

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

IN THE MATTER OF:

OSPI CAUSE NO. 2022-SE-0045

OAH DOCKET NO. 04-2022-OSPI-01559

TACOMA SCHOOL DISTRICT

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

Administrative Law Judge (ALJ) Matthew D. Wacker held a due process hearing in the above matter via remote video conference over five days on July 25-28, and August 2, 2022. The Mother of the Student whose education is at issue<sup>1</sup> appeared and the Parents were represented by Whitney Hill and Lara Hruska, attorneys at law. The Tacoma School District (District) was represented by Susan Winkelman, attorney at law. Also present for the District over the course of the hearing were Jennifer Herbold, director of student services, or Katie Hilen, deputy general counsel. A certified court reporter was also present.

**STATEMENT OF THE CASE**

*Procedural History*<sup>2</sup>

The Parents filed a Special Education Due Process Hearing Request (Complaint) on April 5, 2022. The Complaint was assigned Cause No. 2022-SE-0045 and Docket No. 04-2022-OSPI-01559. The Complaint was assigned to ALJ Matthew D. Wacker as the presiding ALJ. The District filed its Response to the Complaint on April 27, 2022. A prehearing conference was held on May 9, 2022, and the First Prehearing Order was entered on June 7, 2022. The First Prehearing Order set the due process hearing for July 25-28, 2022. On July 27, 2022, a partial fifth day of hearing was set for August 2, 2022, due to the unavailability of a witness.

The parties agreed that post-hearing briefs would be due by close of business, October 10, 2022. On October 10, 2022, the District requested a two-day extension for filing post-hearing briefs due to illness of counsel. The Parents did not object, and the request was

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<sup>1</sup> In the interest of preserving the family's privacy, this decision does not use the actual names of the parents or the student. Instead, they are identified as the "Mother," "Father," or "Parents," and the "Student."

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

granted. Accordingly, the parties' post-hearing briefs were due by close of business, October 12, 2022. The parties timely filed their post-hearing briefs

### *Due Date for Written Decision*

The due date for a written decision in the above matter is the close of record plus thirty (30) calendar days. See First Prehearing Order. The record of the hearing closed with the filing of post-hearing briefs on October 12, 2022. Thirty calendar days from October 12, 2022, is November 11, 2022. Therefore, the due date for a written decision in the above matter is **November 11, 2022**.

### **EVIDENCE RELIED UPON**

The following exhibits were admitted into evidence:

Parent Exhibits: P1-P6, P8-P14, P17-P19, P22-P23, P27, P30-P38, P41-P42.

District Exhibits: D1-D18, D19 (pp6-7, pp21-22, pp31-32, pp34-35, p38, p50, p54, p61, pp71-75, p80, pp85-86, pp88-97, pp108-112, pp114-115, pp117-122, pp126-127, p129 only), D20.

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

The Mother;  
Bruce Dykeman, District school psychologist;  
Jill Ogata-Tucker, District occupational therapist;  
Julea Fitzhugh, tutor/clinician, Hands on Learning Solutions (HOLS);  
Jennifer Herbold, District director of student services;  
Katrina (Sherfey) Seibel, District occupational therapist;  
Jeff Parker, co-founder, HOLS;  
Erin Kilgore, District special education teacher and case manager;  
Shayna Raphael, board certified behavior analyst;  
Margaret Nelson, District special education teacher;  
Carol Davis, District speech/language pathologist;  
Jennifer Wilson, District general education teacher;  
Jo Ann Smith, former District occupational therapist.

## ISSUES AND REMEDIES

The statement of the issues and requested remedies for the Parents' Complaint is:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) beginning April 2020 by:
  - i. Failing to provide the Student with an Individualized Education Program (IEP) that included a 1:1 paraeducator, an appropriate amount of Occupational Therapy (OT) services, additional minutes of Specially Designed Instruction (SDI), and Speech/Language as a related service;
  - ii. Failing to amend the Student's IEP to include a 1:1 paraeducator, an appropriate amount of OT services, additional minutes of SDI, and Speech/Language as a related service when the Student did not demonstrate academic progress;
  - iii. Materially failing to implement the Student's IEP(s) by not providing all the Student's SDI and related services;
  - iv. Determining to change the Student's placement outside of an IEP team meeting;
  - v. Denying the Parents meaningful participation in February 2022 by issuing a Prior Written Notice (PWN) without addressing the Parents' request for 1:1 support and a half-day program at Hands On Learning Solutions (HOLS);
- b. Whether the private services and evaluations provided by HOLs beginning April 2020 were appropriate for the Student;
- c. And, whether the Parents are entitled to their requested remedies;
  - i. Declaratory relief that the District denied the Student FAPE;
  - ii. Compensatory special education and related services to allow the Student to obtain the educational benefit the Student would have received but for the District's violations of the IDEA and failure to provide FAPE;

- iii. An appropriate IEP for the 2021-2022 school year that is developed, reviewed, and revised in accordance with WAC 392-172A-03090;
- iv. An order that the District shall reimburse the Parents for private evaluations and services obtained for the Student beginning April 2020.

See First Prehearing Order.

## FINDINGS OF FACT

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

### *General Background*

1. The Student was diagnosed with an anxiety disorder and a sensory disorder through Seattle Childrens' Hospital during December 2015 when she was about [REDACTED] See D1p6; P2p2.<sup>3</sup>
2. In a letter "To Whom it may concern" dated June 2, 2016, the Student's pediatrician, Dr. Bruce Davies, stated that the Student "suffers from severe crippling anxiety. Given this diagnosis, [the Student] would be best in a 1:1 school/classroom setting. This type of setting would set [the Student] up to be successful in her school career." P1.
3. The Mother gave Dr. Davies' letter to the District in 2016 when the Student was in kindergarten. Mother T35.<sup>4</sup>

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<sup>3</sup> Citation to the exhibits is by Parent or District and page number. For example, citation to "See D1p6; P2p2" is a citation to District Exhibit 1 at page 6, and Parent Exhibit 2 at page 2.

<sup>4</sup> Citation to the testimony of a witness is by last name and page number of the Transcript. The exception to this is citations to the testimony of the Mother, who is identified as such to help preserve the privacy of the family. For example, citation to "Mother T35" is a citation to the testimony of the Mother at page 35 of the Transcript.

4. The Student was initially evaluated by the District for special education and related services on June 13, 2016. D1pp7-8. The evaluation determined the Student was eligible for a Section 504 Plan<sup>5</sup> but was not eligible for special education. *Id.*

5. The Mother disagreed with the District's evaluation and had the Student evaluated at Olympic Psychology Services (the Olympic Evaluation) during September 2017, 15 months later. Mother T40; P2.

*2016-2017 School Year: Kindergarten at Skyline*

6. The Student started kindergarten at the District's Skyline Elementary School (Skyline) during October 2016. Mother T38. In part, the Mother enrolled the Student at Skyline because she knew the occupational therapist assigned to Skyline, Jo Ann Smith, from her own attendance and receipt of occupational therapy services as a student at Skyline. *Id.*

7. Skyline was not the Student's "home school." *Id.* T36. The Student and the Parents resided in the Tacoma School District, but not within the area where students would be assigned to Skyline. *Id.* The Student and the Parents resided in the area assigned to the District's Grant Elementary School (Grant). *Id.* T36.

8. The Student's special education teacher and IEP case manager from kindergarten through fourth grade at Skyline was Margaret Nelson. *Id.* T169.

9. Ms. Nelson holds a Bachelor's degree and Master's degree in special education. Nelson T575. She is certificated by the Washington State Office of Superintendent of Public Instruction (OSPI) to teach preschool through 21-year-old special education, and kindergarten through eighth grade elementary education. *Id.* Prior to her retirement at the end of the 2021-2022 school year, Ms. Nelson was employed by the District as a special education teacher for 35 years. *Id.* T576. This included eight years as a special education teacher in a self-contained classroom, with the remainder of her tenure in a Learning Resource Center (LRC) classroom. *Id.*

10. The Student was served through a Section 504 plan for Sensory Processing Disorder and Anxiety during kindergarten. Mother T39; D1p1. Ms. Nelson worked with the Student to provide social and emotional supports during kindergarten and first grade. Nelson T576.

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<sup>5</sup> This reference is assumed to be a reference to a plan under Section 504 of the Rehabilitation Act of 1973.

11. The Mother characterized the Student's kindergarten year at Skyline as "very overwhelming for her. She spent most days in tears... unable to self-soothe...She wet her pants often because she was afraid of the bathroom. And she spent most of the day wearing noise cancelling headphones." Mother T39.

*2017-2018 School Year: First Grade at Skyline*

12. The Mother gave a copy of the Olympic Evaluation to Ms. Nelson. *Id.* T41.

13. The Olympic Evaluation assessed the Student's Full Scale Intelligence Quotient (FSIQ) at 76. P2p4. However, that score was not considered valid due to the wide variability in performance on individual skills domains. *Id.*

14. The Olympic Evaluation diagnosed the Student with Generalized Anxiety Disorder (GAD), a Specific Learning Disability (SLD), and an Unspecified Neurodevelopmental Disorder. *Id.* p10. It concluded that the Student's symptoms of anxiety "have caused significant distress and impairment in social and academic functioning." *Id.* It went on to conclude that:

(T)he deficits revealed in the evaluation have caused significant impairment in [the Student's] social and academic functioning and are indicative of an unspecified neurodevelopmental disorder.

...

[The Student's] academic skills fall largely within the low average range, with the exception of total reading skills falling in the borderline (significantly at-risk) range...These weaknesses have significantly interfered with academic performance and are indicative of a specific learning disorder with impairment in reading."

...

Her overall neurodevelopmental profile is atypical, variable, and does not seem to have a clear explanation.

*Id.* p11. The evaluation went on to note the Student might be eligible for an IEP and identified possible accommodations for the Student. *Id.* p12.

15. On January 2, 2018, the Student had an OT Evaluation at the Center for Therapeutic Intervention. See D1p23.

16. On March 5, 2018, the District convened a team meeting to consider the results of the District's evaluation of the Student. D1. The Mother, Ms. Nelson, and Ms. Smith all attended the meeting. *Id.* p29. No professional member of the team indicated any dissenting opinion to the evaluation. *Id.*

17. The evaluation determined the Student was eligible to receive special education and related services under the emotional/behavioral disability (EBD) category. *Id.* p2. The evaluation recommended SDI in the social/emotional/behavioral and OT domains, as well related services for OT and speech/language. *Id.* p4. The evaluation did not recommend SDI in any academic areas. The evaluation assessed the Student's FSIQ at 84, which falls in the low-normal range. *Id.* p11.

18. The Mother expressed at the meeting that the services recommended in the evaluation were not enough for the Student, and that she was concerned with the amount of time the Student would spend in general education classes. Mother T112. Although she received a copy of the evaluation report, the Mother never provided the District with any written disagreement to the evaluation. *Id.* T113-114.

19. A PWN dated March 5, 2018, stated the Student was found eligible under the EBD category. D1p26.

20. Any IEP developed from the District's March 2018 evaluation is not part of the evidence.

#### *2018-2019 School Year: Second Grade at Skyline*

21. By second grade, the Student was getting used to Skyline staff and her accommodations. Mother T41. However, the Parents began to observe the Student's "academic delays really kind of spike." *Id.* The Parents believed the Student was noticing other students doing classwork that she could not, and this "brought on a whole new level of anxiety...second grade was a struggle." *Id.* T42.

22. During second grade, Ms. Nelson focused more of her support for the Student towards academics, while continuing to provide special education support. Nelson T576.

23. There is little evidence of any events during the period from September 2018 until March 2019.

24. An IEP team meeting was held during March 2019.<sup>6</sup> Mother T42, Nelson T580. The Mother, the Student's maternal grandmother, Ms. Nelson, Ms. Smith, District speech

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<sup>6</sup> Any IEP developed as result of this meeting is not part of the evidence.

language pathologist (SLP) Donna Lurvey, and the Student's second-grade general education teacher, Lindsey King, all attended. Mother T44.

25. The Mother raised her concerns regarding the Student's academics with the team. *Id.* T42. Ms. Nelson thought the Student was likely dyslexic. *Id.* T42-43.

26. The Mother testified that at the meeting, Ms. Nelson told her that "she was not trained nor skilled to help (the) Student any longer in the classroom and that it felt as though (the) Student had become unteachable." *Id.* T43. Ms. Nelson testified she never told the Mother that she did not have the skills or training to serve the Student, or that the Student had needs beyond what she was able to serve. Nelson T598.

