special Education	11/30/2020	11/29/2021
No	Communication	Sp/Lang Path	Sp Ed Teacher	30 Minutes / Monthly	Special Education	11/30/2020	11/29/2021

P41p21.

Independent Educational Evaluation

118. In February 2021, Sonja Hemmerling, PhD,²⁶ conducted an independent educational evaluation (IEE) of the Student in the area of academics at the Parent's expense. T511-13;

²⁶ Dr. Hemmerling has a bachelor's degree in developmental psychology, a master's degree in special education and educational leadership, and a PhD in educational leadership. Dr. Hemmerling is currently employed as a

P44. The purpose of the IEE was to assess the Student's current academic functioning and to determine if the Student's skills had regressed during the COVID-19 pandemic. P44p1. The Parent wanted an evaluation that was independent from the District's evaluation, and that did not consider school-based performance. T513. At the Parent's request, Dr. Hemmerling did not meet with any District staff as part of her evaluation. T544; 646.

119. Dr. Hemmerling reviewed the Student's records, including the Student's IEPs, evaluation from the University of Washington in 2015, and District reevaluation on November 18, 2019. P44pp1-2. To assess the Student's functional academic skills, Dr. Hemmerling used the Styer-Fitzgerald Program for Functional Academics Student Assessment²⁷ and the Assessment of Basic Language and Learning Skills-Revised (ABLLS-R). P44pp2-4. She selected the ABLLS-R, which is administered to family members who are familiar with a student's academic skills, to provide a comparison between the direct assessment of the Student's skills by an unknown examiner and skills that "known adults have observed [the Student] as being able to do." P44p3. In this case, the Student's Mother, Father, and Sibling²⁸ worked together to provide responses about the Student's skill levels in academic areas. P44p3; T515, 539.

120. Dr. Hemmerling met with the Student and her family to conduct the assessments for a total of approximately two hours. T539. Based on the assessment results, Dr. Hemmerling concluded that the Student was performing significantly below grade level in all academic areas and was focused more on pre-literacy skills, pre-writing skills, and basic beginning math concepts. T516; 544.

121. Dr. Hemmerling testified that she concluded from her review of records that there was "a disconnect" between the results of her evaluation and the present levels of performance in the November 2019 and November 2020 IEPs. T517-18. She further testified that the Student's academic skill levels in the 2021 IEE were very similar to the skill levels from the 2019 reevaluation. T521. Although Dr. Hemmerling's report discusses the 2019 evaluation and the November 2020 IEP, it does not specify what, if anything, she considered to be inaccurate or out-of-date in these documents. P44.

school psychologist by another school district in Washington, and previously worked for other school districts as an educational specialist, assistant director of special services, and director of special services. Since 2020, Dr. Hemmerling has also owned a private business that conducts IEEs. P65p1; T509-510.

²⁷ The District that employs Dr. Hemmerling uses the Styer-Fitzgerald curriculum. Dr. Hemmerling has not taught this curriculum but has used it in assessing students. T542.

²⁸ The Student's Sister was ten in 2019, making her approximately twelve at the time of the IEE. P9p9.

122. Dr. Hemmerling opined that a standardized cognitive assessment of the Student “could potentially be conducted.” T522. She further opined that if it was not possible to conduct a standardized cognitive assessment, “there are other assessments that are based upon adults that know the Student that would allow to get perspectives of cognitive functioning. It is not the same as a direct assessment, but still gives a measure of potential cognitive ability.” T522.

123. In Dr. Hemmerling’s opinion, a comprehensive evaluation of the Student would include an assistive technology assessment because the Student has significant communication delays. T524.

124. The Parent obtained Dr. Hemmerling’s report for litigation purposes. She wanted to show that the Student’s present levels of performance in her IEPs were not correct. The Parent did not provide a copy of Dr. Hemmerling’s report to District staff prior to the exchange of exhibits for this due process hearing, and the report was not considered when the Student’s IEP was amended in late February 2021. T646-48.

Recovery Services

125. Since September 2020, the District has been collecting data on students who have IEPs so that IEP teams may make individualized decisions as to whether they require recovery services. T341; P19p2. Recovery services are any services a student may require to recover skills lost during the COVID-19 pandemic or “to address gaps in service delivery due to COVID-19 health/safely [sic] limitations” T353. IEP teams “will probably be looking at that data” after the District’s spring break. T342; 361. The timeframe covered by recovery services is an individualized determination. T361.

126. Ms. Waite is collecting “the data that I normally collect for ESY, extended school year, so looking at the weekly data performance, how they do after Christmas, winter break, mid-winter break, spring break.” T493.

127. As compensatory education, the Parent is requesting eight weeks during the summer at Carpe Diem, an ABA school in Tacoma. The Parent believes Carpe Diem is a good fit because “they are willing to address her behavior as well as her educational needs.” The Parent toured the school and spoke with the director. The director has not met the Student or reviewed the Student’s records. The Parent is not opposed to a District summer program for eight hours per day for eight weeks, but it would depend on where the program is and who is teaching it. T661-63.

128. In the Parent's view, the Student's present levels were not accurate because "If we don't cognitively know where she is at, how do we write an IEP?" T657. The Parent believes the District did not have a complete picture of the Student and her needs because it did not assess her vision, no one had an accurate understanding of her needs related to the AAC device, and her ability to retain learning is unclear. T656-57. The Parent acknowledged that the Student's "abilities differ from day-to-day, from attitude to attitude, from time to time." T641. She testified that there were times that the Student would use the AAC device and "your mind is blown. There are times that she won't use it and she will throw it at you and you don't know at that point what is going on in her head." T641.

129. During the hearing, the Parent asked Ms. Waite whether it was premature to challenge the Student to work independently, as in her adaptive behavior goal, and whether the Student should be doing a foundational step first. Ms. Waite explained that the way to grow is to work on something. The Student had achieved the foundational step, which was to sit at a desk and do work. They were working on her ability to grow in independence and to do things on her own. T452. In the Parent's view, based on her participation in Zoom sessions, both Ms. Waite's instruction and the Student's IEP goals were above the Student's intelligence level. T624.

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. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Because the Parent is seeking relief, she bears the burden of proof in this case. 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, 4, 256 P.3d 339 (2011). Therefore, the Parent's burden of proof in this matter is preponderance of the evidence.

The IDEA and FAPE

3. Under the IDEA, a school district must provide "a free and appropriate public education" (FAPE) to all eligible children. In doing so, a school district is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 200-201, 102 S. Ct. 3034 (1982).

