

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Olympia School District

Docket No. 01-2021-OSPI-01236

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

Agency: Office of Superintendent of  
Public Instruction

Program: Special Education

Cause No. 2021-SE-0001

A due process hearing was held before Administrative Law Judge (“ALJ”) Courtney Beebe on May 30, May 31, June 1, June 27, June 28, June 29, November 16, and November 17, 2023. The Adult Student was represented by a suitable representative. The Parent<sup>1</sup> attended the due process hearing. The Olympia School District (“District”) was represented by Philip Thompson, attorney at law. Also, present for the District was Ken Turcotte, Executive Director of Student Support.

**STATEMENT OF THE CASE**

1. The Parent, through privately retained legal counsel,<sup>2</sup> filed a due process hearing request (“Due Process Hearing Request”) on January 4, 2021. At the time the Adult Student was a seventeen-year-old senior and attending Henry M. Jackson High School in the Everett School District.

2. The District filed its response on January 14, 2021 (“District’s Response”). The parties appeared for the first prehearing conference on February 1, 2021. (*Prehearing Order*, February 2, 2021.) The parties agreed that the issue statements in the Due Process Hearing Request were the only issues presented for hearing. (*Id.*) The due process hearing was scheduled for April 19, 20, 21, 22, 23, and 26, 2021, from 9:00 a.m. to 5:00 p.m. The hearing was scheduled to occur by video conference due to the Covid-19 public health emergency. (*Id.*)

3. On March 18, 2021, the due process hearing was continued as per agreement of the parties due to the unavailability of a necessary witness. (*Agreed Order Striking Dates and Continuing Due Process Hearing*, March 18, 2021.) The due process hearing was rescheduled for May 10, 11, 12, 13, 19, and 20, 2021. (*Id.*)

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<sup>1</sup> To ensure confidentiality, names of parents and students are not used.

<sup>2</sup> The Parent of the Student was initially represented by attorney Bo Johnson, Kirby-Johnson Law.

4. On April 26, 2021, the Parent's legal counsel filed a Motion for Leave to Withdraw from Representation and the request was granted. (*Order Granting Leave to Withdraw from Representation of Parent*<sup>3</sup>, April 26, 2021.) The Parent requested a continuance of the due process hearing to obtain new legal representation and the request was granted. (*Second Order Striking Dates and Setting a Prehearing Conference*, April 27, 2021.)

5. On May 4, 2021, the Parent requested a second continuance to obtain legal representation, and the request was granted. (*Second Prehearing Order*, May 5, 2021.) A prehearing conference was scheduled for July 7, 2021, but the Parent did not appear. (*Order of Continuance of Prehearing*, July 7, 2021.)

6. The parties appeared on July 14, 2021, for a prehearing conference and the due process hearing was rescheduled for September 27, September 29, September 30, October 1, and October 4, 2021. (*Third Prehearing Order*, July 14, 2021.) At this prehearing conference, the ALJ advised the Parent on the record that the Adult Student's educational rights would transfer to the Adult Student on her eighteenth birthday, [REDACTED], as per Washington Administrative Code (WAC) 392-172A-05135 (2), and that the Adult Student would be required to represent herself or obtain legal representation.<sup>4</sup> (*Third Prehearing Order*, pp.2-3.)

7. On [REDACTED], the Adult Student turned eighteen-years-old, and her educational rights transferred from the Parent to the Adult Student. (See *Sixth Prehearing Order*, November 24, 2021; *Due Process Hearing Request*, p.3; Tr., p.103 (Adult Student).)

8. On September 20, 2021, the District filed its Witness List, Exhibit List, and Exhibits. (*Order Granting Continuance Request of Adult Student; Order Denying District Request for Dismissal*, pp.1-2.) The Parent and the Adult Student did not file a witness list, exhibit list, or exhibits by the due date of September 20, 2021. (*Id.*) At a prehearing conference on September 21, 2021, the District moved to dismiss the matter for failure to pursue claims and follow directives in prehearing orders. (*Id.*) However, the day before the prehearing conference, the Adult Student requested Americans with Disability Act ("ADA") accommodations. (*Id.*) The due process hearing was continued, and the District's motion was denied. (*Id.*, pp.3-7.)

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<sup>3</sup> The reasons for Mr. Johnsons' withdrawal are listed in the April 26, 2021, Order Granting Leave to Withdraw from Representation of the Parent.

<sup>4</sup> Until such time as a student eligible for special education reaches the age of majority, the student's parents have their own substantive and procedural rights under the Individuals with Disabilities Education Act (IDEA). *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516 (2007). When a student who is eligible for special education reaches the age of majority, however, all rights accorded to the student's parents under the IDEA transfer to the now adult student. Washington Administrative Code (WAC) 392-172A-05135(1)(b).

9. The case was reassigned to another ALJ to ensure availability for the due process hearing. (*Notice of Reassignment*, October 12, 2021.) This matter proceeded with the Adult Student as the party in interest and appearing pro se. (*Fifth Prehearing Order*, October 20, 2021; *Sixth Prehearing Order*, November 24, 2021.) The matter was scheduled for a telephonic due process hearing on March 2, 3, 4, 7, 8, 9, 10, and 11, 2022, from 1:00 p.m. to 5:00 p.m. each day, to accommodate the Adult Student and to comply OAH Covid-19 Emergency Protocols. (*Sixth Prehearing Order*, November 24, 2021.)