27. The only witness who attended the meeting other than the Mother and Ms. Nelson was Jo Ann Smith.

*District OT Jo Ann Smith*

28. Ms. Smith holds an undergraduate degree in occupational therapy and a Master's degree in Education.<sup>7</sup> Smith T672, T695. She is nationally board certified and licensed and registered as an OT. *Id.* T673. She is not a certificated teacher. *Id.* T695.

29. Prior to her retirement after the end of the 2019-2020 school year, she was employed by the District as an OT for 34 years. *Id.* p705; P33¶1.

30. Ms. Smith provided OT services to the Student at Skyline from kindergarten through third grade. Smith T675; P33¶2.

31. At an IEP meeting where the team was "looking over" a report from an "outside evaluator," Ms. Smith testified that although, "I don't remember Ms. Nelson's exact words...she said something along the lines of she 'did not have the skills to serve [the Student's] disability.'" Smith T693; P33¶14. Ms. Smith testified that Ms. Nelson stated at:

(M)ore than that one meeting that she did not. That's why we got involved with [the Student] getting some extra services, because Ms. Nelson had shared that she did not feel like she had the skills to work with [the Student], and she had not worked with students with specific dyslexia.

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<sup>7</sup> Ms. Smith also identified her Master's degree as a "Master's in Curriculum and Instruction." Smith T705.



Smith T692-693. For the following reasons, it is found as fact that Ms. Smith's testimony regarding Ms. Nelson's alleged statements is not credible.

32. The Mother knew Ms. Smith from attending Skyline as a student herself and receiving OT services from Ms. Smith. Mother T38. Ms. Smith "became the main point of contact between the (M)other and the school staff. Although this was outside of my duties as an OT, the (M)other really trusted me, and it worked well for me to be a liaison between home and school." P33¶11. However, Ms. Smith also testified that becoming the main point of contact between the Mother and Skyline staff was "under my skillset as an occupational therapist." Smith T707. This conflicting testimony detracts from the credibility of Ms. Smith's assertions about any statements made by Ms. Nelson.

33. Careful examination of other statements in Ms. Smith's declaration also detracts from her credibility. Ms. Smith declared that "I remember there were offers for Ms. Nelson to get additional training educating students with dyslexia, but I do not believe she ever took up those offers." P33¶16. But at hearing, Ms. Smith's testimony revealed she did not have personal knowledge to support this statement in her declaration. See Smith T693-695.

34. In August 2019, the Student begin receiving private tutoring services from **Hands On Learning Solutions (HOLS)** while also attending Skyline part time. Mother T58. It is Ms. Smith's opinion that:

In my view, Ms. Nelson was relieved to have [the Student] somewhere else because the relationship she had with [the Student's] family had deteriorated. Having [the Student] served outside the District was either just the path of least resistance or a way to alleviate the friction between Ms. Nelson and the family.

P33¶19. Ms. Smith's attribution of Ms. Nelson being "relieved" the Student was "somewhere else" evidences a degree of animosity towards Ms. Nelson. This combined with Ms. Smith's relationship with the Mother as both a former student and mother of the Student calls into question Ms. Smith's objectivity and impartiality regarding Ms. Nelson.

35. Ms. Smith declared that the Student, "was not really welcomed back into the school environment for services, which would have been better for her than going back and forth from school to a private setting (HOLS)." *Id.* ¶20. When questioned about this, Ms. Smith was initially unable to identify a single example of how the Student was not welcomed back to Skyline after she began tutoring at HOLS. Smith T700-701. On further questioning, Ms. Smith was able to identify only one alleged incident where the Student was not welcomed back to Skyline. *Id.* T701. However, that alleged incident occurred during spring 2021, approximately 1½ years after the Student started tutoring at HOLS. See Mother T88; P33¶22.

Furthermore, Ms. Smith has no personal knowledge regarding this alleged incident. Ms. Smith's knowledge of this alleged incident is based on hearsay statements from the Mother. *Id.* Ms. Smith's conclusion that the Student was not really welcomed back to Skyline is not supported by the evidence, and further erodes her impartiality and credibility as a witness.

36. With respect to any inability of Ms. Nelson to serve the Student's educational needs, Ms. Smith knew there were other teachers at Skyline and in the District who had the skills to serve the Student. P33¶15, ¶20. However, when questioned at hearing about whether she ever told the Mother there were District staff who could serve the Student, Ms. Smith gave conflicting testimony, first stating she told the Mother there were other staff, only to later state she could not confirm she told the Mother. Smith T696, T699-700. This conflicting testimony further calls into question Ms. Smith's recollection of events. Given Ms. Smith's relationship with the Mother, it stretches credulity to believe she would not tell the Mother that the District had other teachers who could serve the Student.

37. Over the course of the Student's attendance at Skyline, Ms. Smith attended at least six meetings regarding the Student's education that included Ms. Nelson and the Mother: March 5, 2018 Evaluation meeting (D1p29); March 2019 IEP meeting (Mother T44); April 29, 2019 Evaluation Assessment Revision meeting (D2p11); April 29, 2019 IEP meeting (P8p19); August 28, 2019 IEP Amendment meeting (P10p19); and March 20, 2020 IEP meeting (Mother T69, Smith T674, Nelson T578). Ms. Smith attended all these meetings in her role as a District OT. However, apart from the testimony of Ms. Smith and the Mother, there is no evidence to corroborate any of the statements attributed to Ms. Nelson regarding her skills or training to serve the Student. For example, there is no evaluation report, IEP, PWN or email that mentions or references such statements by Ms. Nelson. This lack of corroboration is startling. If the statements attributed to Ms. Nelson are true, they would have been highly averse, if not fatal, to her continued assignment as the Student's special education teacher. That no team member present at any meeting where such statements are alleged to have been made, including Ms. Smith, would not have immediately raised this as a red flag is not credible.

38. Ms. Smith opined that "I do not believe that the IEPs [the Student] was offered with less than 100 minutes of SDI per week were at all appropriate for her and would not have addressed her needs." P33¶21. However, Ms. Smith attended two IEP meetings where the IEPs proposed for the Student offered her less than 100 minutes of SDI per week: August 28, 2019, and March 20, 2020. P10, D3. Despite this, there is no evidence that Ms. Smith ever spoke up or objected to the August 28, 2019 IEP. With respect to the March 20, 2020 IEP, Ms. Smith "probably" shared with the team her belief that the Student should be provided additional resources. Smith T696. However, there is no evidence she ever made any written

dissent or objection to the IEP, nor told the IEP team she believed the IEP was not appropriate for the Student. Given Ms. Smith's long tenure as an OT and, presumably resultant experience as an IEP team member, her *ex post facto* opinion these two IEPs were not appropriate for the Student is not credible. This further compromises the credibility of Ms. Smith's testimony.

39. Ms. Smith declared that as "a public-school OT, I am strongly committed to serve all students with the needs they present at school despite their backgrounds and or challenges at home." P33¶12. At hearing, Ms. Smith stated that "we didn't try to extend ourselves to decrease that service (HOLS). And if it would have been me that had been in charge of that program, we would have worked on trying to welcome her back." T701.

40. Finally, as a professional and experienced member of the Student's IEP teams, Ms. Smith owed the Student a duty to ensure her IEPs offered her FAPE, just like every other member of the IEP team. The fact that she was not the IEP case manager, Ms. Nelson's role, does not relieve Ms. Smith of her duty to the Student. That Ms. Smith seems to have delegated her duty to ensure the Student's IEP provided FAPE to the person "in charge" of the Student's IEP is very troubling.

41. For all the above reasons, it is found as fact that Ms. Smith's declaration and testimony at hearing regarding the alleged statements by Ms. Nelson about her skills and training to provide the Student's SDI at Skyline are not credible. Ms. Smith's evidence will not be considered to corroborate the testimony of the Mother. Nor will Ms. Smith's evidence be considered on the issue of whether the Student's IEPs at Skyline provided her FAPE.

42. Having found that Ms. Smith cannot corroborate the Mother's testimony about Ms. Nelson's alleged statement, the only direct evidence about what was or was not said at the March 2019 IEP meeting is the Mother's testimony and Ms. Nelson's testimony. However, after review of all the ancillary evidence, it is found as fact that Ms. Nelson's testimony is the more credible evidence. It is found as fact that Ms. Nelson did not tell the Mother that she was not skilled or trained to provide the Student's SDI at Skyline. In reaching this finding, much of the same ancillary evidence discussed above with respect to Ms. Smith's credibility was weighed. This includes the fact that there is no contemporaneous documentation of what would have been a very significant event: a long-tenured and very experienced special education teacher declaring in front of an IEP team that she was not skilled or trained to provide SDI to one of the students assigned to her.

43. The finding that Ms. Nelson did not make the statement at the March 2019 IEP meeting attributed to her by the Mother must be considered averse to the Mother's credibility generally. This is particularly true with respect to other alleged statements the Mother

attributed to Ms. Nelson. Accordingly, to the extent a finding of fact adopts one version of a matter, the evidence considered has been determined more credible than the Mother's evidence.

44. It is found as fact that Ms. Nelson possessed the education, training and experience to provide the Student's SDI.

45. At the March 2019 IEP meeting, the Mother asked about tutoring for the Student from a non-District or outside provider. Nelson T580. Ms. Nelson replied that this was the Parents' choice. *Id.* The IEP team did not recommend the Parents take the Student to outside tutoring. *Id.* Ms. Nelson suggested that the Parents reach out to the Office of Superintendent of Public Instruction (OSPI) for some direction after the meeting. Mother T47, T175.

46. A PWN dated March 21, 2019, documented the March 2019 IEP meeting. P4. The PWN stated that the "Parents are seeking recommendations for tutoring, especially in the area of dyslexia. Parents and the team agree that we need to relook at her evaluation with a possible limited reevaluation in order to determine if there is a need for additional SDI in reading, written language, and math." *Id.*

47. In an email to the Mother dated March 21, 2019, Ms. Smith stated:

I just talked to our SPED liaison who is (a) psychologist. She reviewed the testing and both outside and school district reports. She suggested that our psychologist can do just academic testing since [the Student] has made minimal gains since last year...I will be talking to Bruce our school psych about further academic testing for [the Student].

P3.

48. On April 4, 2019, the Mother contacted OSPI and spoke with Scott Raub. Mother T46; P5. Mr. Raub identified Leslie Sampson as the "district representative for Skyline." Mother T48. The Mother called Ms. Sampson, who later came to an IEP meeting. *Id.* T49.

49. In an email to Ms. Smith, Ms. Nelson and others on April 8, 2019, the Mother informed the District that she contacted OSPI, then Ms. Sampson, and was waiting for a reply from Ms. Sampson. P6. The Mother went on to state that "You all have done a wonderful job with [the Student], and continue to be so patient and understanding with her." *Id.*

50. On April 29, 2019, an evaluation team meeting was held to consider the results of an assessment revision of the Student. D2. The Mother, Ms. Nelson, Ms. Smith, a District school

psychologist, the Student's general education teacher, Lindsey King, a District SLP, and a District representative all attended as team members. *Id.* p11. The Student has been referred for an assessment revision due to concerns about a lack of progress in reading. *Id.* pp1. This was after the results of standardized testing administered during 2018-2019 "indicated a lack of expected progress in reading and math." *Id.* p1.

51. The assessment revision recommended SDI for the Student in the social/emotional/behavioral, OT, reading, and written expression domains. *Id.* p7. The revision did not recommend SDI in the math domain. *Id.* It recommended related services for OT and speech/language. *Id.* p8. There was no disagreement with the assessment revision at the meeting. Dykeman T226.

52. The math assessment indicated that the Student "just needs a lot of extra time when she's doing math problems." *Id.* T203-204. But a question remained whether this was due to a "reading difficulty...or is it really a math problem itself." *Id.*

53. The Mother testified that everyone listed as attending the meeting agreed that the Student needed to receive outside services, i.e., services provided by a non-District entity. Mother T115, T116. This testimony is found not credible. Had the entire evaluation team determined the Student required outside services, it is highly unlikely and less than probable that there would be no contemporaneous record of such a unanimous conclusion.

54. A PWN dated April 29, 2019, documenting the assessment revision meeting noted that:

Parent requests collaboration between special education instruction and private tutorial services using Orton-Gillingham approach, with a meeting at or beginning the 2019-20 school year to discuss reading progress over the summer and how the special education can coordinate with private tutorial services.

D2p10.

55. The assessment revision meeting was followed the same day by an IEP team meeting. P8. District Representative Leslie Sampson, Ms. King, Ms. Smith, the Mother, Ms. Nelson, and an SLP all attended the meeting. *Id.* p3. The school psychologist who conducted the assessment revision, Bruce Dykeman, stayed to attend the IEP meeting after the assessment revision meeting. Dykeman T204.