4. In *Rowley*, the United States Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA, as follows:

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

Rowley, 458 U.S. at 206-07 (footnotes omitted).

5. The first inquiry is whether the District has complied with the procedures established by the IDEA. *Id.* at 206-07. Procedural safeguards are essential under the IDEA, particularly those that protect the parents' right to be involved in the development of their child's educational plan. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). 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 decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

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

6. The next question is whether the District has violated the substantive requirements of the IDEA. The Supreme Court recently clarified the substantive portion of the *Rowley* test as

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.” *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 197 L.Ed.2d 335 (2017). Additionally, the Student’s “educational program must be appropriately ambitious in light of his circumstances” *Id.* at 1000.

7. The Ninth Circuit has explained the *Endrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can make progress in the general education curriculum . . . taking into account the progress of his non-disabled peers, and the child’s potential.

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 138 S. Ct. 556 (2017) (citations omitted; internal quotation marks omitted). 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.*

ISSUES AND REMEDIES

Issue a. Whether the District violated the IDEA and denied the Student a FAPE by failing to provide the services listed in the Student's November 2019 IEP from March 13, 2020, through June 19, 2020, and from September 8, 2020, through November 25, 2020, by failing to provide all the service minutes listed for communication, para educator services, occupational therapy, adaptive behavior, math, reading, social/emotional/behavioral, and written language.

Issue b. Whether the District violated the IDEA and denied the Student a FAPE by failing to offer an appropriate education that was accessible to the Student from March 13, 2020, through June 19, 2020, and September 8, 2020, through November 25, 2020.

8. In issues a and b, the Parent argues that the District violated the IDEA and denied the Student FAPE because it failed to provide her with all of the SDI and related services required

by or included in the November 2019 IEP, and because the Student was unable to access the limited educational resources provided by the District due to her disabilities.²⁹

9. The District was ordered to stop all in-person educational programs on March 13, 2020, by proclamation from the Governor of Washington State. Governor Proclamation 20-08, 20-09. The U.S. Department of Education (DOE) Office of Special Education and Rehabilitative Services (OSERS) 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, then 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 every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP)

OSERS, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 2020) at 2.

10. 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 the 2020-21 School Year* (originally released 3/24/20), Question A-1. 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 those laws. *Id.*

11. On March 21, 2020, OSERS offered guidance that addressed the role of online learning during the pandemic. OSERS, *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020). This guidance stated in relevant part:

To be clear: ensuring compliance with [the IDEA] . . . should not prevent any school from offering educational programs through distance instruction.

²⁹ In footnote 26 of its closing brief, the District argues that it does not agree that accessibility is an applicable legal requirement under the IDEA, other than as an inherent part of the District's IEP implementation obligation. Here, the Parent's claim does not appear to go beyond that inherent implementation obligation.

School districts must provide [a FAPE] consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. . . . However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.

Id. at 1-2. (Emphasis in original.)

12. Under the guidance from OSERS, the District was required to provide special education services to the Student during the COVID-19 school closure. The issue in this case is whether the District's services to the Student satisfied its obligation to implement the Student's IEP, and if not, whether any failure to implement the IEP was a material failure. See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007).

13. In *Van Duyn*, the United States Court of Appeals for the Ninth Circuit set out the standard for assessing whether a District's failure to implement an IEP violates the IDEA as follows:

[W]e 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. Because the parties debate whether [the student's] skills and behavior improved or deteriorated . . . we clarify that the materiality standard does not require that the child suffer demonstrable education harm in order to prevail. However, the child's education progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. For instance, if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material.

502 F.3d at 822 (emphasis in original).

Services From March 13, 2020, through March 17, 2020

14. Under OSERS guidance, the District was required to provide special education services to the Student when it was providing educational services to other students. Here, the District provided educational services to other students from March 18, 2020, through June 19,

2020. Accordingly, the District was required to start providing special education services to the Student on March 18, 2020. Therefore, any failure to provide the Student with services between March 13, 2020, and March 17, 2020, did not violate the IDEA because the District was not providing services to any students during that time period.

Services from March 18, 2020, to June 19, 2020

15. The OSERS guidance makes clear that the District was required to provide the Student with special education services despite the school closure once instruction began again for general education students. The Student's November 2019 IEP provided the Student with para educator support throughout her day due to behavioral issues. Following the school closure, para educators attended some Zoom meetings virtually, but the Student did not receive any in-person support from para educators to assist with her behavior. Ms. Zaldivar, the Student's home ABA therapist paid for by the Parent's insurance, attended some Zoom meetings with the Student.

16. The Student's November 2019 IEP provided that the Student be served in the special education setting for 945 minutes per week. This amounted to 11,340 minutes during the 12-week period between March 18, 2020, and June 19, 2020, not counting the District's spring break. During that time, the Student actually received a total of 1,560 minutes via Zoom. Therefore, the Student missed 9,780 minutes (11,340 minus 1,560) which is approximately 86 percent of the minutes provided by the November 2019 IEP.

17. The District points to the unprecedented circumstances presented by the COVID-19 pandemic, and contends that it was doing the best it could to provide the Student a FAPE. District's Closing Brief at 21. There is no question that Ms. Waite and others who served the Student worked diligently to try to meet the Student's needs through Zoom, by communicating with the Parent, and by providing resources to use at home. The District recognizes that the COVID-19 pandemic has not altered the requirements of the IDEA, but contends that it is appropriate to consider the District's reasonable efforts to implement the November 2019 IEP in response to the pandemic. In support of its argument, the District relies on *In re Student with Disability*, 121 LRP 3961 (SEA NV 2020), a decision that is not binding on this tribunal. Regardless, that decision does not stand for the proposition that it is appropriate to consider a District's best efforts in deciding whether a District's failure to implement an IEP was material under *Van Duyn*, which is the applicable standard in the 9th Circuit.

18. Here, the Zoom meetings offered by the District provided only a small percentage of the Student's minutes. The significant difference between the minutes provided by the November

2019 IEP and the minutes provided during Zoom meetings was not a minor shortfall and constituted a material failure to implement the IEP.

19. Moreover, resources to the Student, such as Schoology and News2You, did not make up for the shortfall in minutes. The Parent did not even receive the code to access Schoology until April 10, 2020. Additionally, as early as March 26, 2020, Ms. Waite had advised the Parent that Zoom meetings would be best for the Student, and that she did not think other resources would meet the Student's needs. Ms. Waite's testimony holds great weight for several reasons. First, she has worked with the Student for a long time, starting in 2017, and again during the 2019-2020 and 2020-2021 school years. Second, the evidence in the record clearly demonstrates that she has spent a great deal of time thinking about the Student and how to meet her needs. Third, not only is she a certificated special education teacher, but Ms. Waite also has training and work experience as an RBT, which is significant given that the Student's behaviors impact her ability to access her education. Thus, although the District eventually provided these materials to the Student, the evidence establishes that they did not meet her educational needs.