10. Between October 12, 2021, and January 6, 2023, the Adult Student requested and received continuances of prehearing conferences and the due process hearing because: 1) the Adult Student continued to seek a legal representation or a suitable representative, and 2) the Adult Student needed time to prepare for the due process hearing. (*Order of Continuance*, January 25, 2022; *Order of Continuance* January 28, 2022; *Order of Continuance*, February 4, 2022; *Seventh Prehearing Order*, February 16, 2022; *Eighth Prehearing Order*, March 16, 2022; *Ninth Prehearing Order*, April 13, 2022; *Tenth Prehearing Order*, June 7, 2022; *Eleventh Prehearing Order*, June 22, 2022; *Order Setting Prehearing Conference*, August 9, 2022; *Twelfth Prehearing Order*, August 26, 2022; *Order Setting Prehearing Conference*, August 30, 2022; *Order Setting Prehearing Conference*, September 12, 2022; *Order Setting Prehearing Conference*, October 12, 2022; *Order Setting Prehearing Conference*, November 1, 2022; *Order Setting Prehearing Conference*, November 8, 2022; *Order Setting Prehearing Conference*, December 29, 2022; *Order Setting Prehearing Conference*, January 6, 2023; and *Order of Continuance*, February 6, 2023.)<sup>5</sup>

11. The matter was reassigned to ALJ Courtney E. Beebe on March 6, 2023, and Keith Altman, attorney at law, filed a Notice of Appearance on March 2, 2023, appearing as the Adult Student's OAH appointed suitable representative.<sup>6</sup> (*Notice of Reassignment of Administrative Law Judge*, March 6, 2023, and *Notice of Appearance*, March 2, 2023.)

12. The parties appeared for a prehearing conference on April 10, 2023, and the matter was scheduled for a due process hearing on May 30, May 31, and June 1, 2023, from 9:00 a.m. to 3:00 p.m., with the verbal consent of the Adult Student on the record. (*Prehearing Order*, April 11, 2023; *Audio Recording of Prehearing Conference*, April 10, 2023.) The due process hearing was scheduled to occur in-person at the request of the Adult Student. (*Id.*) The District was ordered to provide "a

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<sup>5</sup> During this period, the matter was also reassigned to other ALJs to ensure availability for the due process hearing.

<sup>6</sup> Mr. Altman was appointed as a suitable representative as per WAC 10-24-010.

large video screen to allow the Adult Student to view documents electronically, if necessary,” but the Adult Student and her attorney were directed to “consult regarding the means by which the Adult Student will view exhibits.” (*Id.*, p.2.)

13. On the record at the April 10, 2023, prehearing conference, the parties confirmed that the issues for the due process hearing were the same issue statements presented in the January 4, 2021, Due Process Hearing Request and the February 2, 2021, Prehearing Order. (*Id.*, pp.2-3.) On May 22, 2023, the Adult Student filed Exhibits P1 through P24, and her Witness List and Exhibit List. The Adult Student filed Exhibits P25, P26, P27, and P28, on May 25, 2023. The District relied on its Witness List, Exhibit List, and Exhibits filed on September 20, 2021.

14. On May 23, 2023, the Adult Student’s legal representative emailed a request to change the time of the hearing to 1:00 p.m. to 5:00 p.m. each day to accommodate the Adult Student (*Email*, May 23, 2023.) The District objected. (*Email*, May 24, 2023.) The parties appeared for a prehearing conference on May 25, 2023, and presented arguments regarding the Adult Student’s motion. (*Fourteenth Prehearing Order*, pp.1-3.) The Adult Student’s motion was granted, and the due process hearing was rescheduled to occur from 1:00 p.m. to 5:00 p.m. each day, and the parties were instructed to make witnesses available on June 2, 2023. (*Id.*)

15. The due process hearing commenced on May 30, May 31, and June 1, 2023. The Parent attended the entirety of the hearing at the request of the Adult Student. The due process hearing was continued after June 1, 2023, to allow for the further presentation of witness testimony and evidence. (*Order Continuing Due Process Hearing and Order Setting Prehearing Conference*, June 2, 2023; *Order Setting Continued Due Process Hearing*, June 7, 2023.) The due process hearing reconvened on June 27, 28, and 29, 2023.

16. At approximately 10:30 a.m. on June 28, 2023, the Parent emailed Mr. Altman seeking to terminate the attorney-client relationship between he and the Adult Student. (Tr., pp.508-511 (K. Altman).) On the record at the due process hearing on June 28, 2023, at 1:00 p.m., the Adult Student terminated the attorney-client relationship with Mr. Altman. (Tr., pp.508-518 (Adult Student) (K. Altman) (ALJ Beebe).) The Parent, at the request of the Adult Student, was appointed the Adult Student’s suitable representative for the remainder of the hearing. (Tr., pp.510-518 (Adult Student) (ALJ Beebe) (Parent).)

17. At the end of the day on June 29, 2023, the due process hearing was continued to allow for additional testimony of witnesses and presentation of evidence. (*Order of Continuance*, July 3, 2023; *Order Setting Due Process Hearing*; *Order Scheduling and Limiting Testimony Order for Submission of Exhibits*, July 14,

2023; *Second Order Continuing Due Process Hearing*, August 21, 2023; *Order of Continuance*, August 28, 2023; *Order of Continuance*, September 6, 2023; *Third Order Setting Due Process Hearing; Third Order Scheduling and Limiting Testimony; Third Order for Submission of Exhibits*, September 29, 2023.)

18. The Parent filed additional exhibits P1.1 through P4.0 and a Parent's Audio Exhibit, on November 9, 2023, and November 10, 2023. The due process hearing reconvened on November 16 and November 17, 2023.

19. The Parent attended in person on November 16, 2023, and the hearing schedule was modified to begin at 9:00 a.m. at the Parent's request. The Adult Student did not attend the due process hearing on November 16, 2023.

20. The Parent and the Adult Student attended the due process hearing by video conference on November 17, 2023, and the District representative and legal representative attended in person with the ALJ and the court reporter. (Tr., pp.897-899.) The presentation of evidence was completed on November 17, 2023, and an "Order Setting Due Date for Post-Hearing Briefs" was issued on November 20, 2023. The parties were ordered to file their closing briefs by January 26, 2024, by 5:00 p.m.