56. The Mother reported a decrease at home in the number and severity of the Student's emotional meltdowns. P8p3. The Mother's main concern is the Student's continuing struggle

with grade-level academics. *Id.* The Student's general education teacher reported she was pleased with the Student's "emotional growth" this year. *Id.* p4.

57. The Mother understood that the IEP provided the Student with 315 minutes per week in a special education setting. Mother T51-52. The Mother did not believe 315 min per week was enough because the Student "was still struggling...we weren't making forward progress...there was no academic growth and so I couldn't imagine how 315 minutes was enough." *Id.* T52.

58. The Mother received a copy of the IEP. *Id.* T113-114.

59. While special education is not Mr. Dykeman's "specialty," he would tell the IEP team if the IEP drafted seemed "way off" from what his evaluation results indicated the Student needed. Dykeman T205-206. This IEP "was consistent with the amount of intervention that's provided to other people having similar concerns." *Id.* T207.

60. A second PWN dated April 29, 2019, documenting the IEP team meeting noted that:

Parent is looking into private tutoring that will start over the summer. The tutoring times may impact [the Student's] school day. The IEP team will meet in late August or early September to review/consult with outside provider and determine if an IEP amendment is needed.

61. The Mother contacted multiple non-District providers about tutoring for the Student. Mother T54-56. She finally contacted Hands On Learning Solutions (HOLS). *Id.* T56.

62. HOLS is an educational therapy clinic. Parker T415. HOLS is not approved as a Non-Public Agency (NPA).<sup>8</sup> *Id.* T416, Herbold T376. Among its staff, HOLS employs two certificated teachers. Parker T416. HOLS also employs some additional number of tutors or instructors who are not certificated. P42¶6. All staff are supervised by the Educational Director. *Id.* As of July 2022, it served approximately 28 students. *Id.* ¶3. This included both general education students and students with IEPs. *Id.* Staff at HOLS work 1:1 with the students and can individually tailor programming to the students' needs. *Id.* at ¶2.

63. On July 15, 2019, the Student had a Functional Academic and Learning Skills Evaluation at HOLS (HOLS evaluation). P9. The evaluation was conducted by Laura Parker, the Educational Director at HOLS. *Id.* p

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<sup>8</sup> See Washington Administrative Code (WAC) 392-172A-04090, -04095.

64. Ms. Parker did not appear as a witness, and the information regarding her education, training, and experience comes from Ms. Parker's husband, co-owner of HOLS, and HOLS' "Clinical Director," Jeff Parker. See P42, Parker T409.

65. Ms. Parker is certificated as a general education teacher in California. P42¶6; Parker T416. Ms. Parker is certified or credentialed in the Barton Reading and Spelling program. Parker T417.

66. The HOLS evaluation consisted of parent interviews, examination of current schoolwork samples, prior testing reports, and a battery of assessment/screening tools. P9p2. The Student was tested in one 2-hour session. *Id.* p10. There is not sufficient evidence to find on a more probable than not basis that Ms. Parker possesses the necessary education, training, or experience to administer the battery of assessment/screening tools used for the evaluation or interpret the results of those tools. Similarly, there is insufficient evidence to find that Ms. Parker is qualified to interpret the results of any "prior testing reports."

67. The HOLS evaluation includes a statement or disclaimer:

The Functional Academic and Learning Skills Evaluation is not intended for use in determining eligibility for school-based intervention. Program, activity, and symptom descriptions are for educational/informational purposes only. Any recommendations given are not to be considered diagnosis, medical, therapeutic, or psychological prescriptions. Every parent needs to assume the responsibility for their own child and make their own decisions.

*Id.* p12.

68. The Student began attending HOLS for 10 hours a week just before the start of the 2019-2020 District school year. Mother T58, T116. Ms. Parker would only accept the Student if she attended 10 hours a week because Ms. Parker "felt that that was the only way that Student would be successful at her program." *Id.* T58. The Mother told the District about the Student attending HOLS. *Id.*

69. On August 28, 2019, an IEP team meeting was convened for the Student. P10. The Mother, Ms. Nelson and Ms. Smith all attended as team members. *Id.* p19.

70. The team discussed that the Student was attending HOLS 10 hours a week. Mother T59. The team determined that "Changes needed to be made due to outside tutoring during the school day." P10p16.

71. The Student was attending HOLS in the morning and Skyline in the afternoon. *Id.* The Mother understood that the Student would be a “half day (sic) student; so, she would only receive half of the services that she typically got.” *Id.* T59-60. The IEP provided the Student with 95 minutes per week of services in a special education setting. P10p13. This included five minutes per week of SDI for reading. *Id.* The Student would not receive a grade on her Skyline report card for reading. *Id.* p13.

72. There is conflicting evidence regarding the Student’s precise schedule between HOLS and Skyline at the start of the 2019-2020 school year. The PWN associated with this IEP meeting states: “[The Student] will be at school the following times: Monday all day, Tuesday and Thursday arriving at 1:00, Wednesday and Friday arriving at 12:30.” *Id.* However, the Mother testified that the Student was attending HOLS Monday through Thursday, from 9:00 to 12:30, and was arriving at Skyline on those days at 12:30. Mother T119.

73. While the Student’s schedule is unclear, the Mother confirmed that at some point during the school year she began to hold the Student out from attending Skyline on Fridays because by Fridays the Student was “exhausted.” *Id.* T118, T119.

74. From August 2019 to March 2020, the Mother testified that she was often called to pick up the Student early from Skyline, or the Student came home crying after school. *Id.* T62. In fact, the Mother testified this occurred over “the entire time [the Student] attended Skyline.” *Id.* T120. The Student “was unable to maintain in the classroom, and she was in tears, and they couldn’t handle her; so, I had to come get her.” *Id.* It is difficult to reconcile the Mother’s testimony that this occurred over the entire five years, kindergarten through fourth grade, that the Student attended Skyline full- or part-time with reports from Skyline staff and a general dearth of independent, corroborating evidence, such as contemporaneous emails. The available evidence supports finding that by at least second grade, the Student’s social and emotional behavior at Skyline had improved enough that the focus of her education shifted more to academics. See Findings of Fact 21, 22, 25.

#### *2019-2020 School Year: Third Grade at Skyline*

75. The 2019-2020 District school year began on September 5, 2019. D20p1.

76. Ms. Nelson remained the Student’s special education teacher and IEP case manager for third grade. Nelson T578. The Student’s general education teacher was Latanya Jaeger. Mother T121; D18p1. The Student’s SLP was Carol Davis. Davis T614-615. Ms. Smith remained the Student’s OT provider. Smith T675; P33¶2.



77. When the Student started attending HOLS, staff at HOLS requested that Ms. Nelson, “(N)ot confuse (the) Student by giving her different instruction than what she was receiving at Hands On Learning. They were working mostly on some decoding skills...And so I kind of backed off and just did a little more comprehension, kind of more monitoring.” T580.

78. At the end of the first trimester in December 2019, the Student’s general education teacher stated on the Student’s Progress Report that “We are continuing to work on finding an effective calm-down strategy for when [the Student] feels overwhelmed or anxious.” D18p3.

79. There is little other evidence of any events during the period from September 2019 until March 2020.

*2019-2020 School Year: From COVID Closure to End of SY*

80. On or about March 16, 2020, all District schools closed due to the COVID-19 pandemic. Nelson T581.<sup>9</sup> When schools closed, the District moved to providing only remote, online instruction for all District students through the end of the school year. *Id.* T586. Ms. Nelson described this period as:

(P)retty difficult because we didn’t have all of the systems in place for teaching during COVID...so a lot of the services were...a lot of e-mails and phone calls to parents and...sending some worksheets and some ideas of things for parents to work with. And it also depended on...the parents...their time schedule and how they could work...with us.

*Id.* T581-582. “(I)t ended up in the spring not being real direct services because of just trying to pull everything together that spring.” *Id.* T582.

81. HOLS also closed for a few weeks before first going online to provide tutoring, and then going very quickly back to in-person tutoring. Mother T72. The Student continued to attend HOLS for 10 hours a week. *Id.* The Mother told Ms. Nelson and Ms. Smith that the Student was continuing tutoring at HOLS. *Id.* T72-73.

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<sup>9</sup> The Parents’ closing brief identifies the exact date of the school closures as March 16, 2020. This is generally confirmed by Ms. Nelson’s testimony that schools closed within a week prior to an IEP meeting on March 20, 2020.

82. In an email to the Mother on March 16, 2020, Ms. Nelson stated that, “We can hold a phone conference on Wednesday for [the Student’s] IEP...What is your availability?... I can email a draft IEP to you tomorrow so you can follow along.” P11p2.

83. The Mother replied via email the same day, asking if it was possible to wait until they could have an in-person meeting, as she would prefer that. P11p1.

84. Ms. Nelson replied via email to the Mother the next day, stating, “According to OSPI, we are expected to complete IEPs on time...If the draft looks ok, we can sign off, then meet once school is back in session. We can amend the IEP at that time if necessary.” *Id.*

85. The Mother replied via email the same day, stating that, “I am happy to sign so long as we can possibly expand service minutes and if you could add in the prior written notice that we will meet once the district resumes to discuss and possibly amend if necessary.” *Id.*

86. This email is the only communication Ms. Nelson had with the Mother about increasing the amount of service minutes in the Student’s IEP. Nelson T607. Ms. Nelson understood the Mother was aware that “if Student came back into school full time, that we would relook at the amount of time” in the IEP. *Id.* T608. Ms. Nelson’s understanding was based on her working with the Mother from March through the end of the school year. *Id.* The Mother never asked what the IEP service minutes would look like if Student attended full time. *Id.* T609.

87. Ms. Nelson provided the Mother with a draft copy of the Student’s new IEP. P13.

88. An IEP meeting invitation to review the Student’s current IEP set an IEP team meeting for March 20, 2020. D3p1.

89. An IEP team meeting for the Student was held on March 20, 2020. D3. Ms. Nelson drafted the IEP. Nelson T578. The Mother, Ms. Nelson, Ms. Smith all attended the meeting. Mother T69, Smith T674, Nelson T600. The IEP provided the Student with a total of 65 minutes a week of services in a special education setting, and SDI for reading, written expression, social/emotional/behavioral, and OT. D3p15. Ms. Nelson was responsible for providing the Student’s reading, written expression, and social/emotional/behavioral SDI. Nelson T581.

90. The amount of OT services in this IEP was based on Ms. Smith’s recommendation. Smith T686. She recommended a total of 30 minutes a week because, “(W)e had changed the plan and she was now leaving campus...she would not be at school. She was only at school a few hours a day.” *Id.* T686.

91. The 65 minutes a week of services in a special education setting was agreed to by the Mother because:

This was a unique case, in that I was working with (the) parents in order to provide the services that I could provide around the time constraints that I was given, based on the fact that they had chosen to go to...the outside private tutoring that they were doing.

Nelson T600.

92. By this time, the Student was attending Skyline all day on Mondays, and afternoons on Tuesday, Wednesday, and Thursday. Nelson T579, D3p6. The Student was attending Skyline part-time because the parents chose to have the Student attend HOLS. Nelson T579. The Student attended HOLS to receive her written language and reading instruction. D3p6. She attended Skyline for math and science instruction. *Id.* p7.

93. It is unclear precisely how this IEP meeting was held. The IEP states that it was held via "Individual or Conference Telephone Call." D3p4. The PWN associated with this meeting states, "The team met through a phone conference call due to school closures." D3p18. The Mother recalls the meeting was held over the phone and, "It was out of the blue. It was not scheduled. I received a call from Margaret (Nelson) saying we need to have an IEP meeting and suddenly on speaker phone was the entire IEP team...but not Jo Smith." Mother T69, T171-172. Ms. Smith recalls the meeting was held in person. Smith T674. Considering all the evidence, it is found that this IEP meeting more likely than not occurred via a telephone conference call. Ms. Smith's recollection that this meeting was held in person when the schools were closed calls into question the accuracy of her recollection. Furthermore, Ms. Smith's recollection of attending this meeting in any manner conflicts with the Mother's testimony that Ms. Smith was not on the telephone conference call. Therefore Ms. Smith's testimony about any statements or events at this meeting is given no weight.

94. The Mother testified that at this meeting Ms. Nelson once again stated she was not qualified to teach students with dyslexia, and that the Student still needed "outside assistance." Mother T67. It has already been found as fact that Ms. Nelson never made any such statement that she was not skilled or trained to provide the Student's SDI. Therefore, the Mother's testimony regarding any statements by Ms. Nelson at this IEP meeting is found not credible.