20. The District also points to guidance by OSPI acknowledging "the reality that during school building closures, parents were necessary partners in delivery [of] instruction to students in Washington, including those with disabilities." District's Closing Brief at 22-23. First, it is important to emphasize that this is not a case in which the Parent refused to work with the Student or to collaborate with Ms. Waite. To the contrary, the Parent communicated with Ms. Waite regularly and made significant and continuing efforts to work with the Student. Additionally, it is important to note that OSPI's reopening guide for Washington schools contained a checklist of considerations, including the question: "How will you ensure students with disabilities receive appropriate services and supports, and make meaningful progress, without relying on parents to deliver or facilitate instruction." In other words, OSPI guidance did not absolve districts of their obligation to deliver or facilitate instruction, even if districts did need to rely on parents to assist them in fulfilling this obligation.

21. Additionally, although Ms. Waite initially informed the Parent that Zoom meetings would be better for the Student than other resources, she ultimately concluded that Zoom meetings were not serving the Student's needs. In September 2020, she advised the Parent to forego Zoom meetings and instead work on the Student's IEP goals at home to the best of her ability. The evidence in the record clearly establishes that when the Parent attempted to work with the Student on Zoom, the Student would not use her AAC device and was frequently distracted. Ms. Comstock did not consider Zoom learning to be equivalent to in-person learning because she was unable to model on the AAC device, which is the Student's sole means of communication. Ms. Waite lobbied for the Student to receive in-home teaching

support because she felt this was a way to provide services to students who could not benefit from Zoom or remote learning opportunities. As Ms. Waite explained during the hearing, the Student is one of the few she has ever taught who has no interest in computer screens. As a whole, the evidence in the record establishes that while the District provided the Student with remote learning opportunities through Zoom, these opportunities were not meeting the Student's educational needs.

22. Finally, the District argues that despite the challenges posed by the pandemic, the Student "continued making some, albeit limited, progress with the support of [the] Parent in the areas of instruction possible during the school closures." District's Closing Brief at 23. A review of the record, however, indicates that the Student made insufficient progress or received no instruction on most of her IEP goals. She did not make sufficient progress toward any of her goals except her sight word goal, and showed emerging skills toward math and reading goals.

23. Considering the testimony in the record as a whole, it is clear that the District significantly reduced the Student's minutes following the school closure, and that the minutes provided through Zoom did not meet the Student's educational needs. Therefore, the Parent has shown that the District did not fully implement the Student's IEP between March 18, 2020, and June 19, 2020, a period of twelve weeks, which violated the IDEA and denied the Student a FAPE.

Services from September 8, 2020, to September 30, 2020

24. During the three-week period between September 8, 2020, and September 30, 2020, the District provided both remote and in-person learning opportunities. With respect to remote activities, the District also provided Zoom instruction for approximately 3 to 4 hours per week. The District also provided resources for the Student to use at home. As discussed above, the Student was not able to engage in these remote learning opportunities.

25. During this timeframe, the Student received in-person communication services, but there is no evidence in the record as to exactly when those services commenced or how many minutes she received. Similarly, while the District offered in-person OT services, there is no evidence in the record concerning what OT services the Student actually received during this time or when they commenced. The Parent bears the burden of proof on this issue. Here, the Parent has not met her burden to show by a preponderance of the evidence that the District failed to provide the Student with the communication or OT minutes provided by the November 2019 IEP.

26. During this timeframe, the Student also attended Harbor Heights in person, two days per week, for a total of 360 minutes per week. Excluding communication and OT, the November 2019 IEP provided 900 minutes of SDI per week. Since the District provided only 360 minutes, the Student missed 540, or 60 percent, of those minutes between September 8, 2020, and September 30, 2020.

27. It is clear the shortfall in instruction between September 8 and September 30, 2020, was a material failure to implement the Student's IEP. *Van Duyn.*, 502 F.3d at 822; see also *Los Angeles Unified School District*, 77 IDELR 116 (SEA CA August 24, 2020) (student's distance learning fell materially short of adequately implementing IEP because student received less than half of minutes provided by her IEP). The evidence establishes that between September 8, 2020, and September 30, 2020, the Student missed more than one-half of the SDI provided by the November 2019 IEP, which cannot be considered a minor discrepancy.

28. Accordingly, the Parent has shown that the District failed to fully implement the Student's IEP between September 8, 2020, and September 30, 2020, which violated the IDEA and denied the Student a FAPE.

Services from October 1, 2020, to November 25, 2020

29. Between October 1, 2020, and November 25, 2020, the Student was attending school in person. The Parent contends that the Student still was not attending full-time at this point because the District was not providing a full day of school on Wednesdays. The Parent did not establish what, if anything, the Student missed on Wednesdays, and whether the shortened school day on Wednesdays impacted the Student. Accordingly, for the period of October 1, 2020, through November 25, 2020, the Parent has not met her burden to show that the District failed to fully implement the Student's IEP. Therefore, the Parent has not shown that the District violated the IDEA or denied the Student a FAPE during this time period.

30. In conclusion, the Parent has shown that the District failed to fully implement the November 2019 IEP between March 18, 2020, and June 19, 2020, and between September 8, 2020, and September 30, 2020. Because the Parent has shown by a preponderance of the evidence that the District violated the IDEA and denied the Student a FAPE, the Parent is entitled to a remedy, as discussed below.

Issue c. Whether the District violated the IDEA and denied the Student a FAPE by predetermining the outcome of the Parent's request for in-person services during the September 2020 IEP meeting when the District representative insisted no other options

existed to consider, including, but not limited to, services “could not be provided in the home” and IEP minutes did not need to be conducted in person.

Issue d. Whether the District violated the IDEA and denied the Student a FAPE by failing to attend the September 2020 IEP meeting with an open mind, as shown by the District representative stating to the Parent that she needed to “step up” and “be more of a teacher” to the Student.

Issue e. Whether the District violated the IDEA and denied the Student a FAPE by failing to involve the Parent in decisions for the Student during the September 2020 IEP meeting, by the District stating at the meeting that the Student would begin attending school four (4) days a week, full days, starting September 21, 2020, and then the Parent receiving a communication later that night stating that in-person services would not start until September 28, 2020, and then receiving a communication later stating that in-person services would not start until October 1, 2020.