21. On January 22, 2024, the District requested an additional week to file its closing brief, and the Parent agreed to the extension of time. On January 24, 2024, an "Order Extending Due Date for Post-Hearing Briefs" issued and ordered the parties to file closing briefs "by 5:00 p.m. on February 2, 2024."

22. On February 2, 2024, the District filed its closing brief at 4:04 p.m. The record closed on February 2, 2024, at 5:00 p.m. The Parent filed her closing brief at 6:08 p.m. on February 2, 2024, after the record closed. The Parent's closing brief was not considered in rendering a decision because it was not timely filed as ordered in the January 22, 2024, Order Extending Due Date for Post-Hearing Briefs. The Parent also did not request a continuance or notify OAH of any difficulties with using secure email or the participant portal to file the closing brief.

### **EVIDENCE RELIED UPON**

#### **Exhibits Admitted:**

District's Exhibits: D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, D13, D14, D15, D16, D17, D18, D19, D20, D21, D22, D23, D24, D25, D26, D27, D28, D29, D30, D31, D32, and D33.

Parent's Exhibits: P5, P6, P7, P8, P9, P10, P11, P12, P13, P14, P15, P16, P17, P18, P19, P20, P21, P22, P23, and P24.

Exhibits Not Admitted: P1, P2, P3, P4, P25, P26, P27, P28, P1.1, P1.2, P1.3, P2.1, P2.2, P2.3, P2.4, P2.5, P3.1, P3.2, P3.3, P4.0, and Parent's Video.

**Witnesses Heard (in order of appearance)**: Gayle Fay, Ph.D; Adult Student; Kari Lewinsohn; Joseph Dlugo; Susan McDonald, Matthew Epplin, Thomas Parnell, Dr. Franklin Wood, M.D.; and Parent.

### **ISSUES**

The time period at issue is January 4, 2019, to June 6, 2019.<sup>7</sup> For this period, the Adult Student raised the following issues in the January 4, 2021, Due Process Hearing Request:

*Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by failing to:*

- i. Provide the Student with instruction in reading and writing Braille that should have included instruction in the Unified English Braille Code and the Nemeth Code for Mathematics;*
- ii. Adequately implement the orientation and mobility services;*
- iii. Provide the Student with adequate counseling / mental health / psychological services;*
- iv. Adequately consider the Student's specific situation and needs related to vision impairment and other disabilities, and consequently failed to adhere to the IDEA's mandates, Washington's rules for the provision of special education (Chapter 392-172A WAC et seq.,) and the U.S. Supreme Court's guidance issues in Endrew F.;*

The Adult Student makes the following requests for relief:

- i. Compensatory education to remedy the deficiencies created by the violations;*
- ii. Compensatory education for items required by the Student's disabilities but not provided;*
- iii. Compensatory education in the form of Braille instruction, adequate visual / orientation / mobility services, and mental / emotional treatment; and*

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<sup>7</sup> See Conclusions of Law Section E, *infra*.

- iv. Attorneys' fees;
- v. Or other equitable remedies, as appropriate.

(Due Process Hearing Request, p.9; Prehearing Order, February 2, 2021.)

## FINDINGS OF FACT

### **The Adult Student**

1. The Adult Student has a severe visual impairment due to [REDACTED]. [REDACTED]. (Due Process Hearing Request, p.4; D9, p.9; Tr., pp.103-108 (Adult Student).) As per an evaluation performed by the District on November 8, 2006, the Adult Student initially became eligible for special education services in the category of vision impairment. (D9, p.5.) Subsequently, the District performed an evaluation on November 6, 2009, and concluded the Adult Student remained eligible due to a vision impairment. (*Id.*) Based on evaluations performed on October 17, 2012, and June 3, 2014, the Adult Student “was found to no longer be eligible for special education,” and was provided with Rehabilitation Act 504 Plan. (*Id.*) However, due to concerns with the Adult Student’s abilities in math, the District reevaluated the Adult Student again on January 28, 2015, and concluded that the Adult Student was eligible for special education services due to her visual impairment and qualified for specially designed instruction (“SDI”) in the areas of math, social / emotional, and vision support services. (*Id.*)

### **2016-2017 Academic Year – Washington State School for the Blind**

2. For eight grade the Adult Student attended the Washington State School for the Blind (“WSSB”) during the 2016-2017 academic year. (D9, p.5; Tr., pp.944 (Adult Student); 208 (Lewinsohn).) In January 2017, the WSSB assessed the Adult Student, concluding that the Adult Student was eligible for special education due to a disability in “visual impairment.” (P5, p.5.)<sup>8</sup> The Adult Student was deemed eligible for SDI and related services in the areas of social / emotional and math. (P5, p.6.) The Adult Student received orientation and mobility (“O&M”) services, and vision supports and services which “are naturally embedded into classrooms” at WSSB. (P7, p.18.)<sup>9</sup> Even

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<sup>8</sup> The Adult Student was not found eligible in the areas of reading and writing because: “[The Adult Student] receives handouts in 18-point font . . . . In November she received a school issued iPad for school assignments/projects. Often, she takes pictures of handouts and accesses them on the iPad. With handwritten assignments, her writing is very legible. Her comprehension skills in the area of literature appear to be above grade level.” (P5, p.5.)

<sup>9</sup> O&M services are part of the “expanded core curriculum for student with blindness and visual impairment.” (Tr., p.275 (Dlugo).) O&M is an element “that deals with safe and efficient travel skills for student with blindness and visual impairments,” including crossing streets, shopping, riding public transportation, and communicating with the public. (*Id.*)

without O&M services, however, the Adult Student was able to independently travel around the WSSB campus in just a few days, and able to travel safely off campus on residential streets in varying weather conditions, use pedestrian signals to cross the street and independently navigate to and through downtown Vancouver. (P5, pp.4-5.)