95. The Mother testified that when the Student started on-line instruction it was "overwhelming" for her and the Mother was "constantly" in contact with Ms. Nelson on a "daily

basis” via phone calls and emails, telling Ms. Nelson that remote learning was not working for the Student. Mother T72. However, the evidence does not include any such emails, nor is there other evidence to corroborate such communication between the Mother and Ms. Nelson, i.e., the Student could not effectively use on-line learning. There is evidence, however, that from the school closure through the end of the school year, the Student was able to participate in on-line learning. Fitzhugh T298-299<sup>10</sup> (“The Student got pretty good at maneuvering that mouse and understanding...We all had to learn how to use Zoom...How to share and pull up the PDFs and use the pencil. But she did really well; and Mother didn’t really have to help that much, just only if there was a technical problem.”). Ms. Smith also provided OT SDI for the Student in part on-line within the first 10 days of the school closure. Smith T681. Ms. Seibel was also able to provide OT services for the Student on-line at the start of the 2021-2022 school year. Therefore, it is found as fact that the Mother’s testimony she informed Ms. Nelson that on-line instruction was not working for the Student is not credible.

96. From school closure through the end of the school year, Ms. Smith provided OT services for the Student for 25 or 30 minutes per week. Mother T75.

97. From April 2020 through the end of the school year, Ms. Davis provided the Student with “speech and language services.” Davis T616. This included availability by phone for speech services. *Id.* T629.

98. In an email to Ms. Nelson on May 3, 2020, the Mother reported that “[The Student] continues to do really well at home and is working very hard. She is anxiety free and it’s so good to see her relaxed.” D19pp31-32.

#### *The Student’s Continuous Learning Plan*

99. On May 7, 2020, a Continuous Learning Plan (CLP) was developed for the Student. D4. The purpose of a CLP is:

To support individualized student planning for the delivery of special education and related services through continuous learning instruction during school facility closure. The Continuous Learning Plan is not intended to replace a student’s IEP, but rather to document individual decisions for special education services during school facility closure.

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<sup>10</sup> Ms. Fitzhugh was one of the Student’s tutors at HOLS and was providing the Student with tutoring remotely over Zoom before HOLS reopened for in-person services. Fitzhugh T297; P34¶19

D4p1.

100. The Student's CLP provided for a total of 60 minutes a week of services. *Id.* Of that 60 minutes, 30 minutes were OT services, 15 minutes were reading services, 5 minutes were social/emotional/behavioral services, and 10 minutes were written expression services. *Id.* None of the services were to be provided in person. *Id.*

101. The CLP did not provide any time for SLP services. *Id.* This was because the District staff who developed the CLP considered how parents were:

(V)ery often saying, 'I'm not sure how...consistent I will be able to do these things and how often I want to access.' So rather than putting something down that we weren't able to really be sure of from one week to the next, we thought we would leave it open-ended and just try to, in our narrative, explain what we were going to do."

Davis T627.

102. When asked to opine on whether the CLP provided the Student FAPE, Ms. Nelson stated that "no student was getting all of their free and appropriate public education because...we were navigating an unprecedented time and didn't have all of the tools yet to provide that." Nelson T602-603.

103. An IEP progress report at the end of the 2019-2020 school year regarding the goals in the Student's March 20, 2020 IEP documents that for all but one of her IEP goals (written expression), the Student had received no instruction "due to the closure of school buildings during the Covid 19 epidemic." D15pp1-3.

104. In an email on June 7, 2020, to Ms. Nelson and others the Mother stated that, "[The Student] is ready for summer break...She is still happy and very silly. She is maturing more, and becoming even more independent." D19p71. The Mother went on to say that the Student would be attending HOLS for 10 hours a week throughout the summer. *Id.*

105. In a Student Progress Report at the end of the 2019-2020 school year, the Student's general education teacher, Ms. Jaeger, reported that the Student was "Approaching Grade Level Standard" in reading, writing, math, and social studies. D18pp1-2. Ms. Jaeger reported that the Student was "Meeting Grade Level Standard" in science. *Id.*

106. In the comments for the last trimester of the school year, Ms. Jaeger remarked that "this has been a memorable year watching your child grow socially and academically." *Id.* p3.

107. In an email to the Mother on August 12, 2020, Ms. Nelson stated, “We discussed 3 options for [the Student’s] school this year. 1: virtual learning (would need to stay with that program through the end of the 1<sup>st</sup> semester, possibly all year) 2: remote learning with Skyline staff 3: homeschooling with Special Education services provided by Skyline staff.” P17p2.

108. The Mother replied to Ms. Nelson via email the following day, stating:

I have made the difficult decision to homeschool [the Student] this year. However, I would like her to continue to receive her sped services. I have the paperwork filled out and will get it mailed. When a plan is in place for services, please let me know.

*Id.* pp1-2.

109. In an email to the Mother later the same day, Skyline Principal Regina Rainboth stated, “If you’d like to do the home school option, you might want to consider Tacoma Online. It will provide you with a Tacoma teacher, but be completely on line (sic) for students...Tacoma Online will have somewhat of a flexible schedule and is certainly work (sic) checking out.” *Id.* p1.

110. The Mother replied to Principal Rainboth later the same day, stating, “I have considered that option and I can’t seem to get a very clear understanding of how her IEP is included in that option. I also don’t know how it would work with Hand on Learning (sic)...At this point, I don’t know if she will be back as a fifth grader. *Id.*

#### *2020-2021 School Year: Fourth Grade at Skyline*

111. The first day of the 2020-2021 District school year was September 9, 2020. D20p2. During fourth grade, Ms. Nelson remained the Student’s special education teacher, Lynne Reder was the Student’s general education teacher, Ms. Davis remained the Student’s SLP, and Katrine (Sherfey) Seibel replaced Ms. Smith as the Student’s OT. Nelson T586, Seibel T383; D19p114, D5p1, D6p1.

112. The Student continued attending HOLS for 10 hours a week during the 2020-2021 school year until sometime in the spring or summer of 2021, when she began attending HOLS four hours a week. Mother T84-85, T139.

113. At the start of the school year all the Student’s instruction at Skyline remained remote, on-line instruction. Nelson T586.

114. There was conflicting testimony regarding when Ms. Nelson began providing on-line instruction to the Student. The Mother testified that Ms. Nelson did not begin providing any instruction, including on-line instruction, until sometime between Thanksgiving and Christmas. Mother T75, T175. However, the Mother admitted that she didn't remember whether Ms. Nelson provided the Student services in September 2020. *Id.* T184. And she later testified that the District did not offer the Student any in-person services until March 2021. *Id.* p83. Ms. Nelson testified that she began providing on-line instruction "within a couple of weeks of the start of school." Nelson T586. Other evidence corroborates Ms. Nelson's testimony over that of the Mother's.

115. In an email to the Mother dated September 16, 2020, Ms. Nelson stated "It was good to talk with you today to set up [the Student's] schedule. I will meet with her from 2:30 to 3:30 on Wednesdays. D19p85.

116. In an email to the Mother dated September 21, 2020, Ms. Seibel stated "I'd encourage you to check in about the possibility of [the Student] returning for some in person (sic) services if that's what you would like." *Id.* pp118-119. Ms. Seibel followed that email with another later the same day, stating "This afternoon our principal shared that in-person sessions would be an option by appointment for some of our students on Wednesdays." *Id.* p118. Ms. Seibel believes the Student returned to Skyline for in-person instruction by late September or early-to mid-October. Seibel T399. When the Student returned for in-person instruction on Wednesdays, Ms. Seibel continued to provide the Student's OT SDI and OT related service. *Id.* p385.

117. Once the Student returned to Skyline for in-person instruction, Ms. Nelson worked with her individually for one hour, and then the Student joined a "social emotional group" for 30 minutes. Nelson T586.

118. After considering all the evidence, it is found as fact that Ms. Nelson's recollection of events in the Fall of 2020 is more likely correct than the Mother's. The Student returned to Skyline for in-person instruction on Wednesdays by late September to mid-October and received services from at least Ms. Nelson and Ms. Seibel. The Mother's recollection that Ms. Nelson provided no services to the Student until Thanksgiving or Christmas is not reliable. It is found as fact that Ms. Nelson began providing on-line services for the Student within a couple of weeks of the start of the school year.

119. The Mother also testified that during the school year she was called or emailed multiple times to come pick up the Student early from Skyline, apparently due to manifestations of the Student's anxiety. Mother T120. The Mother testified she was called by the Student's general

education teacher, Ms. Reder, Ms. Nelson, or Ms. Smith to come pick up the Student. This testimony is not credible. First, Ms. Smith retired prior to the start of the school year. Second, there are no emails in evidence to support the Mother's assertion she received emails from Skyline staff directing her to come pick up the Student.

120. By December 2020, the Student was making "Sufficient Progress" on all but one of his March 2020 IEP goals to achieve her goals within the duration of the IEP. P18pp1-3. The Student demonstrated an "Emerging Skill" for her OT goal. *Id.* p1.

121. In an email to the Mother on December 16, 2020, Ms. Nelson wrote "I am so pleased with [the Student's] progress. She is doing so well this year. Attached is her progress report towards her IEP goals. I'm looking forward to seeing how she scores on the assessments that Bruce will be doing in January." D19p92.

122. The Mother replied to Ms. Nelson via email the next day, stating "Thank you, I am very pleased with her progress as well." *Id.*

123. On January 5, 2021, a Student Resource Team (SRT) meeting was held for the Student. D19p94; Dykeman T227. The Mother attended along with Ms. Nelson, Ms. Davis, Ms. Seibel, and Mr. Dykeman, the same District school psychologist who was responsible for the Student's last District evaluation in March 2018. *Id.* D1. Mr. Dykeman took notes for the meeting. Dykeman. T228. The purpose of an SRT meeting is to discuss any need for additional education intervention. *Id.* T227.

124. The team met to discuss academic concerns about the Student and the Student's three-year reevaluation. D19p1. The Mother indicated that "[the Student] is doing well with her 10-hour, hands-on instruction and appreciates the home-school environment that works well with her social anxiety." *Id.*

125. An Evaluation team meeting for the Student was held on February 9, 2021. D5. Mr. Dykeman was again the evaluation case manager. *Id.* p5. The team members appeared remotely due to the Covid-19 pandemic. *Id.* p23. The evaluation report noted that:

"[The Student] is a Home School student whose academic learning at home is supplemented by participation for 10 hours per week at Hands-on-Learning, which provides learning activities in written expression, math, and reading." (p5).

*Id.* p5. The evaluation determined to change the Student's eligibility category from EBD to Other Health Impairment (OHI). *Id.* It recommended SDI in the reading, written expression, math, and social/emotional/behavioral domains. *Id.* p7. It provided no related services, and



only one supplementary aid/service for OT. *Id.* The evaluation concluded that the Student's speech skills had improved and recommended that the Student be discharged from SLP services. *Id.* p16.

126. Mr. Dykeman reviewed all the Student's reading assessments starting in 2017 and concluded that:

[The Student] could read. She could understand what she's read...but the difficulty that she had was she spends so much time trying to focus on each word trying to understand which word it means, it then begins to interfere with her ability to understand the meaning of the sentence itself. So, she does understand. It's just that if she tries to do it fluently she gets stumbled with the particular word itself it just slows everything down, and so that...detracts from her reading abilities.

Dykeman T213.

127. With respect to the Student's written expression, Mr. Dykeman concluded that the Student was writing full sentences, but labored at it. T214. He went on to conclude that:

(W)hen [the Student's] trying to write a sentence she has such difficulty spelling the word correctly that it interferes with her ability to string words together to make a complete sentence. So, the spelling basically detracts from her ability to write complete sentences or to complete a five sentence (sic) paragraph.

*Id.* T214.

128. With respect to the Student's math skills, Mr. Dykeman concluded that despite math interventions, "things weren't working for [the Student] and so her relative position in comparison to others declined...So, my thought was that she needs help." *Id.* T216.

129. The Mother does not disagree with any of the areas of recommended services in the evaluation. Mother T136. She learned from the evaluation that "we were correct that there was (sic) still significant global delays and that she needed...a lot of support, and that she needed math support." *Id.* T79.

130. Ms. Davis wrote the communication section of the evaluation report. Davis T624. She agreed with the recommendation to discharge the Student from speech-language services. *Id.* T625. The Student "no longer demonstrated that she had a disability in the area of a speech disorder." *Id.* No one at this meeting disagreed with the recommendation to discharge the Student from speech services. *Id.* T626.