31. In issues c, d, and e, the Parent raises several claims alleging that the District predetermined decisions or failed to involve the Parent in making decisions.

32. “[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives.” *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. Appx 342, 344 (9th Cir. 2007). Predetermination of a student’s placement is a procedural violation that can deprive a student of FAPE. According to the Ninth Circuit, a school district violates IDEA procedures “if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). A school district may not enter an IEP meeting with a “take it or leave it” position, and if it does so, then even the parents’ decision not to cooperate thereafter may not excuse the district’s error.” *Id.*

33. “Denying parental access to the IEP process is a serious procedural violation of the IDEA.” *Ms. S.*, 337 F.3d at 1131. “Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.” *Id.* (quoting *Amanda J. v. Clark County*, 267 F.3d at 882).

34. In *H.B.*, the school district had a plan to return the student to a public school placement, assumed at the IEP meeting that the student would be moved to that placement, and did not discuss alternative placements. The court held: “This establishes that the School

District desired the student return to a public school and believed that its proposed placement was appropriate. It does not, however, necessarily establish that the School District was unwilling to consider other placements.” *H.B.*, 239 F. Appx. at 345.

35. Here, the evidence demonstrates that the Parent had an opportunity to discuss her concerns about the Student’s need for in-person services. The Parent felt that the answer to every question was “no.” The fact that the District ultimately determined that it would not offer in-person services by District staff or by contracting with an outside provider does not establish that the District was unwilling to listen to and consider the Parent’s concerns. To the contrary, evidence that the District offered in-person OT and SLP services because it felt it could safely do so indicates that the District did listen to and consider the Parent’s input. Also, parents do not have veto power over individual provisions or the right to dictate any particular educational program. *Ms. S.*, 337 F.3d at 1131-32.

36. Additionally, the Parent was understandably frustrated by Ms. Truitt’s comment that she should step up as a Parent. The evidence in the record demonstrates that the Parent was working hard and doing her best to meet the Student’s needs, making Ms. Truitt’s comments insensitive at best. That being said, Ms. Truitt’s comments, without more, do not establish that the District failed to keep an open mind or predetermined that it was not willing to consider other options.

37. Finally, the undisputed evidence demonstrates that the District postponed the start of in-person services because wildfires led to air quality issues resulting in building closures. Nothing in the IDEA requires a school district to involve parents in district-wide decisions concerning its ability to operate safely. As such, the Parent has not proven an IDEA violation in regard to these issues.

38. Following a comprehensive review of the evidence in the record, the Parent has not shown by a preponderance of the evidence that the District predetermined that it would not offer in-person services, failed to attend the September 2020 IEP meeting with an open mind, or was required to involve the Parent in decisions regarding when it could safely reopen schools following wildfires.

Issue f. Whether the District violated the IDEA and denied the Student a FAPE by failing to provide the Student's Supplementary Aid and Service of a full-time 1:1 para educator as listed in the Student's IEP dated November 18, 2019, from March 22, 2020, to November 25, 2020, which resulted in the Student being left unsupervised in the classroom at times.

39. The November 2019 IEP stated: “Due to [the Student’s] behaviors, she requires a

para educator throughout her day.” The Parent interpreted this to mean a full-time 1:1 para educator for the Student alone. She contends that the District failed to provide this support because the Student sometimes worked in small groups with other students assisted by a single para educator. The District contends that it provided para educator support throughout the Student’s day, and was not required to provide “one full-time para educator assigned to her and her alone continuously throughout her school day.” District’s Closing Brief at 28. Because the Parent bears the burden of proof, it was her burden to establish that the November 2019 IEP provided the Student with a 1:1 para educator, who was assigned to work with the Student throughout her day and no one else. The Parent did not introduce any evidence to show that IEP team members intended for the Student to receive 1:1 para educator support when the November 2019 IEP was adopted. Additionally, she did not introduce any evidence to show that team members believed the Student required 1:1 support. Moreover, the evidence in the record does not establish that the Student required 1:1 support in the Options classroom or general education classroom to obtain an educational benefit. Accordingly, the Parent has not met her burden to show that the November 2019 IEP provided the Student with 1:1 para educator support.

40. Additionally, there is no evidence in the record to support the Parent’s allegation that the Student was ever left unattended in the classroom. Four of the Student’s para educators, a special education teacher, and two general education teachers testified during the due process hearing, and none stated that the Student was ever left unattended or unsupervised in the classroom or elsewhere during school hours. Nor did the Parent offer any testimony based on her personal knowledge of this occurring.

41. The evidence establishes that the Student did not always have a para educator with her during her OT therapy with Ms. Brandt. However, the evidence does not establish how many times this occurred. Moreover, Ms. Brandt testified that the Student did not exhibit any behavioral issues during OT sessions except for occasionally folding her arms and turning away when she wanted to avoid a task. Accordingly, the Parent has not shown that the failure to have a para educator present for all OT sessions constituted a material failure to implement the Student’s IEP. See *Van Duyn*, 502 F.3d at 822. The Parent has not met her burden to establish this claim.

Issue g. Whether the District violated the IDEA and denied the Student a FAPE by failing to follow the IDEA’s requirements for excusing a mandatory IEP team member by excusing occupational therapist Lauren Rollins³⁰ from the November 2020 IEP meeting without the

³⁰ During the hearing, the Parent also contended that she did not excuse Ms. Buckland from the November 2020 IEP meeting. T626. The Parent’s issue statement did not raise this claim and it is not addressed. WAC 392-172A-

Parent's consent.

42. A required district member of the IEP team is not required to attend if the parent and the district agree in writing that the member's attendance is not necessary because the member's area of curriculum or related services is not at issue. WAC 392-172A-03095(5)(a). For an IEP team member whose area of curriculum will be discussed to be excused from all or part of that meeting, the district must obtain written consent to the excusal from the parents and the member must submit written input into the development of the IEP prior to the meeting and provide that input to the parent and other IEP team members. WAC 392-172A-03095(5)(b).

43. It is undisputed that the Parent verbally consented to excuse Ms. Rollins from the November 16 IEP meeting. Ms. Rollins provided written input prior to the IEP meeting and the Parent had an opportunity to discuss her concerns about the Student's hand strength with Ms. Rollins at the November 24 IEP meeting. Although the Parent contends that Ms. Rollins did not answer questions to her satisfaction, that is a separate issue that was not raised by the Parent in her Complaint or in the issue statement.