3. On January 17, 2017, the WSSB offered the Adult Student an Individualized Educational Program (“IEP”) that provided for math SDI 30 minutes, three times per week from a teacher of the visually impaired (“TVI”)<sup>10</sup> and counseling 30 minutes, one time per week. (P6, p.12.) The WSSB also offered 90 minutes per month of O&M related services and the following accommodations:

Accommodations	Frequency	Location	Duration
Access to computer with magnification	As needed / requested	All Educational Environments	01/18/2017 to 01/17/2018
Extended Time 100%	As needed	Testing Environments	01/18/2017 to 01/17/2018
Frequent breaks, testing in short segments	As needed / requested	Testing Environments	01/18/2017 to 01/17/2018
Large Print	As needed / requested	Classroom	01/18/2017 to 01/17/2018
Large Print	All non-digital medium	Testing Environments	01/18/2017 to 01/17/2018
Monocular	As needed / requested	Classroom	01/18/2017 to 01/17/2018
Proctor entered response	As needed / requested	Testing Environments	01/18/2017 to 01/17/2018
Protective eyewear and sun hat	As needed / requested	Outside Environments	01/18/2017 to 01/17/2018
Student will meet with a staff member prior to leaving campus and discuss what to expect on the trip	All off-campus activities	All off-campus activities	01/18/2017 to 01/17/2018
Use of screen enlargement programs	All digitally administered tests	Testing Environments	01/18/2017 to 01/17/2018

(P6, p.9.) The 2017 WSSB IEP team specifically concluded that braille was not appropriate for the Adult Student because she is “visually impaired and uses large print as her primary learning medium.” (P6, pp.2-3.)

4. The WSSB IEP team, including the Parent, met on January 17, 2017, to discuss the WSSB IEP, but the Parent asked to continue the meeting to another date. (P7, p.18.) However, “between 1/18 and 1/25, [WSSB] staff and administration . . . made multiple unsuccessful attempts to contact [the Parent] through email and phone to re-schedule.” (P7, p.18.). The Parent did not respond and WSSB issued a

<sup>10</sup> A teacher for the visually impaired supports the “academic program of a student with visual impairment in their school,” and “access to the curriculum [is] the main focus.” (Tr., pp.275-276 (Dlugo).) A TVI will work on “adapting materials for . . . assistive technology use to access the curriculum. They will work on teaching braille, instructing in the use of various tools that would allow the student to perform without the limitations that a visual impairment might bring.” (*Id.*)



prior written notice (“PWN”) on January 25, 2017, implementing the January 17, 2017, IEP. (P7, pp.1-21.)

5. The Adult Student left WSSB at the end of the 2017-2018 academic year, accusing staff at WSSB of harassment, intimidation, and bullying. (Tr., pp.948-950 (Adult Student).)

### **District January 25, 2018, Reevaluation**

6. For the 2017-2018 academic year, the Adult Student enrolled as a freshman at Capital High School in the District. (D9, p.5; Tr., pp. 208 (Lewinsohn) 278 (Dlugo).) In January 2018, the District initiated a reevaluation (“January 25, 2018, Reevaluation”) of the Adult Student. (D9, pp.1-2; Tr., pp.214-215 (Lewinsohn).) The Parent consented to a reevaluation in the areas of social / emotional, cognitive, communication, vision and mobility, observation, adaptive, academic, assistive technology, and vocational. (D9, p1; Tr., pp.214-215 (Lewinsohn).) The Parent did not request an evaluation for braille instruction. (D9, p.1; Tr., pp.214-215 (Lewinsohn).)

7. The members of the reevaluation team (“2018 Reevaluation Team”) were the Parent; Eric Green, School Psychologist; Matthew Epplin,<sup>11</sup> Special Education Teacher; Sue McDonald,<sup>12</sup> Vision Specialist; Pam Tebeau, Transition Coordinator; Joe Dlugo,<sup>13</sup> WSSB O&M Specialist; Alex Parker, General Education Teacher; and Suzanne Anthony, Assistive Technology Specialist. (D9, p.3; Tr., pp.214-215 (Lewinsohn); 531-534 (McDonald); 279 (Dlugo); 621 (Epplin).)

8. In the area of medical-physical, the 2018 Reevaluation Team reviewed the Adult Student’s diagnosis of [REDACTED] noting that it:

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<sup>11</sup> Matthew Epplin earned his bachelor’s degree in history, and a master’s degree in education from Portland State University. (Tr., pp. 619-620 (Epplin).) Mr. Epplin is a certificated teacher in Washington in education and special education and has taught students since 2011. (*Id.*) Mr. Epplin was assigned as the Adult Student’s case manager in the February 12, 2018, IEP, and he taught the Adult Student in his special education math class during the 2018-2019 academic year. (Tr., p.626 (Epplin).)

<sup>12</sup> Sue McDonald earned her bachelor’s degree in education from the University of Portland and a master’s in deaf education from Lewis and Clark College, and a certification as a teacher of the visually impaired from Portland State University. (Tr., pp.528-529 (McDonald).) Ms. McDonald is a certificated special education teacher in Washington and has worked as a teacher since 1998 and as a teacher of special education for the deaf and visually impaired since 2006. (*Id.*) Ms. McDonald, like the Adult Student, also has a visual condition (nystagmus) and is diagnosed with an auditory processing difficulty. (*Id.*) Ms. McDonald is certified to deliver braille instruction. (Tr., p.536-537 (McDonald).)

<sup>13</sup> Joe Dlugo earned his bachelor’s degree in general studies from Columbia College, a master’s degree in special education, and a master’s degree in special education orientation and mobility from Northern Illinois University. (Tr., pp.273-274 (Dlugo).) Mr. Dlugo has a certificate in teaching students with visual impairment from Portland State University and a certificate in assistive technology for the blind and vision impaired from the University of Massachusetts, Boston. (*Id.*) Mr. Dlugo worked for various schools in California and Nevada between 2004-2005 and has worked for the WSSB since 2005 as an O&M specialist. (*Id.*) Mr. Dlugo serves as the statewide mentor for OSPI’s Washington Sensory Disability Service, as part of a partnership with Steven F. Austin University and the WSSB. (*Id.*)

*results in the loss of pigment in the hair, skin, and eyes (the iris and retina.) The eye involvement causes decreased sharpness of vision, nystagmus (rapid eye movement) and increased sensitivity to light. [The Adult Student] is legally blind. Her mother also reports that [the Adult Student] can become sunburned in less than 20 minutes. There are no other current health issues at this time.*

(D9, p.9.) The Adult Student's uncorrected vision was reported to be 20/400 in each eye, but her corrected vision was 20/150 in her right eye and 20/100 in her left eye. (D9, pp.21-24.)