131. An IEP team meeting was held for the Student on February 9, 2021. D6. The Mother, Mr. Dykeman, Ms. Nelson, Ms. (Sherfey) Seibel, and Ms. Reder attended virtually. *Id.* p3.

132. The IEP included goals for the written expression, math and social/emotional/behavioral domains. *Id.* pp6-7. It provided a total of 120 minutes per week of instruction in a special education setting, with 30 of those minutes for written expression provided concurrently with other SDI. *Id.* It provided 30 minutes per week of OT as a supplementary aid/service. *Id.* SDI was provided in the reading, written expression, math, and social/emotional/behavioral domains. *Id.*

133. Ms. Reder determined that while the Student had made academic growth, she continued to score below grade level in reading, written language, and math. D6p5.

134. At that time, the Student was attending Skyline only for special education services. Nelson T589. The Student was not attending Skyline for general education services. *Id.* Fourth-grade general education students did not return to Skyline until late March 2021. *Id.* p590. The amount of SDI offered in this IEP was based on how much time the Student was spending at HOLS and discussion with the Mother about the Student's availability. *Id.* It was determined that the Student would continue to come into Skyline on Wednesdays to receive her SDI with Ms. Nelson and Ms. Seibel. *Id.* T590-591.

135. It was Ms. Nelson's opinion that the amount of SDI in the IEP would not provide the Student FAPE were she to return to Skyline full time. *Id.* T603.

136. Based on the Student's skills, it was Ms. Seibel's recommendation that 30 minutes per week of OT was an appropriate amount of this supplementary aid/service for the Student. Seibel T394. She continued to provide 30 minutes a week of OT services to the Student through the end of the school year on Wednesdays, and the Student made progress. *Id.* T394-395.

137. Sometime during the spring or summer of 2021, the Student began attending HOLS four hours a week rather than 10 hours a week. Mother T84-85, T139. This was due to financial circumstances of the Parents; it was not indicative of any decreased need for services at HOLS. *Id.* T85. The Mother informed the District of the decreased time at HOLS. *Id.*

138. By March 15, 2021, the Student was making sufficient progress on all her IEP goals to achieve her goals within the duration of his IEP. P19pp1-4.

139. By June 14, 2021, the Student was making sufficient progress on all her IEP goals to achieve her goals within the duration of his IEP except for her social/emotional/behavioral goal, which she mastered. *Id.*

140. In an email on July 9, 2021, to Ms. Nelson and other District staff, the Mother reported the Student had “shown a bit of interest in returning to school but has extreme anxiety about the topic as well.” P22pp3-4. The Mother asked if the Student would qualify for a 1:1 paraeducator because she believed that a paraeducator would help the Student with her anxiety, social interactions, and education. *Id.*; Mother T82.

141. By July 2021, all students in the District were back to in-person instruction. Herbold T368.

142. In an email on September 1, 2021, to Erin Kilgore and other District staff, the registrar at the District’s Wainwright Intermediate School (Wainwright) reported that the Mother was informed yesterday that Skyline was full and could not provide the part-time sped services like last school year. P23p1. The Mother and the Student live in the Wainwright catchment area, and the Mother wanted to schedule a meeting regarding the Student receiving those services at Wainwright. *Id.*

143. Erin Kilgore was and remains a special education teacher at Wainwright. Kilgore T433. She would become the Student’s special education teacher for fifth grade. Mother T145.

144. It had been the Mother’s intention to return the Student to Skyline. Mother T85. However, on August 31, 2021, she received a call from Ms. Nelson. *Id.* T86. Ms. Nelson informed the Mother that Skyline was full, and because Skyline was not the Student’s home school, the Student could not return to Skyline for fifth grade. *Id.*

145. A virtual meeting was scheduled for September 9, 2021, at Skyline to review the Student’s current EIP and instructional needs, and “Discuss support model as student transitions to Wainwright Intermediate.” D7p1.

#### *2021-2022 School Year: Fifth Grade at Wainwright*

146. September 8, 2021, was the first day of the District’s 2021-2022 school. D20p3.

147. Jennifer Wilson was the Student’s fifth-grade general education teacher at Wainwright. Wilson T647. Ms. Wilson had a multi-grade, fourth and fifth grade classroom. Wilson T652.

Erin Kilgore was the Student's special education teacher at Wainwright. Mother T145. Jill Ogata-Tucker was the Student's OT at Wainwright. Ogata-Tucker T249.

148. The Mother testified that the Student began the school year attending Wainwright three full days a week, on Mondays, Wednesdays, and Fridays. Mother T147. This is clearly incorrect. See e.g. D13p3 (2/2/20: the Student's schedule at Wainwright changed from 3 half-days to 3 full days.); Wilson T647 (At the start of the school year the Student was "coming one or two days a week for about an hour to two in the morning."); D7p3 (9/9/21: It was proposed to have [the Student] receive special education services on Wednesdays and participate in half days with her same aged peers on Monday and Friday Mornings.); D19p117 (9/17/21: "Here is her schedule...Monday & Friday 8:15-11:00...Wednesday 9:15-11:30); D9, Mother T148-149 (1/28/22: Mother confirms the Student attending Wainwright only three mornings each week at this time.); D10p1, Mother T152 (2/2/22: "Shortly after this meeting, the Student's schedule changed and she attended Wainwright full days on Mondays, Wednesdays, Fridays).

149. While there is some inconsistency in the evidence, it is found more likely than not that the Student began the school year attending Wainwright about half-days on Mondays, and Fridays. Wilson T647. Shortly after, she added a half-day on Wednesdays. See D19p117.

150. At the start of the school year, the Student was not participating in general education for reading or writing. Wilson T651. The Student had no issues communicating with her peers in class, although there were times when the Student would not always communicate her feelings to staff. Wilson T647-648. This occurred more frequently when Student "was coming less frequently. And then that kind of subsided as she came more frequently." *Id.* T648. The Student had no behavioral issues in her classroom. *Id.*

151. Ms. Wilson never called the Mother to come pick up the Student from Wainwright. *Id.* T650. There were occasions when the Student would use her cell phone to call the Mother to have the Mother pick her up from school. *Id.* Sometimes the Student would call the Mother without the staff knowing. *Id.*

152. The Student did not need a 1:1 paraeducator in Ms. Wilson's classroom. *Id.* T649. "(W)ith the right supports in place and accommodations, she was able to access the learning and to successfully complete tasks independently or with support from either myself, another teacher, or her special education teacher." *Id.* Ms. Wilson was able to provide the supports the Student needed in her classroom. *Id.*

153. Ms. Kilgore did observe the Student getting overwhelmed, calling home, and having outbursts at Wainwright. Kilgore T453. However, over the course of the school year the Student did well socially and emotionally “compared to the way that we thought she might.” *Id.* T453. Ms. Kilgore observed a decrease in the length, severity, and frequency of the Student having long episodes of crying or feeling really anxious. *Id.* T453-454.

154. Ms. Kilgore observed growth towards the Student’s math goals. *Id.* T454. The Student was “a beautiful reader.” *Id.* She had “really nice fluency and very rarely makes a mistake.” *Id.* Her spelling was not perfect, but it was readable and improved over the school year. *Id.* Her handwriting was very legible. *Id.*

155. Offering the Student opportunities to participate with her general education peers is beneficial because the Student is “still receiving exposure to grade-level curriculum so that she doesn’t fall further behind.” *Id.* T565. The Student can participate in grade-level curriculum with “appropriate accommodations and support.” *Id.*

156. A virtual IEP team meeting for the Student with staff from Skyline and Wainwright was held on September 9, 2021. D7pp1, 3. The Mother, Ms. Nelson, Ms. Seibel, Ms. Kilgore and Ms. Wilson attended. Mother T89-90.

157. It was proposed that the Student receive special education services on Wednesdays and participate in half-days with her same-aged peers on Monday and Friday morning. D7p3. “This was proposed in order to satisfy [the Student’s] services minutes while accommodating both her family’s schedule and the school schedule.” *Id.* This proposal “was rejected because [the Student] was not fully enrolled yet.” *Id.*; Kilgore T558. As soon as the Student was enrolled her IEP services were delivered. Kilgore T558.

158. In an email on September 13, 2021, to the Mother, Ms. Kilgore, and others, Wainwright Registrar Lisa Duncan wrote that she “was instructed to only schedule [the Student] into the courses (Math, PE, Health, Music and Library) that she will be attending. Attendance will have to be hand entered each day as she will not appear on Ms. Wilson’s homeroom roster until/if at all she attends full-time.” D19p113.

159. In an email on September 13, 2021, to Registrar Duncan, Ms. Wilson wrote: “My student (the Student) who comes in on Monday’s and Friday’s (sic) is now going to come on Wednesday’s (sic) as well...Here is her schedule...Monday & Friday 8:15 – 11:00...Wednesday 9:15 – 11:30.” D19p117.

160. An IEP team meeting for the Student was held and an IEP amendment was developed on September 20, 2021. D8. The Mother, Ms. Nelson, Ms. Kilgore, a general education teacher, an OT, and a District representative attended. Kilgore T437-438. The IEP amendment included goals for the written expression, math, and social/emotional/behavioral domains. D8 pp6-7. It provided 60 minutes of SDI in a special education setting. *Id.* p12.<sup>11</sup> The IEP offered the Student 30 minutes a week of OT as a supplementary aid/service. *Id.*

161. Ms. Nelson drafted the IEP, except for the Fine Motor section. Ms. Nelson drafted the majority of the IEP because Ms. Kilgore did not yet know the Student well enough to make any changes to her service matrix. Kilgore T442. The Student was not offered a more robust IEP reflecting full-time attendance at Wainwright because Ms. Kilgore did not:

(L)ike to make any big instructional changes...before having data and knowing the student. The (Mother) expressed a lot of concerns...So I think the idea was keep the schedule how we agreed...and kind of collect some data on how she did and then look at what we think the next steps would be.

*Id.* T556. Ms. Kilgore went on to explain that:

(The) Student's mom advocated that she would like her to start slow. You know, we were trying to be really sensitive to the fact that it was a new school, coming back after COVID they had like kind of a unique relationship with the outside tutoring, and that had been reflected in her previous service minutes...So (the IEP Amendment) was kind of almost a placeholder while we got to know the Student and the family and gathered some data about the kind of where she was at.

*Id.* T570.

162. Ms. Nelson confirmed that the IEP amendment addressed "the needs of the (S)tudent based on what the (Mother) was requesting us to be doing...she had signed her up for Hands On Learning, and we provided additional services based on...the time constraints that we were given." T606. Ms. Kilgore would provide the Students SDI for reading, writing, and math. Kilgore T459.

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<sup>11</sup> While the Student's prior IEP (D6) provided 90 minutes per week of SDI in a special education setting, the IEP amendment (D8) did not decrease the amount of the Student's SDI. The difference between the prior IEP and the IEP amendment is that the amendment called for the Student to receive 30 minutes per week social/emotional/behavioral SDI in a general education setting. The prior IEP provided the same 30 minutes of SDI in a special education setting. These two IEPs offered the Student the same amount of SDI.

163. Ms. Ogata-Tucker provided the Student's OT supplementary aid/service on Wednesdays for 30 minutes. Ogata-Tucker T249, T250. She would:

(G)o into...(Ms. Kilgore's) LRC during the time that she was receiving her written expression instruction and collaborate with the teacher, observe, make sure that Student's fine motor handwriting skills were not a hindrance to her being able to participate in the classroom tasks. I would occasionally intervene and...offer suggestions or sometimes even activity ideas with the teacher.

*Id.* T250. Ms. Ogata-Tucker "felt that the written expression time was the best time for me to provide that instruction. Mom agreed to this at the meeting, and we set that up." *Id.* T265, T261.

164. The OT services offered in the IEP amendment were appropriate for the Student. *Id.* T251.

165. The PWN associate with the IEP amendment meeting noted that the service matrix was changed after deciding what the Student's schedule at Wainwright would look like. D8p15.

166. By December 2021, the Student had mastered all her IEP goals except for her written expression and math goals, where she was making sufficient progress to achieve those goals within the duration of her IEP. P19pp1-4.

167. Due to the Student's schedule attending HOLS and Wainwright part time, she was not assessed in academic areas at the end of her first trimester at Wainwright. D18p5. However, the Student's social skills and work habits all met grade-level standards. *Id.* p4.