44. The evidence establishes that the District did not comply with the procedural requirement to obtain written consent to excuse Ms. Rollins. As discussed previously, however, not all procedural violations result in a denial of FAPE. Here, the Parent has not established that the District's failure to obtain written consent, rather than verbal consent, to excuse Ms. Rollins amounted to a denial of FAPE so as to warrant a remedy. USC §1415(f)(3)(E)(ii); see WAC 392-172A-05105(2); 34 CFR §300.513(a)(2).

Issue i. Whether the District violated the IDEA and denied the Student a FAPE by failing to assess the Student in all areas of suspected disability during the evaluation conducted on November 18, 2019, including the areas of cognitive, assistive technology, gross motor, vision/orientation and mobility, functional academic, and functional vision, thereby leading to the inability to write appropriate present levels of academic performance and functional performance.

45. A school district must reevaluate each student eligible for special education "at least once every three years, unless the parent and the school district agree that a reevaluation is unnecessary." WAC 392-172A-03015(2)(a). When a school district evaluates a student, it has a duty to assess all areas of suspected disability, which also applies to reevaluations for

05100(3); *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS 37815 *15-19 (E.D. Cal. Mar. 7, 2019), aff'd 810 Fed. Appx. 588 (9th Cir. 2020).

children with existing IEPs. 20 U.S.C. § 1414(a)(2)(A); *D.S. v. Bainbridge Island Sch. Dist.*, 2021 U.S. Dist. LEXIS 95299 (W.D. Wash. May 19, 2021). A student must be “assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities.” WAC 392-172A-03020(3)(e).

46. The requirement to assess in all areas of suspected disability

serves a critical purpose: it allows the child's IEP Team to have a complete picture of the child's functional, developmental, and academic needs, which in turn allows the team to design an individualized and appropriate educational plan tailored to the needs of the individual child. Our precedent establishes that a disability is ‘suspected,’ and therefore must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability.

Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1119 (9th Cir. 2016). Moreover, “[a] school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this suspicion through informal observation.” *Id.* at 1121.

47. The so-called snapshot rule applies when determining whether a school district had reason to suspect that a child might have a disability. This question

must be evaluated in light of the information the district knew, or had reason to know, at the relevant time, not “exclusively in hindsight.” *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993)). However, some consideration of subsequent events may be permissible if the additional data “provide[s] significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date.” *E.M. v. Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 1006 (9th Cir. 2011) (quoting *Adams*, 195 F.3d at 1149).

E.S. v. Conejo Valley Unified Sch. Dist., 2018 U.S. Dist. LEXIS 126251 *38 (C.D. Cal. 2018). Once a district is on notice that a Student may have a disability that requires special education services, a district must decide whether or not to evaluate a student within a reasonable time period. See *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995).

48. Here, Dr. Shanshala observed that the Student had some difficulty focusing when asked to look at a picture while her teacher was reading to her. Based on her observation and her review of the Student's educational records, Dr. Shanshala had concerns that the Student's vision might need to be assessed. These concerns, which cannot be characterized as frivolous, led Dr. Shanshala to contact the Parent and the District vision specialist. In the District, the vision evaluation process typically starts with a doctor's report to identify the type of visual impairment at issue and whether the impairment has been corrected with glasses or other interventions. The Parent signed a release for the Student's vision records, but was not asked to provide records or reports to the District. There is no evidence in the record that the vision specialist ever took any steps to obtain the Student's records, followed up with the Parent to obtain the records, or made a decision about whether it was necessary to assess the Student's vision. There is no evidence that Dr. Shanshala ever contacted the vision specialist to determine whether she had considered and made a decision about whether to evaluate in this area. Even if the Parent had agreed to provide a doctor's report and failed to do so, that does not excuse the District's failure to procure such information for itself. See *Union School Dist. v. Smith*, 15 F.3d 1519, 1523 (9th Cir. 1994); see also *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202, 1208, 1209 (9th Cir. 2008) (district cannot abdicate affirmative duties under IDEA).

49. The District argues that the Parent did not ask for an assessment or check the box for "Vision/Orientation and Mobility" on the consent form. The District also emphasizes that the Parent was aware, in 2019, that the Student "did not look at what she [was] doing, ever," which was the reason for seeking the evaluation in 2020. T633. In this case, however, Dr. Shanshala had her own independent concerns about the Student's vision and the need for an assessment in this area. The fact that the Parent did not seek an evaluation does not relieve the District of its responsibility to act on its own concerns. Based on the evidence of record, it is concluded that the District was on notice about concerns related to the Student's vision but failed to take further action. See *D.S. v. Bainbridge Island Sch. Dist.*, 2021 U.S. Dist. LEXIS 95299 at *13-14. The failure to evaluate, despite these non-frivolous concerns, constitutes a procedural violation of the IDEA. *Id.*

50. The Parent contends that the District also failed to evaluate the Student's cognitive skills. The evidence establishes that the District attempted to administer two nonverbal subtests of the Wechsler Nonverbal Test of Cognitive Ability, and subtests of the Cognitive Test of Nonverbal Intelligence - Second Edition. Dr. Shanshala was unable to successfully administer these assessments due to the Student's receptive and expressive language delays and attention deficits. Dr. Shanshala made no further efforts to assess the Student's cognitive skills at this point, despite evidence that the University of Washington had been able to successfully assess the Student's cognitive skills in 2015. Dr. Shanshala paid special

attention to Dr. Glass's note from 2013, indicating that a standardized assessment could easily overestimate the degree of cognitive deficit. The Student was two years old in 2013. Relying on this note, the District took no further steps to ascertain the Student's cognitive skills. This is especially troubling because the District was unable to assess the Student's cognitive skills in 2017 as well. Dr. Hemmerling opined that if standardized assessment was not possible, it would be possible to use assessments based on adults who know the Student to gain perspective. Here, instead of looking for alternative ways to measure the Student's cognitive levels, the District concluded that "previous evaluative data and the Student's current performance suggested that the Student's cognitive abilities were significantly delayed." An "attempt" to evaluate is not the same as an evaluation. Given the District's limited efforts to assess the Student's cognitive skills, it is concluded that the District did not evaluate the Student in all areas of suspected disability as required by WAC 392-172A-03020(3)(e).