9. The school psychologist used the Behavior Assessment for Children-3 ("BASC-3") tool to assess the Adult Student in the area of social / emotional behavior. (D9, pp.11-12; Tr., pp.218-219 (Lewinsohn); 678-679, 690-691 (Parnell).) The behavior rating scales were completed by the Parent, Mr. Epplin, and Alex Parker (general education Spanish teacher). (*Id.*) The Adult Student did not complete a behavior rating scale, which is recommended. (Tr., pp.678-679 (Parnell).) The Adult Student's scores were in the average range and her behaviors were "felt to be appropriate", with "clinically significant" elevated scores in the areas of anxiety and somatization. (D9, pp11-12; P9, pp.7-8; Tr., pp.218-219 (Lewinsohn); 678-679 (Parnell).)

10. In the area of adaptive, the ABAS-3 assessment showed that the Adult Student "could benefit from developing more independence in adaptive skills" because "due to vision limitations, she does not access resources as independently as others her age. Adaptive skills could likely be addressed through mobility and orientation skills." (D9, p.14; Tr., pp.218-219 (Lewinsohn).)

11. In the area of cognitive, the Adult Student showed "strong cognitive ability" on the Wechsler Intelligence Scale for Children - IV ("WISC-IV"). (D9, p.17; Tr., pp.219-221 (Lewinsohn).) In the area of academic, the Weschler Individual Achievement Test - III ("WIAT-III") results revealed that the Adult Student "has good reading and writing skills. She needs no [SDI] in these academic areas. Her math skills are weak. [SDI] in math is needed to support her in making progress toward meeting grade level expectations." (D9, p 18; Tr., pp.220-221 (Lewinsohn).) At the time of the reevaluation, the Adult Student was enrolled in five general education classes and one special education class for math. (D9, p.9.)

12. Regarding the Adult Student's communication skills, the assessments confirmed that the Adult Student "demonstrated adequate communication skills during informal testing, and communication services are not recommended at this time." (D9, p.19; Tr., pp.222-223 (Lewinsohn).)

13. The Adult Student was also reevaluated in assistive technology to determine eligibility for related services and accommodations. (D9, p.20; Tr., pp.222-224 (Lewinsohn); 624-626 (Epplin).) Specifically, the following results and recommendations were included in the 2018 Reevaluation report:

*Reading: [Adult Student] is able, and prefers to, read black on white text. She is able to read fonts enlarged to 18-24, depending on the font and materials presented, at 170 words per minute. She is accurate in her understanding of the materials. She requires that light is dimmed, presented from behind, and at different angles to allow her to see her pages accurately.*

*Note Taking: [Adult Student] has difficulty with note taking in some of her classes. She uses Doceri<sup>14</sup> to help get information (taking a picture with her phone or iPad) and she is generally able to access her needed materials via Schoology.<sup>15</sup> For the classes that are not provided in Schoology or where use of Doceri is not optimal, her teaching team may need to provide her with notes to help her access the materials outside of class.*

*Writing: Student is able to access a typical keyboard, texting features on her phone, Google tools in her student Google Docs, and does use the speech to text options<sup>16</sup> (STT) on her phone. Her team would like to see her using a keyboard for more of her writing options or STT tools to allow her to write more, and vary her writing, to provide more information about what she knows and understands. She may also need access and time to learn to use tools that offer annotation (write on document) to complete assignments.*

*Over the years she has trialed a variety of options to see what works the best for her to access school tasks. She currently uses her phone and iPad to access her work. She has been provided access to*

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<sup>14</sup> Doceri is a computer system that “interfaced with the teacher’s computer so that [the Adult Student] was able to get notes and do screenshots and have things that were up on the board accessible for her.” (Tr., p.223 (Lewinsohn).)

<sup>15</sup> Schoology is a “platform for teachers to post assignments, and they could also do some sort of conversation back and forth between the teacher and the student withing the system. And the teachers can also post readings and links and videos and things in there for student to access what’s going on in the classroom.” (Tr., pp.225-226 (Lewinsohn); 587-589 (McDonald).)

<sup>16</sup> Speech-to-text allows for a student to speak into an iPhone, iPad or computer and the computer would translate the speech to written text. (Tr., pp.584-587 (McDonald).) Voiceover is a program on all iPhones and iPads that creates an auditory reading of the text on the screen. (*Id.*)

*Bookshare<sup>17</sup>, Doceri, magnifying options, and a school-system based means of presenting information digitally, called Schoology (online or app on her phone).*

(D9, pp.21-22; Tr., pp.225-226 (Lewinsohn); 624-626 (Epplin).) Based on this information, it was concluded that:

*the Student is able to use the vision she has to independently access written materials in the classroom with frequent eye breaks and enlarged materials. She likes using her phone to help her access materials and does know how to use the Doceri feature on the iPad to access the teacher's computer screen. She is able to navigate and participate in most areas of her school day independently . . . Her team is concerned that she is not fully utilizing all the options available to her on the iPad / tablet and would like to see her use it consistently in school.*

(D9, p.22; Tr., pp.624-626 (Epplin).) The 2018 Reevaluation Team included a series of recommended assistive technology resources. (*Id.*)