168. From January 2022 through June 2022, the Mother reported that the Student was still experiencing crying and meltdowns at Wainwright. Mother T177-178. The Mother reported she was in "daily communication" with Wainwright staff. *Id.* T178. The Mother reported this level and frequency of communication between herself and District staff started in kindergarten and continued to June 2022. *Id.* The Mother's report that she was in daily communication with Wainwright staff and that this level and frequency occurred over a six-year period is not credible. While there is evidence that the Student's anxiety negatively impacted her receipt of an education and that the Student at times struggled with emotional distress at school, a preponderance of the evidence does not support the Mother's assertion this occurred on a daily, or even near daily frequency over the course of six school years. The Mother's unsubstantiated assertion harms her reliability and credibility as an objective, impartial reporter of the facts.

169. A virtual IEP team meeting was convened for the Student on January 28, 2022. D9; Herbold T1377. The Mother attended with her legal counsel, Ms. Hill and Ms. Hruska. Mother T148; D9p20. The District also had legal counsel present. D9p20. Ms. Herbold attended. Herbold T363. Ms. Kilgore and Ms. Wilson attended. D9p20.

170. The IEP provided the Student with SDI in the math, reading, written expression and social/emotional/behavioral domains. *Id.* p17. It provided OT as a supplementary aid and service. *Id.* The IEP provided the Student with 435 minutes a week of services in a special education setting, with all SDI to be provided by a special education teacher. *Id.* The IEP included goals for reading, written expression, math and social/emotional/behavioral. *Id.* pp8-11.

171. The increase in the amount of SDI in this IEP was determined based upon the Student attending Wainwright full time, five days a week, her most recent evaluation and:

(B)ased on her progress monitoring. It would have been based on her performance both in a small group LRC setting, as well as her general education classroom, input from her teachers, input from her parent, the rest of her IEP team.

Kilgore *Id.* T447, Herbold T365, T367.

172. The District team members believed the Student was doing well at Wainwright. All their data showed that she was making progress and growth both socially and academically. *Id.* T571.

173. The Mother did not express any disagreement with the amount of service minutes in this IEP. Mother T150.

174. Ms. Kilgore advocated for the Student to attend Wainwright full time, five days a week. Kilgore T456. She would not be able to provide all 435 minutes of SDI in this IEP while the Student was attending less than full time because she had to build time into the Student's schedule for things like recess and general education. *Id.* T560. The Mother disagreed. *Id.* T461. The Mother did not return the Student to Wainwright full time because she wanted the Student to continue at HOLS four hours a week through the end of the school year to give the Student time to transition into a general education classroom. Mother T94. The Mother's goal was for the Student to attend middle school full time the next school year. D9p5.

175. Ms. Kilgore provided the Student with 30 minutes of SDI in each domain on the three days the Student attended Wainwright. Kilgore T463.



176. The OT services provided in this IEP were appropriate for the Student. Ogata-Tucker T252.

177. The Parents requested the IEP provide the Student with a 1:1 paraeducator. D9p5; Mother T150. The Mother was concerned that the Student was too far behind her same-age peers to meaningfully engage in a general education setting without a 1:1. D9p5. However, the Mother reported that “[the Student] became upset when (the) LRC teacher or (the) OT was present in her classroom as [the Student] felt she was being singled out.” *Id.* The team “talked a lot about if by adding...a layer of support with a one-to-one person, if that would allow for (the) Student to access peers and engage socially and what the benefit would be for that type of support for her.” Herbold T372. The team rejected the Parents’ request for a 1:1 paraeducator but agreed to collect data to determine what level of support was needed for the Student. Mother T150. The team also agreed to conduct a Functional Behavioral Analysis (FBA) of the Student as a guide to developing a behavior plan for the Student. Mother T151; D9p20. The team agreed to conduct an FBA for the Student “because what we were seeing at Wainwright was not consistent with what the [Mother] was seeing at home.” Kilgore T465.

178. An IEP team meeting for the Student was held on February 2, 2022. D10pp1,3. The team members included the Mother, Ms. Kilgore, Ms. Wilson, and Ms. Ogata-Tucker. *Id.* p3. The purpose of the meeting was to discuss supports for the Student as she began her new schedule attending Wainwright three full days a week on Mondays, Wednesdays, and Fridays. *Id.* “These supports included: a copy of her daily schedule, a personal break pass, a nonverbal flip card that [the Student] could use to indicate needing help from a teacher, the places that [the Student] could take breaks, and a task checklist.” *Id.* Shortly after this meeting, the Student began attending Wainwright three full days a week. Mother T152, Kilgore T466; D13p3.

179. The Mother is unsure if she asked for a 1:1 paraeducator at this IEP meeting. Mother T98, T152. Nevertheless, the Mother asked for a correction to the draft PWN (P27pp5-6) through her attorney. P27pp1-2; Mother T98-99.

180. On February 4, 2022, the Parents’ counsel, Ms. Hill, sent an email to the District’s counsel, Malik Gbenro. P27pp1-2. In her email, Ms. Hill stated that, “The Parents received this PWN today. Can the District reissue and specifically address the request for one-to-one paraeducator support that we asked for in the IEP meeting? We want to make sure we have a clear record.” *Id.*

181. Mr. Gbenro received Ms. Hill’s email and responded the same day, stating he would follow up with the District and get back to Ms. Hill. *Id.* p1. Ms. Kilgore was aware of the

request for a corrected PWN but cannot recall if she reissued the PWN. Kilgore T559. The Mother did not receive a corrected PWN. Mother T99.

182. The Mother asserted the impact of not getting a corrected PWN was that “nothing got accomplished after that point.” *Id.* Issues were not resolved. *Id.* “It’s hard to know what the goal is, what we’re after, what we’re looking at for the future, and it’s hard to know how to track (the) Student.” *Id.* It is found that the Mother’s assertion regarding the impact of not receiving a corrected PWN is not credible. Parents’ counsel were clearly on notice that the draft PWN did not include anything about the Parents’ request for a 1:1 paraeducator. The Parents were represented by the same legal counsel from at least the January 28, 2022 IEP team meeting through the due process hearing. Therefore, Parents’ counsel were aware of the IEP team’s decision to deny the Parents’ request for a 1:1 paraeducator, and the team’s decision to begin collecting data to determine what level of support was necessary for the Student. And the team did collect such data after the IEP meeting. *See below.*

183. A virtual IEP team meeting for the Student was held on February 16, 2022. D12p1. The purpose of the meeting was to “Check-in on student progress and discuss next steps for support.” *Id.* Ms. Kilgore, Ms. Wilson, Ms. Ogata-Tucker, Ms. Herbold, the Mother, and counsel for both the Parents and the District attended. *Id.* p3. Ms. Kilgore took notes during the meeting. *Id.* p5.

184. By this time, the Student had attended Wainwright for seven full school days. *Id.* pp3, 5. The team agreed to either pause or discontinue the Student’s FBA because “Anticipated behaviors (student having prolonged emotional episodes requiring staff support during school day) have not been observed” since the Student started three full school days a week. *Compare* D12p3, D13p3.

185. The team felt that the Student had done a pretty great job of coming in, adjusting well and engaging with peers. She seemed happy to be there and was learning. Herbold T374.

186. The team decided not to move forward with the FBA because there were not enough behavioral concerns. Mother T155. The Mother believed that the transition to three full school days a week was successful in some areas, but other areas needed improvement. *Id.* T154.

187. The Mother asserted that:

I was picking Student up on occasion when she got too stressed or was crying uncontrollably. I had to often go down to the school and sit with her in the office and discuss different issues. Sometimes I had to bring her home, other times I was able

to get her to stay. We also had it set up where if she got too stressed she could give me a call and I could try to work out the issues that way, which I did on numerous occasions and then...every once in a while (the) Student school refused (sic) because of the stress that Wainwright caused.

*Id.* T155. The Mother went on to assert that:

I was going there often to help...soothe her because she was unable to self-soothe. So, it really depended on the day. She could go and have a great day. When she was challenged academically or when she was challenged socially, then unfortunately I had to come, drop everything immediately and come to the school right away.

*Id.* T157-158.

188. The Mother's assertions regarding the Student's transition to three full school days at Wainwright cannot be reconciled with the preponderance of the evidence. Again, there is little independent evidence to corroborate the Mother's testimony. For example, there is no evidence that any other members of the IEP team had any significant concern about the Student's transition to three full school days such that it was necessary to continue with an FBA. The Parents had counsel at this meeting and there is no evidence that counsel disagreed or objected to pausing or discontinuing the FBA, which would have been reasonable if the Mothers' description of the Student's behavior was accurate. And the reliability of the Mother's recollection of events at Skyline and Wainwright has already been considered and found questionable. It is found by a preponderance of the evidence that the Student's transition to three full days of school was more likely than not generally successful, and the Mother's assertions to the contrary are unreliable.

189. After this IEP meeting, staff at Wainwright began to track the Student's behavior more formally and collect additional data from the Student's teachers and support staff. D12p3, D13p3. Data on the Student's behavior was tracked and recorded intermittently from February 25, 2022, through April 20, 2022. On the 11 days when it was tracked and scored, the Student had only two "emotional outbursts." D16pp8, 19, 45.

190. An IEP team meeting for the Student was held on March 15, 2022. D14p3. The Mother attended with legal counsel. *Id.* Ms. Kilgore and Ms. Herbold attended. See Kilgore T468, Herbold T375. The purpose of the meeting was to discuss the Student's behavioral and academic progress since the last IEP meeting on February 16, 2022. D14p3.

191. The Student had made "great progress, both behaviorally and academically, and in both general and special education settings." *Id.*; Kilgore T469. The Student was not experiencing disruptions at school, was well adjusted, and excited to be there. Herbold T375.

192. The Mother reported that she was “still experiencing challenges with [the Student] at home.” D14p3. This included “exhaustion, anxiety, needing to go to bed early, and helping [the Student] work through concerns about school.” D14p3; Kilgore T469. The Mother declined moving the Student to a full-day, five day a week schedule at Wainwright. D14p3. The Mother noted that she currently had a contract with HOLS for the Student to attend on Tuesday and Thursday afternoons, the Student had swim lessons on Tuesday and Thursday mornings, and generally used those days to decompress from attending school. *Id.*

193. The Mother reported that the Student “was still showing signs of severe anxiety at school. I was still having to go several times a week to calm her down at Wainwright and I was not confident that she could make it through...an entire school schedule.” Mother T161. It is found that this report is not reliable. The Student was attending Wainwright three full days a week. If the Mother’s report was reliable, it would compel a finding that the Mother was going to Wainwright at least once every day to calm the Student, or multiple times on at least one day a week. This would be so inconsistent with a preponderance of the evidence that it cannot be reconciled.

194. In a Letter To Whom It May Concern dated March 16, 2022, a nurse in Dr. Davies office wrote:

[The Student]...is a patient of University Place Pediatrics. Due to [the Student’s] anxiety disorder it is recommended that she continues with 50% traditional schooling, with special education support. As well as 50% 1:1 schooling with Hands On Learning Solutions in Gig Harbor. This helps reduce [the Student’s] anxiety, stress response, and sensory issues caused by traditional schooling. This should continue throughout her schooling.

P30. The letter is signed by a licensed practical nurse. *Id.* The letter bears a stamp of Dr. Davies’ name and business address. Unlike Dr. Davies’ earlier letter (P1), it was not signed by Dr. Davies. There is no evidence to find the stamp of Dr. Davies’ name authenticates he wrote or reviewed the letter. Neither Dr. Davies nor the nurse testified at the due process hearing. The Mother asked for this letter. Mother T101. It is clear the Mother must have provided information to the nurse about the Student’s tutoring at HOLS, but it cannot be determined what information was provided or how accurate any such information was. This letter is given not weight.

195. In March 2022, Ms. Kilgore administered i-Ready Diagnostic assessments in reading and math to the Student. Kilgore T450; P31. The Student was in fifth grade. See e.g., P31p1.

196. The Student's overall reading was assessed at the third-grade level. *Id.* pp3-5. The Student's overall math was assessed at the second-grade level. *Id.* pp1-2.

#### *Shayna Raphael Consultation Recommendations*

197. Counsel for the Parents contacted Shayna Raphael to "see if I could come and potentially help with some supports for (the) Student and her family." Raphael T491. She was hired by the Parents. *Id.* 529. Ms. Raphael identifies herself as an "Educational Consultant and Behavior Specialist." P41p1.

198. Ms. Raphael holds a Bachelor of Science degree in Speech and Hearing Sciences, but she has never been certified as an SLP by Washington State and does not possess a Certificate of Clinical Competence (CCC) as an SLP. P41p1, Raphael T528. She was employed as a "conditionally-certified" SLP by the District in 2008, where she worked for 18 months. Raphael T488. She then worked as a clinic manager for a private speech-language company from 2009-2013. P41p2.