51. The Parent's issue statement also asserts that the District should have evaluated the Student in the area of functional academics. The precise nature of this claim is unclear because the evidence establishes that the District did assess the Student's skills in math, reading, and writing. The Parent's issue statement alleges that the evaluation failed to address all areas of suspected disability, but it does not allege that the District's evaluation was otherwise inappropriate. 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); 20 U.S.C. § 1415(f)(3)(B); see also *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS 37815 (E.D. Cal. Mar. 7, 2019). Accordingly, to the extent that the Parent is claiming that the District's academic assessment was inappropriate, that claim was not raised and is not addressed.

52. The Parent's remaining claim is that the District should have evaluated the Student's gross motor and assistive technology needs. The record establishes that neither Ms. Brandt nor anyone on the Student's IEP team, including the Parent, identified gross motor as an area that required assessment in the Fall of 2019. The Parent has not met her burden with respect to this claim.

53. Similarly, with respect to assistive technology, Ms. Comstock's evaluation included an assessment of the Student's functional communication skills with her AAC device. Ms. Comstock evaluated the Student's skills using the Dynamic AAC Goal Grid, and concluded that the Student had learned multiple new skills since the 2017 evaluation and benefitted from the use of her AAC device at school. Although the Parent argues that she has been frustrated with the Student's AAC device "from the minute I took it out of the box," this does not establish the need for an assistive technology evaluation. Parent's Closing Brief at 6. Similarly, while

the Parent argues that staff were not properly trained on the device, that is a distinct issue, which was not raised in the Parent's issue statement and is not addressed. *Id.*, p6.

54. Finally, I give more weight to Ms. Comstock's opinion that she conducted a comprehensive review of the Student's communication needs at the time than to Dr. Hemmerling's opinion that it was necessary to conduct a separate assistive technology assessment. Dr. Hemmerling did not know the Student at the time of the evaluation, has never observed the Student in the classroom, has never spoken to Ms. Comstock or any of the Student's teachers or para educators, and her evaluation in February 2021 was limited to the area of academics. In sum, the Parent has not met her burden on this claim.

55. The Parent also claims that the District should have conducted a separate assessment of the Student's speech apraxia. The Parent did not raise this claim in her issue statement and it is not addressed. WAC 392-172A-05100(3); 20 U.S.C. § 1415(f)(3)(B).

56. The Parent has established that the District violated the procedural requirements of the IDEA by failing to assess the Student's vision and cognitive skills. As discussed previously, only procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parent's opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, result in the denial of a FAPE and require a remedy. *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202, 1208 (9th Cir. 2008).

57. The District's failure to obtain the Student's vision records or make an affirmative decision to evaluate the Student's vision delayed her receipt of related services in this area. As shown by the unrebutted testimony of the Parent, the Student's vision did not change between 2019 and 2021, and when the District evaluated the Student's vision in February 2021, she was found eligible for related services in this area. Had the Student been properly evaluated in November 2019, she likely would have received vision services starting in November 2019. Thus the District's procedural violation deprived the Student of an educational benefit and denied her FAPE.

58. Additionally, the evidence demonstrates that the District was unable to assess the Student's cognitive skills in 2019 or 2017. The Student's cognitive skills were last evaluated in 2015, when she was only four years old. Accordingly, when the IEP team members developed the Student's IEP in November 2019, their only understanding of the Student's cognitive skills was that they were significantly delayed. Without cognitive and vision assessments, neither the District nor the Parent had an accurate understanding of the Student's functioning in these areas, which was a necessary predicate to setting appropriate IEP goals. See *K.I. v. Montgomery Pub. Sch.*, 805 F. Supp. 2d 1283, 1294 (M.D. Ala. 2011);

see also *N.B. v. Hellgate Elem. Sch. Dist*, 541 F.3d at 1210 (District's failure to obtain critical medical information about whether child had autism rendered "the accomplishment of the IDEA's goals – and the achievement of FAPE – impossible"). This information was also essential to the Parent's ability to meaningfully participate in the IEP process. *E.S. v. Conejo Valley Unified Sch. Dist.*, 2018 U.S. Dist. LEXIS 126251 *45 (C.D. Cal. July 27, 2018).

59. In conclusion, the Parent has established that the District's failure to evaluate the Student's vision and cognitive skills was a procedural violation that resulted in a denial of FAPE. The Parent has not established that the District failed to evaluate the Student in any other area of suspected disability.

Issue h. Whether the District violated the IDEA and denied the Student a FAPE by failing to provide accurate and up-to-date information about the Student's present levels of academic performance and functional performance, including the impact the Student's disabilities have on her ability to learn, from November 2019 to November 25, 2020.

60. An IEP must contain a statement of a student's present levels of academic and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. WAC 392-172A-03090(1)(a); 34 § CFR 300.320(a)(1). The Parent contends that the District did not have accurate or up-to-date information about the Student's present levels of performance and functional performance and the impact of her disabilities on her ability to learn when it created the November 2019 IEP, resulting in a denial of FAPE.

61. The evidence demonstrates that Ms. Waite was very thorough in drafting the Student's present levels of performance in the November 2019 IEP. She consulted with Ms. Senon to discuss information concerning the general education setting. She discussed skills that the Student could and could not do, as well as progress toward her previous IEP goals. Despite these efforts, the present levels of performance did not, and could not, address the impact of the Student's disability on her involvement and progress in the general education curriculum because the District did not have evaluative data to provide an accurate picture of her disabilities. *N.B. v. Hellgate Elem. Sch. Dist*, 541 F.3d at 1210. Without an understanding of the Student's visual impairment, the District could not draft present levels that addressed the impact of that disability. This is particularly important in this particular case because the Student's only form of communication is an AAC device, and she must visually locate the appropriate icon in order to communicate effectively. Also, the District's only understanding of the Student's cognitive skills was that they were "significantly delayed." This very limited information did not give the IEP team sufficient information to discuss the impact of the Student's disabilities on her involvement and progress in the general education curriculum.

See *E.S. Conejo Valley Unified Sch. Dist.*, 2018 U.S. Dist. LEXIS 126251 at *46-47, *52-53 (concluding that District’s procedural violation in failing to evaluate the Student in all areas of suspected disability was significant enough to undermine “an otherwise substantively adequate IEP”).

62. For all of these reasons, the District’s failure to evaluate the Student’s vision and cognitive skills in November 2019 undermined the accuracy of the present levels of performance in the November 2019 IEP. That, in turn, resulted in an IEP that was not reasonably calculated to enable the Student to make educational progress in light of her particular circumstances.