14. In addition to the WIAT-III academic assessment in reading and writing, Ms. McDonald assessed the Adult Student in reading and vision using the informal reading inventory Jerry Johns. (D9, p.24; Tr., p.532 (McDonald).) The Adult Student read between 150-176 words per minute at the 8<sup>th</sup> and 9<sup>th</sup> grade level using 18-to-20-point font. (*Id.*) More specifically, the Adult Student's visual reading capability was reflected in the following assessment report:

*[The Adult Student] read 4 different stories. Two of the stories were in 18-point print and two were in 20-point print. She stated that she prefers 24-point print.*

*8<sup>th</sup> grade 18 point print 172 words per minute 8 out of 10 questions correct.*

*9<sup>th</sup> grade 18 point print 154 words per minute 10 out of 10 questions correct.*

*8<sup>th</sup> grade 20 point print 176 words per minute 8 out of 10 questions correct.*

*9<sup>th</sup> grade 20 point print 156 words per minute 9 out of 10 questions correct.*

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<sup>17</sup> Bookshare is a program that allows students to download books from a library to an iPad or Chromebook and the program reads the text in an auditory robot voice. (Tr., pp.584-585 (McDonald).)

*[The Adult Student] prefers 24-point print but is able to read 18-point print on white paper. [The Adult Student] has been successful in the past using the iPad with the doceri program.*

*(Id.)*

15. In the area of vision and mobility, the Adult Student was assessed by Mr. Dlugo. (D9, pp.24-26; Tr., p.279 (Dlugo).) Mr. Dlugo worked as the Adult Student's O&M specialist at WSSB and reported that the Adult Student was trained to use a white cane<sup>18</sup> but "she has not elected to use it." (D9, p.24; Tr., pp.227 (Lewinsohn); 282-283 (Dlugo).) Mr. Dlugo also reported that the Adult Student was able to read four different stories in 18-point and 20-point font, and "preferred black print on white paper," but "currently, [the Adult Student] is not coming to class prepared." (D9, p.24; Tr., pp.226-227 (Lewinsohn); 282-284 (Dlugo).)

16. Mr. Dlugo used the Michigan MDE-LIO goal bank<sup>19</sup> and the EVS Orientation and Mobility Screening<sup>20</sup> tools to assess the Adult Student. (D9, pp.24-26; Tr., p. 280 (Dlugo).) The assessments showed that the Adult Student could perform "8/8 indoor travel skills<sup>21</sup> tested from the MDE-LIO goal bank" when navigating the school campus. (D9, pp.24-26; Tr., pp.283-284 (Dlugo).) Mr. Dlugo noted that the Adult Student "seemed pretty knowledgeable of the environment at Capital High School [and] its layout. There was no issue really with. . . having difficulty with walls or large obstacles." *(Id.)* He observed the Adult Student traveling in crowded hallways and "she looked pretty confident doing that . . . She didn't appear to struggle. Perhaps some orientation issues where she wasn't familiar where every room number was, but . . . that didn't seem to cause serious difficulties for her." *(Id.)*

17. Mr. Dlugo evaluated the Student in the area of public transportation, with the understanding that when the Adult Student lived in Vancouver, she used public transportation and was currently learning the Olympia Intercity Transit bus system. (D9, p.25; Tr., pp.284-286 (Dlugo).) The Student was able to perform "10/14 public transportation skills tests (71%) from the MDE-LIO goal bank." (D9, p.25; Tr., pp.286-

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<sup>18</sup> A white cane is an "advocacy tool," that assists the user with safely navigating their environment and also signals to others that the person is visually impaired or blind and may have certain needs. (Tr., pp.282-283 (Dlugo).)

<sup>19</sup> The "Michigan Department of Education Low Incidence Outreach Orientation and Mobility Goal Bank" is a regularly used and standardized O&M assessment tool. (Tr., p.280 (Dlugo).)

<sup>20</sup> The Educational Vision Services ("EVS") is an organization that publishes an O&M screening tool that is "used as the first step in an orientation and mobility evaluation. It's a fairly simple tool that outlines some typical orientation and mobility needs." (Tr., p.280 (Dlugo).)

<sup>21</sup> Indoor travel skills include "traveling, obstacles, crowded hallways, and navigating with room numbers and landmarks." (Tr., p.284 (Dlugo).)

288 (Dlugo).) The areas the Adult Student showed difficulty were “paying for her ride with the pay machine and communicating with the driver.” (*Id.*) Mr. Dlugo found the Adult Student to be “very intelligent” and noted a strength in communication and believed that she would learn these skills quickly.<sup>22</sup> (*Id.*)

18. Mr. Dlugo also assessed the Adult Student in street crossings, and she was able to perform “9/12 traffic light street crossing skills tested (75%) from the MDE-LIO goal bank.” (D9, pp.24-25; Tr., pp.288-290 (Dlugo).) Mr. Dlugo noted a concern that the Adult Student had a tendency to look straight forward and rely on pedestrian controls but needed practice scanning for traffic or potential hazards. (Tr., pp.288-290 (Dlugo).)

19. Mr. Dlugo recommended the Adult Student continue to receive O&M related services. (D9, pp.24-26; Tr., p.279 (Dlugo).)

20. At the January 25, 2018, Reevaluation meeting, the 2018 Reevaluation Team, including the Parent, determined that the Adult Student was eligible for special education services due to a disability in visual impairment, and that she qualified for SDI in the areas of math, adaptive, vision, and O&M services. (D9, pp.5-7; P9, pp.1-2; Tr., pp.216-217 (Lewinsohn).)

21. The 2018 Reevaluation Team, including the Parent, also determined that the Adult Student was not eligible for SDI and related services in the area of social / emotional and did not recommend counseling, mental health, or psychological services. (Tr., pp.403-404 (Lewinsohn).) The 2018 Reevaluation Team, including the Parent, determined that the Adult Student was not eligible for SDI and related services in the area of reading and writing, and did not recommend that the Adult Student receive braille instruction. (Tr., pp.403-404 (Lewinsohn); 532 (McDonald).)