199. Ms. Raphael holds a Master of Arts in Education, with a "focus" on special education. P41p1; Raphael T487. She is currently certificated as a teacher in Washington State, with an endorsement to teach preschool through 12<sup>th</sup> grade. Raphael T487. She was employed as a special education teacher in the District from 2013-2015. P41p2. She taught in self-contained classrooms for students identified as having severe emotional-behavioral disorders. Raphael T488.

200. Ms. Raphael holds a graduate certificate in Applied Behavior Analysis (ABA), but she is not a Board Certified Behavior Analyst (BCBA). P41p1; Raphael T529. She was employed by the District as a Behavior Specialist from 2015-2017. P41p2.

201. From 2017 through the present time, Ms. Raphael has operated Raphael Consulting, her private company. *Id.*

202. Ms. Raphael's consultation regarding the Student consisted of a review of some of the Student's educational records from the District and outside assessment reports, two direct observations of the Student, and parent input. P32p1; Raphael T491. Afterwards, Ms. Raphael produced her Consultation Recommendations report. P32p1. She provided her report to the Parents' legal counsel, but not the District even though her report states, "**Conducted for:** Wainwright Intermediate School." Raphael T515, P32p1 (Bold in original). As of the due process hearing, the Parents had not provided a copy of Ms. Raphael's report to the Student's IEP team at Wainwright. Mother T167-168.

203. Ms. Raphael's report states that:

*This is not an assessment. These recommendations are for consideration with [the Student's] educational planning and based on a file review of outside assessments and school documents, direct observations, and parent input.*

P32p1 (Italics in original).

204. In the "**BACKGROUND**" section of her report, Ms. Raphael identifies the date of the Student's most recent District evaluation as "(4/11/2021)." P32p1 (Bold in original). This is incorrect. The most recent District evaluation of the Student is the Student's triennial reevaluation on February 9, 2021. D5. Ms. Raphael's report identified the Student's "current setting" as three partial days a week at Wainwright and continued homeschooling/HOLS. P32p1. This is incorrect. The Student began attending three full days a week at Wainwright on February 2, 2022. D13p3. Ms. Raphael does later state that the Student increased her time at Wainwright to three full days a week. P32p1.

205. Ms. Raphael reported that the Student "has been picked up early from school multiple times this year. *Id.* Ms. Raphael obtained this information from "Direct e-mails sent from the mother on days that she was picked up or left school early." Raphael T516. However, if Ms. Raphael reviewed any such email, she did not identify them as part of the records she reviewed. See P32p1 (The following documents were reviewed:). No such emails appear in the evidence.

206. Ms. Raphael conducted two direct observations of the Student: one at Wainwright and one at HOLS. P32pp2-3. Her report identifies both observations as occurring on June 6, 2020. P32p2. This is incorrect. Her observation of the Student at Wainwright took place on June 6, 2022, and her observation at HOLS took place on June 7, 2022. Raphael T529.

207. Her observation at Wainwright was 2¼ hours long, first in Ms. Kilgore's LRC classroom, followed by observation in Ms. Wilson's general education classroom. P32p2. This was the first time Ms. Raphael met the Student. Raphael T509. Ms. Raphael was able to observe the Student first in small-group instruction in Ms. Kilgore's classroom, and then highly engaged in a seven-sentence response to a visual prompt with sentence stems. P32p2. The Student was able to request support with her spelling. *Id.* The Student transitioned to Ms. Wilson's classroom where she chatted and worked collaboratively with her peers throughout the class. *Id.*

208. Ms. Raphael did not speak with Ms. Kilgore about what explicit instruction she provided the Student, or what types of skills Ms. Kilgore was targeting with the Student. Raphael T510-511. Ms. Raphael does not know if the explicit instruction to support the Student's anxiety she recommended for the Student in her report was provided to the Student outside of her 2¼ hour observation at Wainwright. *Id.* T494, T511.

209. Ms. Raphael did not speak with Ms. Kilgore about whether or what kind of social skills instruction she provided to the Student because Ms. Raphael was there to observe the Student and didn't have much time to speak with Ms. Kilgore. *Id.* T519. Ms. Raphael did speak briefly with Ms. Kilgore about the Student's service minutes. *Id.* T511.

210. The following day, Ms. Raphael observed the Student for one hour at HOLS. P32p2; Raphael T517. During reading instruction, the instructor used the Orton-Gillingham method for reading instruction, to which the Student responded well. P32p2. The Student responded well to interventions. *Id.* Her instructor reported that the Student had made great progress. P32p3.

211. It is unknown why Ms. Raphael spent 2½ hours at Wainwright, but only one hour at HOLS. The summary of Ms. Raphael's observations at Wainwright and HOLS consisted of approximately 1¼ pages of her report, the majority of which was the summary of her observation at Wainwright. P32pp2-3.

212. Ms. Raphael's daughter attended HOLS as a student when she was in first grade. *Id.* T492. HOLS was "a great support for my daughter to have." *Id.* Her daughter also had an IEP "and (HOLS) helped with a lot of her literacy skills." *Id.*

213. Ms. Raphael's report included recommendations for the Student's academic and social-emotional needs. P32pp3-5. After producing her report, Ms., Raphael was provided and reviewed additional District educational records for the Student. Raphael T508.

214. Ms. Raphael did not review any District IEP progress reports for the Student. Raphael T513. She did not review any progress reports or progress data from HOLS. *Id.* T518. Ms. Raphael acknowledged that "It's always important to look at a student's progress." *Id.* T514. She has never participated in an IEP team meeting for the Student. Raphael T512.

215. When asked to opine on the amount of academic SDI in the Student's current IEP (D9), Ms. Raphael stated "I would expect to see a little bit more for math, reading, and writing." *Id.* T497. For social/emotional/behavioral SDI, Ms. Raphael stated, "That would be far below

what I would expect.” *Id.* T498. She recommended a range of 375 to 500 minutes a week. *Id.*

216. Ms. Raphael was also asked to opine on the amount of service minutes in the Student’s September 2021 IEP amendment (D8) and the Student’s February 2021 IEP (D6). *Id.* T506-507. Ms. Raphael opined that those IEPs were either not appropriate or that the amount of service minutes were extremely low for the Student’s level of need. *Id.* However, Ms. Raphael clarified on cross-examination that she was not saying the Student could not make progress on her IEP goals with the amount of service minutes in the IEPs. *Id.* T512. She clarified that “I think that (the amount of service minutes) could potentially hinder progress or that she could make more progress is she had an appropriate amount of minutes.” *Id.*

217. Ms. Raphael was questioned by Parents’ counsel about the Student’s progress overall, and whether she could attribute that progress to her tutoring at HOLS versus the IEP services she received at the District. *Id.* T532. Ms. Raphael first responded that “To be able to delineate between...I think that’s a difficult thing to be able to do.” *Id.* On further questioning by Parents’ counsel, Ms. Raphael stated:

(A)gain, it’s hard to know for sure. But...I was surprised at the low number of minutes (in the Student’s IEPs), particularly compared to the minutes she was receiving at Hands on Learning. So I think it’s easy to come to the conclusion that a majority of the instruction and gain was from Hands on Learning. But again...there’s no way for us to know for sure.

*Id.* T533-534. Ms. Raphael does not know how many hours the Student attended HOLS. *Id.* T535.

218. Ms. Raphael’s opinion regarding the appropriateness of HOLS is based on her one-hour observation of the Student at HOLS. *Id.* T517.

219. When Ms. Raphael uses the term appropriate, “I mean appropriate to the level of needs that records showed that [the Student] demonstrated.” *Id.* T530. Ms. Raphael is not familiar with the term “appropriate” as a term of art in special education. *Id.*

220. After careful review of Ms. Raphael’s Consultation report and testimony, it is found that her opinions regarding the Student’s education, services and progress at the District and HOLS merit little to no weight. The extent of her knowledge to offer such opinions is very limited. While she reviewed some of the Student’s educational records, her report does not set out what she gleaned from those records outside of a single paragraph. Her report reflects multiple factual errors that detract from any confidence in its preparation. Her report reflects



little in the way of thoughtful analysis, jumping from observations to recommendations. Her report was most likely obtained as a litigation tool, which further detracts from justifiable reliance on her conclusions. Her testimony regarding parsing out the relative contributions of HOLS versus the District to the Student's progress is particularly troubling given she does not know how many hours the Student attended HOLS and has not reviewed progress reports for the Student. Ms. Raphael appeared to conform her testimony to the intent of Parents' counsel. And offering an opinion on the Student's progress when she has not reviewed any progress reports is untenable. Offering an opinion that an IEP should offer "a little bit more for math, reading, and writing" is not helpful, and does not reflect a nuanced or careful analysis of the facts. The fact that Ms. Raphael's daughter attended HOLS in the past raises an issue of whether her opinions about HOLS are based on just her observations, or are they influenced by some preexisting knowledge or bias in favor of HOLS.

221. On April 5, 2022, the Parents filed the Complaint in this matter. See Complaint.

222. The Mother does not disagree with the OT services offered in the Student's IEPs from March 2020 to the due process hearing. Mother T133. With respect to the speech-language services offered in those IEPs, the Mother stated that "I believe that if we needed speech, it's far down the list. I still have a lot more to worry about than just speech." *Id.* T134.

*Parents' Tutoring and Transportation Expenses Paid or Incurred for HOLS<sup>12</sup>*

223. The Parents' incurred expenses at HOLS for the Student's tutoring services. P36. The Parents have paid all the HOLS invoices in P36. Mother T102.

224. The Mother drove the Student to and from the Parents' residence to HOLS for tutoring, incurring transportation expenses for mileage and tolls. The Mother calculated the Parents' mileage expense using the then-current federal mileage rate. Mother T102-103; P37. Transporting the Student to and from HOLS and the Parents' residence required driving over the Tacoma Narrows Bridge, a toll bridge. Mother T103. This resulted in the Parents' incurring and paying for the bridge tolls. *Id.*; P38.

225. The Parents seek reimbursement for tuition and transportation expenses for HOLS from April 5, 2020, to June 2022. See Parents' Post-Hearing Brief, p.67. The Parents have not reduced their claim for reimbursement to a sum certain.

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<sup>12</sup> P36 includes an invoice for \$400 for the Student's Functional Academic and Learning Skills Evaluation in July 2019. P36p30. The Parents are not seeking reimbursement for that evaluation. See Parents' counsel statements at T106-107.

## CONCLUSIONS OF LAW

### The IDEA and Jurisdiction

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Therefore, the Parents bear the burden with respect to the issues raised in their Complaint.

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

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

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

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

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

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

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

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

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

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

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

ISSUE: *Whether the District denied the Parents meaningful participation in February 2022 by issuing a Prior Written Notice (PWN) without addressing the Parents' request for 1:1 support and a half-day program at Hands on Learning Solutions.*

6. Prior Written Notices are governed by WAC 392-172A-05010, which provides in relevant part that:

(1) Written notice that meets the requirements of subsection (2) of this section must be provided to the parents of a student eligible for special education services, or referred for special education services a reasonable time before the school district:

- (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or
- (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student.

(2) The notice required under this section must include:

- (a) A description of the action proposed or refused by the agency;
- (b) An explanation of why the agency proposes or refuses to take the action;
- (c) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (d) A statement that the parents of a student eligible or referred for special education services have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (e) Sources for parents to contact to obtain assistance in understanding the procedural safeguards and the contents of the notice;
- (f) A description of other options that the IEP team considered and the reasons why those options were rejected; and
- (g) A description of other factors that are relevant to the agency's proposal or refusal.

7. Violations of WAC 392-172A-05010 are procedural violations of the IDEA. Therefore, to warrant any remedy such a procedural violation must impede the Student's right to FAPE, significantly impede the Parents' opportunity to participate in the decision-making process regarding provision of FAPE to the Student, or cause a deprivation of educational benefits for the Student. WAC 392-172A-05105(2).