Issue j. Whether the District violated the IDEA and denied the Student a FAPE by failing to address the Student’s behavioral concerns that inhibited the Student’s academic success, including engagement, in the IEP dated November 18, 2019, and failing to develop an appropriate Functional Behavior Assessment that addressed the target behaviors.

63. 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 (FBA) 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). Although school districts use FBAs in other contexts, they are only *required* in specific disciplinary situations as the Ninth Circuit recently held in *Butte Sch. Dist. No. 1 v. C.S.*, 817 F. App’x 321 (9th Cir. 2020):

The IDEA only requires an FBA when a child is removed from his current placement due to problem behaviors. 20 U.S.C. § 1415(k)(1)(D)(ii). For other students with disability-related behavioral needs, an IEP need only include (1) “measurable annual goals” developed to “enable the child to be involved in and make progress in the general education curriculum;” and (2) how “progress toward meeting the annual goals . . . will be measured.” 34 C.F.R. § 300.320(a)(2)(i), (3)(i).

Id. at 326.

64. A behavioral intervention plan (BIP) is a plan incorporated into a student's IEP if the IEP team determines that it is necessary for the Student to receive FAPE. WAC 392-172A-01031.

65. The evidence demonstrates that Ms. Waite created data sheets to track the frequency of the Student's behaviors. She figured out which behaviors were a concern in November 2019 and needed to be addressed. She identified two target behaviors, swiping and noncompliance. She developed an FBA that recommended a BIP and suggested replacement behaviors and setting event strategies, antecedent strategies, teaching strategies, and consequence strategies. During the November 2019 IEP meeting, the team reviewed the FBA and implemented the BIP. No one raised any additional behavior concerns at that time. During the hearing, Ms. Waite testified with persuasive detail as to how that BIP was implemented effectively in the classroom. This is consistent with Ms. Comstock's testimony about improvements in the Student's behaviors, Ms. Brandt's testimony that the Student did not show any significant behaviors during OT sessions, and Ms. Senon's testimony that the Student was not showing any significant behaviors in the general education classroom.

66. The Parent relies on Ms. Zaldivar's testimony that the FBA did not appropriately address the Student's behaviors. As discussed previously, however, Ms. Zaldivar has never observed the Student in-person at school. Moreover, Ms. Waite credibly testified as to the effective implementation of the FBA and BIP. The Parent also argues that the FBA was inappropriate because it included information from the Student's 2017 FBA. Ms. Waite credibly explained that this provided a "global picture of who the Student is and where she has come from and the original FBA of where we started." Additionally, the 2019 FBA analyzed and addressed behaviors that were not addressed in the 2017 FBA. Finally, the home behavior plan used by Ms. Zaldivar similarly included historical data.

67. The Parent further contends in her closing brief that Ms. Waite "admitted she knows that a new FBA should be written every year, however my daughter has not had a new FBA since 2019." Parent's Closing Brief at 4. As discussed above, the IDEA only requires an FBA when a student has been removed from his or her educational placement for behavioral reasons. That is not the case here. The Parent has not established that the District was required to conduct a new FBA after November 18, 2019. Moreover, to the extent that Ms. Waite did not have a complete understanding of the FBA process in November 2019, the evidence does not indicate that her lack of understanding undermined the integrity of the FBA. Ms. Waite credibly testified as to the actions she took to track and identify the behaviors that were currently at issue and to analyze those behaviors. She developed strategies to address those behaviors and effectively implemented them in the classroom.

68. The Parent further contends that the District failed to provide an appropriate FBA and BIP to address the Student's behaviors during the school closure period. On April 20, 2020, Ms. Waite asked the Parent about the Student's behaviors in an e-mail. The Parent had not raised any issues about the Student's behaviors prior to that time. When the Parent responded to Ms. Waite's email, she stated that the Student's behaviors had spiked at the beginning of the closure period, but had improved when the Student changed her allergy medication. She reported that Ms. Zaldivar had seen a spike in behaviors since January, noting that they could be related to school and to "less/more time with dad." P16pp1-2. During the hearing, the Parent testified that the Student was obsessed with getting kisses. Ms. Waite and Ms. Comstock agreed that the Student was engaging in this behavior, but the record does not contain evidence of when this behavior occurred or how often. There is no evidence that the Parent raised concerns about this behavior prior to June 19, 2020, or that the District was otherwise aware of it then.

69. On September 14, 2020, the Parent emailed Ms. Waite and discussed that the Student would not touch the AAC device and would grab the Parent's hand or kiss it to avoid questions or to have the Parent use the AAC. Ms. Waite responded the next day by offering advice on how they encouraged the Student to use the AAC device at school, and by offering to develop a BIP addressing behaviors at home. This evidence establishes that Ms. Waite was responsive to the Parent's concerns about behaviors when she learned of them. Two weeks later, the Student returned to in-person learning, five days per week, obviating the need for a BIP focused on home behaviors. Additionally, there is no evidence in the record that the Student was continuing to engage in these behaviors after she returned to school.

70. In sum, the Parent has not met her burden to show that the District failed to properly address the Student's behavioral concerns in the November 2019 IEP or FBA, or failed to develop an appropriate FBA to address target behaviors.

Summary of Violations

71. The District violated the IDEA and denied the Student a FAPE by failing to provide the Student with all of the SDI and related services provided by the November 2019 IEP between March 18, 2020, and June 19, 2020, and between September 8, 2020, and September 30, 2020. (COL 23, 28, 30).

72. The District violated the IDEA and denied the Student a FAPE by failing to evaluate the Student in all areas of suspected disability during the reevaluation on November 18, 2019. (COL 59).

73. The District violated the IDEA and denied the Student a FAPE by failing to provide accurate information about the Student's present levels of performance and functional performance, including the impact the Student's disabilities have on her ability to learn, in the November 2019 IEP. (COL 62).

74. The Parent has not otherwise proven a denial of FAPE.

Remedies

75. The Parent has proven that the District violated the IDEA and denied the Student a FAPE by failing to evaluate the Student in all areas of suspected disability, failing to develop an appropriate IEP in November 2019, and failing to fully implement the Student's November 2019 IEP between March 18, 2020, and June 19, 2020, and between September 8, 2020, and September 30, 2020. Accordingly, the Parent is entitled to remedies. 20 U.S.C. § 1415(i)(2)(C)(iii).

76. As compensatory education, the Parent seeks an eight-week program during the summer of 2021, for eight hours per day, that provides the Student with all of the services and SDI required by her IEP.