22. A PWN issued on January 25, 2018, reflecting the 2018 Reevaluation Team’s eligibility determination and recommendations. (D9, p.32; Tr., p.231 (Lewinsohn).) The Parent did not request braille instruction or otherwise dispute the 2018 Reevaluation Teams’ eligibility determination or recommendations. (*Id.*)

## **February 12, 2018, IEP**

23. The Adult Student’s IEP team (“2018 IEP Team”) scheduled a meeting on January 25, 2018, to review a proposed draft IEP, but the Parent cancelled the meeting. (D10, p.1; Tr., pp.231-232 (Lewinsohn).) The meeting was rescheduled for

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<sup>22</sup> Mr. Dlugo did not test the Adult Student in the areas of transferring routes, subways, railways, and multisystem routs because of time constraints and these areas “were not elements that she appeared to be needing to use in the near future or available in this region.” (Tr., pp.286-288 (Dlugo).)

February 1, 2018, and February 12, 2018. (D11, pp.1, 25-26; Tr., pp.232-234 (Lewinsohn).) The 2018 IEP Team included the same individuals as the 2018 Reevaluation Team, with the addition of Dr. Kari Lewinsohn, Administrator / Designee.<sup>23</sup> (D11, p.1; Tr., pp.208-209, 213-214 (Lewinsohn); 290-293 (Dlugo); 532-533 (McDonald); 625-627 (Epplin).) The Parent and the Adult Student attended the February 1, 2018, and February 12, 2018, IEP meetings. (D11, p.3; Tr., pp.232-234 (Lewinsohn).)

24. At the February 1, 2018, and February 12, 2018, IEP meetings the Parent voiced disagreement with several proposed goals, accommodations, and modifications. (D11, p.25; Tr., pp.233-234 (Lewinsohn); 291-292 (Dlugo).) The IEP Team agreed to amend the proposed draft IEP<sup>24</sup> to include the same ten accommodations from the WSSB January 25, 2017, IEP, and also added accommodations requested by the Parent:

Accommodations	Frequency	Location	Duration
Large Print	During Testing	Testing Location	02/13/2018 to 01/31/2019
More Time	During Testing	Testing Location	02/13/2018 to 01/31/2019
Preferential seating to accommodate vision (low light, close to teacher, windows behind)	Daily	All Educational Settings	02/13/2018 to 01/31/2019
Protective eyewear and sun hat	Daily	Classroom	02/13/2018 to 01/31/2019
Provide a copy of notes / study guide	Daily	Classroom	02/13/2018 to 01/31/2019
Provide orientation to classroom environment (so [Adult Student] can access all parts of the classroom - bookshelves, pencil sharpeners, trash cans, etc..)	As needed	Classroom	02/13/2018 to 01/31/2019
Read-Aloud English	During Testing	Testing Location	02/13/2018 to 01/31/2019
Speech-to-Text	During Testing	Testing Location	02/13/2018 to 01/31/2019
Student training for assistive technology	As Needed	All education environments	02/13/2018 to 01/31/2019
Text-to-Speech	As Needed	Classroom	02/13/2018 to 01/31/2019
Text-to-Speech	During Testing	Testing Location	02/13/2018 to 01/31/2019
Use of speech to text technology	As needed	Classroom	02/13/2018 to

<sup>23</sup> Dr. Lewinsohn earned a doctorate in special education, and master's degrees in education administration and curriculum and instruction. (Tr., pp.205-207, 213 (Lewinsohn).) Dr. Lewinsohn has a bachelor's degree in elementary education with endorsements in special education, elementary education, early learning, and reading. (*Id.*) Dr. Lewinsohn is a credentialed teacher, principal, and superintendent in the State of Washington. (*Id.*) Dr. Lewinsohn was the Director of Secondary Special Education for the District from 2013 to 2019. (*Id.*) Dr. Lewinsohn left the District to accept a position at the North Thurston School District at the end of the 2018-2019 academic year. (*Id.*) Dr. Lewinsohn has worked in education as a teacher, administrator, special education teacher and other positions for over twenty years. (*Id.*)

<sup>24</sup> The Parent's Exhibit P8 is the proposed draft IEP for the January 25, 2018, IEP meeting, and P11, is the IEP proposed draft for the February 1, 2018, IEP meeting. Parent's Exhibit P12 is the same as District's Exhibit D11, the February 12, 2018, IEP that was discussed and amended at the February 12, 2018, IEP meeting, and implemented on February 13, 2018.

<b>Modifications</b>	<b>Frequency</b>	<b>Location</b>	<b>Duration</b>
Access / Use of the following: dimmed lighting in the classroom	Daily	Classroom	02/13/2018 to 01/31/2019
Access / Use of the following: large print books on iPad	Daily	Classroom	02/13/2018 to 01/31/2019
Access / Use of the following: large print textbook when not accessible on the iPad	Daily	Classroom	02/13/2018 to 01/31/2019
Content area: Enlarged print for all written materials	Daily	Classroom	02/13/2018 to 01/31/2019
<b>Supports for School Personnel</b>	<b>Frequency</b>	<b>Location</b>	<b>Duration</b>
Assistive Technology Training for Staff	As needed	All Education settings	02/13/2018 to 01/31/2019

(D11, pp.19-21, 25; Tr., pp.234-236 (Lewinsohn); 538-541 (McDonald).) The 2018 IEP Team also agreed to modify the proposed draft IEP as follows: “added parental concerns, changed a math goal to untimed, agreed to monthly progress reporting, added organization goal, and changed wording in O&M goal.” (D11, pp.1-25; Tr., pp.235-237 (Lewinsohn).) The Parent and the Adult Student did not request braille instruction. (Tr., pp.235-236 (Lewinsohn).)