8. The Parents assert that the February 2, 2022 PWN (P27pp5-6)<sup>13</sup> failed to provide them with proper notice of its refusal of their request for a 1:1 paraeducator and a half-time placement at HOLS. Parent's Post-Hearing Brief, p.60. This PWN is associated with the IEP meeting held the same day. First, the evidence is not sufficient to find the Mother asked for a 1:1 paraeducator at this IEP meeting. The Mother is unsure she asked for a 1:1 paraeducator at this meeting. Finding of Fact (FOF) 179. And there is no evidence of the Mother requesting a half-time placement at HOLS at this IEP meeting. However, to the any extent such omissions constitute a procedural violation of the IDEA, it is concluded that the Parents have not proven such a violation warrants any remedy. The Mother made Parents' counsel aware of the alleged omission in the PWN. Parents' counsel then requested the District reissue the PWN to specifically address the Mother's request for a 1:1 paraeducator.<sup>14</sup> Therefore, Parents' counsel was aware of this alleged omission. The Mother contends that the impact of not receiving a corrected PWN was that nothing got accomplished, issues were not resolved, and it was hard for the Parents to know what they were looking at in the future.

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<sup>13</sup> P27pp5-6 is labeled as a "Draft." This is the PWN included with the email from Parents' counsel to District's counsel on February 4, 2020. (P27pp1-2). There is also an identical copy of this PWN without the draft designation in the evidence. (D10pp3-4).

<sup>14</sup> There was no request to correct the PWN regarding any request for a half-time placement at HOLS. See P27p1.

This is not credible. At the time Parents were represented by legal counsel and had informed their counsel about the alleged omissions in the PWN. Given counsel was informed, it is not credible that the Parents were denied any knowledge or information needed to participate in the decision-making process regarding provision of FAPE to the Student, that any such omission denied the Student FAPE, or that any such omission caused a deprivation of an educational benefit to the Student. Accordingly, to the extent there were in fact any such omissions in the PWN, it is concluded that such omissions warrant no remedy for the Parents.

*ISSUE: Whether the District denied the Student FAPE by determining to change the Student's placement outside of an IEP team meeting.*

9. The Parents argue that the Student's transfer from Skyline to Wainwright to start the 2021-2022 school year constituted a change in the Student's education placement rather than a change in the physical location where she received her educational services. Parent's Post-Hearing Brief, pp. 54-57. Because this transfer occurred without an IEP team meeting to first consider the transfer, the Parents argue were denied meaningful participation in the decision to change the Student's educational placement.

10. The Parents argue that upon entering Wainwright the District significantly amended the Student's IEP, and this significant amendment resulted in a change in educational placement rather than merely a change in physical location for the Student. The significant amendment of the Student's IEP was the change in setting for the Student's social/emotional/behavioral SDI from a special education setting at Skyline to a general education setting at Wainwright. The Parents rely on the proposition that this change decreased the Student's already minimal time in a special education setting from 90 minutes per week at Skyline to 60 minutes per week at Wainwright without any indication of a need to change the setting. Therefore, this was a significant change in the Student's educational placement. This argument is not persuasive. There is no evidence to conclude this change from a special education setting to a general education setting had any material effect on the provision of the Student's social/emotional/behavioral SDI, nor on the Student's receipt of an educational benefit. It is concluded that the IEP amendment at Wainwright was not a significant alteration or change in the Student's educational placement, and the transfer from Skyline to Wainwright was a change in the physical location of the Student's educational placement. Accordingly, it is concluded that the District did not change the Student's educational placement outside of an IEP team meeting and did not deny the Parents meaningful participation in determination of the Student's educational placement.

*ISSUE: Whether the District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education beginning April 2020 by failing to provide the*

*Student with an Individualized Education Program (IEP) that included a 1:1 paraeducator, an appropriate amount of Occupational Therapy (OT) services, additional minutes of Specially Designed Instruction (SDI), and Speech/Language as a related service.*

11. The first educational program developed for the Student that falls within the statute of limitations is the District's Continuous Learning Plan in May 2020. It is manifest that the CLP did not offer the Student FAPE. Ms. Nelson, the Student's special education teacher and IEP case manager, admitted as much when she stated that no students were getting all their FAPE due to the unprecedented Covid-19 pandemic. The District did not defend the legal appropriateness of the Student's CLP in its Post-Hearing Brief. It is concluded that the CLP did not offer the Student FAPE.

12. The next IEP for the Student was developed on February 9, 2021. The Parents argue that this IEP did not offer the Student FAPE because it did not have a reading goal. Parent's Post-Hearing Brief, p.41. Whether this IEP offered the Student a reading goal is not at issue. The Parents did not raise any issue regarding goals in any of the IEPs in their Complaint and cannot now raise an issue concerning goals in the Student's IEPs after the fact. The only other argument raised by the Parents going to the appropriateness of this IEP is that the February 2021 evaluation of the Student showed the Student was further behind her peers in reading and writing, which was suggestive that she needed additional help, presumably additional minutes of SDI. *Id.* However, the testimony of Mr. Dykeman, the school psychologist in charge of the evaluation, cited by the Parents does not support this argument. The Parents do not explain in their Post-Hearing Brief why the Student needed a 1:1 paraeducator in this IEP. Ms. Seibel recommended the 30 minutes per week of OT services as a supplementary aid/service in this IEP, and opined it was an appropriate amount. Nor is there evidence to conclude that the Student required speech-language services in this IEP. It is concluded that the Parents have not proven this IEP did not offer the Student FAPE.

13. The next IEP for the Student was developed on September 9, 2021. This was the IEP amendment. Again, the Parents argue there is no reading goal for the Student. Parent's Post-Hearing Brief, p.43. That is not an issue. The Parents argue that Ms. Kilgore changed the Student's service matrix by decreasing the Student's SDI to 60 minutes per week. *Id.* This is inaccurate. The Student's service matrix was modified by changing the setting for the Student's 30 minutes per week of social/emotional/behavioral SDI from a special education setting to a general education setting. This did not decrease the Student's SDI. As best can be understood, the Parents seem to believe that SDI cannot be provided by a general education teacher in a general education setting. That is not correct. A general education teacher can deliver SDI under the supervision of a special education teacher. The Parents argue that the Mother asked for a 1:1 paraeducator in a July 9, 2021 email. P22pp3-4. In

fact, the Mother asked if the Student might qualify for a 1:1 paraeducator. A parent inquiry is not the same as a parent request. The only recommendation for a 1:1 paraeducator at that time from an individual who might be qualified by education, training and experience was the letter from Dr. Davies on June 2, 2016, over five years earlier. Ms. Wilson, the Student's then-current general education teacher, did not believe the Student required a 1:1 paraeducator. In balance, it is concluded that the Parents have not proven the Student required a 1:1 paraeducator in this IEP amendment to obtain FAPE. The Parent's Post-Hearing Brief does not articulate any basis or argument why the Student required any additional time or additional OT services that what this IEP provided. The same is true for any need for speech-language services as a related service. It is concluded that the Parents have not proved this IEP did not provide the Student with FAPE.

14. The next IEP for the Student was developed on January 28, 2022. The Parents argue that because the IEP knew the Student had been receiving 10 hours per week of 1:1 instruction at HOLS for two and a half years, any IEP that offered less than 600 minutes a week of SDI must be inappropriate. First, the Student did not attend HOLS for 10 hours a week for two and a half years. The Student began attending HOLS for 10 hours a week in August 2019. Her tutoring at HOLS was reduced to 4 hours a week in the spring or summer of 2021, likely less than two years later. The January 28, 2022 IEP offered the Student 435 minutes per week of SDI. The IEP team increased the Student's SDI to show the Parents what could be offered the Student if she returned full-time to the District. However, the Parents elected to decline the IEP team's offer, and did not return the Student to full-time attendance at Wainwright. The Parents do not articulate any other reason why this IEP denied the Student FAPE. It is found as fact that the Parents have not proven this IEP would not offer the Student FAPE.

*ISSUE: Whether the District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education beginning April 2020 by failing to amend the Student's IEP to include a 1:1 paraeducator, an appropriate amount of OT services, additional minutes of SDI, and Speech/Language as a related service when the Student did not demonstrate academic progress.*

15. The Parents make three arguments on this issue. Parent's Post-Hearing Brief, pp45-46. First, the Parents argue that the Student's IEP progress reports should be disregarded because the progress reports were reporting on reading goals that were not part of the Student's IEPs from February 2021 to January 2022. Second, the Parents argue that the Student's February 2021 evaluation showed the Student continued to fall further behind her peers. Third, the Parents argue that the Student has continued to read and write at a first-to-second grade level for the last four years.

16. In March 2022, the Student was assessed by Ms. Kilgore using an i-Ready Diagnostic assessment tool. The Student was assessed as reading at the third-grade level. There was no i-Ready assessment of the Student's writing skills. However, the Student's IEP progress reports on his written expression goals do substantiate progress in development of the Student's written expression skills over time. With respect to the Student's February 2021 evaluation, Mr. Dykeman determined the Student was writing in full sentences, but labored at it. The Student's IEP progress reports substantiate he was making progress on his written expression goals.

17. There is no question that the Student's progress in reading and writing has been gradual over time, but that is not the same as no progress. And assessment or testing tools can only provide a snapshot of an individual's skills and abilities at a particular point in time. Further complicating this issue is the fact that the Student has not attended school in the District full time since the start of the 2019-2020 school year because she was spending quite substantial time at HOLS. And even when her time at HOLS decreased to four hours a week, the Parents did not substantially increase her attendance in the District until she returned to three full days a week in February 2022. The Parents also raise the issue of how to determine whether any progress the Student has demonstrated is due to her tutoring at HOLS or her instruction at Skyline and Wainwright. While Ms. Raphael testified any progress is likely to be due to tutoring at HOLS, it has already been examined and found that her opinion merits little to no weight. Ms. Kilgore's opinion that any progress cannot be parsed out between HOLS and the District carries the day. After reviewing all the evidence, it is concluded that while the Student's progress may not have kept pace with all her peers or has not been as rapid as the Parents might expect, the Student has demonstrated progress sufficient to conclude the District was not on reasonable notice that her IEPs should have been amended.

*ISSUE: Whether the District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education beginning April 2020 by materially failing to implement the Student's IEP(s) by not providing all the Student's SDI and related services.*

18. Only material failures to implement an IEP violate the IDEA. *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007). Minor discrepancies in the services required by the IEP do not violate the IDEA. *Id.*

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



\* \* \*

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

*Id.* at 821-22 (Italics in original).

19. It is concluded that the District more likely than not first materially failed to implement the Student's IEP with the closure of all District schools due to the Covid-19 pandemic on March 16, 2020. While this was clearly due to the unprecedented circumstances created by the pandemic rather than any fault of the District, nevertheless the law still required the District to provide all students eligible for special education with FAPE. This failure to implement the Student's IEP continued with the development and implementation of the Student's CLP on May 7, 2020. The CLP has been found inappropriate for the Student. The failure to materially implement the Student's IEP continued until the development and implementation of the Student's February 9, 2021 IEP.

20. Accordingly, it is concluded that the Parents should be awarded a remedy for the period from March 16, 2020, to February 9, 2021. The preponderance of the evidence establishes the District implemented that IEP.

21. The Parents have requested as their remedy reimbursement for the expenses they have incurred providing the Student with tutoring at HOLS. It is concluded that HOLS was a proper placement for reimbursement given the evidence. **The District shall reimburse the Parents for their expenses for tutoring and transporting the Student to and from HOLS for tutoring for the period March 16, 2020, to February 9, 2021.**

22. The Parents did not reduce their earlier request for reimbursement to a sum certain, and the documentation proving a sum certain is extensive. See P36-38. Accordingly, the parties shall proceed as follows. Relying on the evidence at P36-38, the Parents shall calculate their expenses for tutoring and transportation for the period March 16, 2020, through February 9, 2021. The Parents will submit that sum certain to the District. If the District disagrees with that sum certain, the parties shall engage in good-faith efforts to resolve and disagreement and arrive at a mutually agreeable sum certain. If the parties are unable to agree on a sum certain after good-faith efforts, the Parents shall take this Final Order to the Office of Superintendent of Public Instruction for enforcement.

23. The Parents have withdrawn their requested remedy of an appropriate IEP going forward. See Parent's Pos-Hearing Brief, p31.

### FINAL ORDER

The Tacoma School District has violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education for the period beginning March 16, 2020, to February 9, 2021. The Parents are awarded reimbursement for the expense of tutoring and transportation at Hands On Learning Solutions for that period.

Signed on the date of mailing.



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MATTHEW D. WACKER  
Administrative Law Judge  
Office of Administrative Hearings

### Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety (90) days after the ALJ has mailed the final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Legal Services, PO Box 47200, Olympia, WA 98504-7200. To request the administrative record, contact OSPI at [appeals@k12.wa.us](mailto:appeals@k12.wa.us).

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that true copies of this document were served upon the following as indicated:

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Elise Friedrich-Nielsen  
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Dated November 10, 2022, at Seattle, Washington.

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Representative  
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cc: Administrative Resource Services, OSPI