77. In its March 2020 guidance, OSERS recognized that "[t]here may be exceptional circumstances that could affect how a particular service is provided" to a student during the pandemic, in which case, the Student's IEP team "would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements." OSERS, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 2020), at 1. The District contends that it agreed to consider the Student's need for recovery services after the Student returned to in-person services and should be given an opportunity to do so. When the hearing adjourned on April 1, 2021, the District had not yet considered whether the Student required recovery services, even though she had been attending school in person for six months. The District had more than ample opportunity to decide whether it would award recovery services but declined to do so. Accordingly, an award of compensatory education is appropriate.

78. "Compensatory education is an equitable remedy that seeks to make up for 'educational services the child should have received in the first place,' and 'aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA.'" *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir 2011)(quoting *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)). "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). Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid*, 401 F.3d at 524.

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

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

631 F.3d at 1126.

80. In this case, the Student missed twelve weeks of SDI and related services when the District failed to implement the November 2019 IEP between March 18 and June 19, 2020. Additionally, although the Student received some in-person services between September 8 and September 30, 2020, she still missed 540 minutes of SDI.

81. The evidence supports awarding the Student compensatory education to put the Student in the position she would have been in had the District provided a FAPE. The Parent believes a summer program is an appropriate way to compensate the Student for missed SDI and services. During the hearing, the Parent explained that she opposed ESY programs offered by the District in the past because they were in a different school, with different teachers and staff, and for a period of only four weeks, which did not make the transition worthwhile. The Parent proposes the Student attend a summer program at Carpe Diem school in Tacoma, WA, which she believes can support the Student's behaviors and offer academics. Although the Parent met with the Director at Carpe Diem, the Director has never met the Student or determined whether the program is a good fit for the Student, nor was sufficient evidence presented about the program to make that determination here. The Parent also testified that she was not opposed to a summer program offered by the District, depending on the school and teachers. The evidence in the record supports an award of compensatory education through a summer program because the Student missed a significant amount of

instruction, which would be difficult to provide during the regular school year on top of the Student's regular educational program.

82. As compensatory education for the District's failure to implement the Student's IEP, **the District shall place the Student in an eight-week summer program at Harbor Heights, overseen by a certificated special education teacher, with all of the SDI and services provided in the Student's November 2019 IEP. The summer program shall be a full-day program based on the amount of time provided by the Student's IEP, which is 1,740 minutes per week.** The Student has been successful attending school for that amount of time, whereas it is unclear from the record whether an eight-hour day would meet her needs. It is appropriate to place the Student in a program at Harbor Heights, rather than Carpe Diem, to eliminate any concerns related to transitioning to a different school. The Student's IEP calls for her to spend time in the general education setting. If the summer program does not contain a general education component, the District shall provide academic instruction during the time that the Student would have spent in the general education setting to make up for the instruction she missed. Additionally, it is appropriate to award eight weeks of compensatory education, even though the Student missed slightly more than 12 weeks of instruction, because the Student did obtain some educational benefit when Ms. Zaldivar was present during her Zoom sessions and because the summer program is likely to be more intensive. Nothing in this order precludes the District from placing the Student in an eight-week, full-day program at Carpe Diem, or in a different program or location, if agreed to by the parties. The District shall provide transportation for the Student to and from her home to the chosen program.

83. The District evaluated the Student's vision in February 2021, and the Parent has not challenged that evaluation. Therefore, it is not appropriate to award a new vision assessment.

84. When the Student was evaluated, she was found eligible and her IEP was amended on February 24, 2021, to provide vision services as a related service. The evidence establishes that the Student's vision did not change between 2019 and 2021, indicating that she would have qualified for vision services in November 18, 2019, if the District had evaluated her at that time. The Student would have received those services between November 18, 2019, and February 24, 2021, a period of approximately 45 weeks, not counting summer and school breaks. As compensatory education, **the District shall provide the Student with vision services at Harbor Heights, provided by a District vision specialist or a provider with comparable credentials, in the amount provided by the February 24, 2021 IEP.** The record does not contain the amount of vision services the Student's IEP team determined to be appropriate in the February 24, 2021 IEP because that IEP is not in evidence. The District shall calculate the amount of compensatory services provided by multiplying the weekly vision services minutes in the February 24, 2021 IEP by 45 weeks. The services shall be provided within two calendar

years after the entry of this decision at the duration and frequency determined appropriate by the Parent and the District. The services shall be provided outside of regular school hours unless the parties agree otherwise. Nothing in this order prevents the Parent and the District from agreeing that some of the Student's vision services may be provided during the summer program. Once a schedule is set, the Student shall, except in the case of emergency, provide 24 hours advance notice of the need to miss a scheduled session. Without such advance notice, and in the absence of an emergency, the session will count toward the compensatory award.

85. The Parent also requests the District be ordered to contract with an outside provider, chosen by the Parent, to assess the Student in all areas identified by the provider. The Parent has demonstrated that the District failed to assess the Student's cognitive skills. She has not established that the District failed to assess the Student in any other area aside from vision, which was assessed in February 2021. Accordingly, it is appropriate for the District to pay for an assessment of the Student's cognitive skills. It is also appropriate for an outside provider to conduct this assessment, rather than the District, because the District has not been able to assess the Student's skills in this area successfully in the past. **The District shall pay for a cognitive assessment by a provider selected by the Parent who has the required education, training, and experience to assess the Student's cognitive skills. After the Parent notifies the District of its choice of provider, the District shall enter into a contract with the chosen provider within 15 calendar days, so long as the provider is available and willing to provide this service.**

86. **The District shall hold an IEP team meeting with 30 calendar days of receipt of the cognitive assessment to consider the results in a manner consistent with the requirements of WAC 392-172A-05005(5).**

87. Due to the potentially contentious relationship between the District and the Parent, **the IEP team meeting shall be facilitated by a Sound Options Group facilitator, which shall be arranged by the District.**

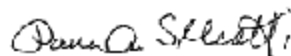
88. All arguments made by the parties have been considered. Arguments not specifically addressed herein have been considered, but are found not to be persuasive or not to substantially affect a party's rights.

ORDER

1. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education as set forth in Conclusion of Law 23, 28, 30, 59, and 62.

2. The Parent has not otherwise established that the District denied the Student a free appropriate public education.
3. The District is ordered to provide compensatory education as set forth in Conclusions of Law 80 through 87.
4. The Parent's remaining requested remedies are denied.

Served on the date of mailing.



Pamela Meotti
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

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

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Dated June 1, 2021 at Seattle, Washington.

Sarah Laasri

Representative
Office of Administrative Hearings
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cc: Administrative Resource Services, OSPI