25. The proposed draft IEP also included SDI in math from a special education teacher (Mr. Epplin) for 55 minutes, five times per week, and vision services from a TVI (Ms. McDonald) for 20 minutes, two times per week. (D11, p.22; Tr., pp.533 (McDonald); 627-628 (Epplin).) In the areas of adaptive and O&M, the proposed draft 2018 IEP required 75 minutes, once a month of adaptive SDI from an O&M specialist (Mr. Dlugo), and 75 minutes, twice per month of O&M SDI from an O&M specialist (Mr. Dlugo). (D11, pp22-23; Tr., pp.291-292 (Dlugo).) The Adult Student spent 82.49% of her time in the general education setting. (*Id.*)

26. The proposed draft IEP did not require the District to provide counseling, mental health, or psychological services because the Adult Student was not eligible for SDI or related services in the area of social / emotional. (Tr., pp.411-412 (Lewinsohn).)

27. The proposed draft IEP did not require the District to provide SDI in the areas of reading and writing because, as per the January 25, 2018, Reevaluation, the Adult Student could read and write at an average or above average level, and therefore was not eligible for SDI or related services in these areas. (D11, pp.1-25; Tr., pp.234-238 (Lewinsohn).)

28. The proposed draft IEP addressed braille instruction by stating that the “Adult Student is visually impaired. She does not require instruction in braille.” (D11, p.5; Tr., pp.235-236 (Lewinsohn); 536-539, 542-543, 564-569, 593-594 (McDonald).) The 2018 IEP Team decision that the Adult Student did not need instruction in



reading or writing braille was made primarily based on the WIAT-III reading and writing results, the Jerry Johns reading assessment, and Ms. McDonald's familiarity<sup>25</sup> with the Adult Student's capabilities because she had worked with the Adult Student since the Adult Student was a first grader. (*Id.*) The WIAT-III result showed that the Adult Student's reading and writing ability fell in the average or high average range. (D9, p.18; Tr., pp.220-221 (Lewinsohn).) The Jerry Johns reading assessment showed that the Adult Student read at an average "rate of 170 words per minute, she is a strong visual learner, and she uses her vision and uses her vision well." (D9, p.24; Tr., p.532 (McDonald).) Also, as reflected in all previous assessments and in Ms. McDonald's experience with the Adult Student, she could access her education using large print materials and assistive technology and read and write at her grade level. (D11, p.5; Tr., pp.235-236 (Lewinsohn); 536-539, 542-543, 564-569, 593-594 (McDonald).) If the District began instructing the Adult Student in braille as a tenth grader, it was Ms. McDonald's professional opinion that she would "never get to 170 words per minute . . . [as] a visual braille reader where they look at the braille and read the braille dots with their eyes...versus tactile." (*Id.*)

29. The Parent and the Adult Student did not request braille instruction at the February 1, 2018, or February 12, 2018, IEP Team meeting. (Tr., pp.235-236 (Lewinsohn).)

30. The District issued a PWN on February 13, 2018, implementing the final version of the IEP ("February 12, 2018, IEP"). (D11, pp.25; Tr., pp.818-819 (Lewinsohn).)

### **Parent's February 12, 2018, IEE Request**

31. At the February 12, 2018, IEP meeting, the Parent voiced a disagreement with the 2018 Reevaluation Team's eligibility determination regarding the area of social / emotional behavior. (D11, p.25; Tr., pp.236-237 (Lewinsohn).) The Parent requested reevaluation of the Adult Student in this area and the District agreed to readminister the BASC-3 assessment and review mental health and medical information from the Adult Student's private providers. (D11, p.25; Tr., pp. 235-238 (Lewinsohn).)

32. On February 16, 2018, the District provided the Parent with a consent form to obtain medical and mental health records, and to conduct the social / emotional reevaluation. (*Id.*) The Parent did not return the consent form and on March 28,

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<sup>25</sup> Ms. McDonald became familiar with the Adult Student in 2009 when the Adult Student was in first grade. (Tr., pp.530-533 (McDonald).) In elementary school, Ms. McDonald attempted to instruct the Adult Student in the use of a monocular, but she refused instruction. (Tr., pp.549-551 (McDonald).) Even though Ms. McDonald did not recommend braille instruction and the Adult Student was able to access her education with her vision, Ms. McDonald offered to instruct the Adult Student in braille starting in 2009. (Tr., pp.564-565 (McDonald).) However, the Parent declined the offer of braille instruction. (Tr., pp.564-565 (McDonald); 836-837 (Parent).)

2018, the District issued a PWN stating that it would not proceed with the social / emotional behavior reevaluation until the Parent provided consent and medical records. (D12, p.1; Tr., pp.236-238 (Lewinsohn).)

33. In May 2018, the Parent requested an Independent Educational Evaluation (“IEE”) in the areas of “social / emotional, functional vision, neuropsychology, hearing, intelligence, communication, physical motor, and academic.” (D13, p.1; Tr., pp.239-240 (Lewinsohn).) On May 29, 2018, the District issued a PWN granting the Parent’s request for an IEE, “although the District believes its [January 25, 2018, Reevaluation] is appropriate.” (*Id.*) The District asked the Parent to select a provider to conduct the IEE, but the Parent did not select a provider for the IEE until April 2019. (Tr., p.240 (Lewinsohn).)

### **Adult Student’s Class Schedule for the 2018-2019 Academic Year and November 16, 2018, Mediation Agreement**

34. When the February 12, 2018, IEP was implemented, the Adult Student was a freshman at Capital High School in the District during the 2017-2018 academic year. (Tr., pp.186-187 (Adult Student); 207-208 (Lewinsohn).) The Adult Student entered her sophomore year at Capital High School in September 2018, for the 2018-2019 academic year and the February 12, 2018, IEP remained in effect. (*Id.*)

35. The Parent, the Adult Student, and the District met in June 2018 to plan the Adult Student’s class schedule for the 2018-2019 academic year, and at this meeting the parties discussed including on-line classes from the Olympia Regional Learning Academy (“ORLA”). (D21, p.7; Tr., pp.254-256, 347-349, 762-763, 768-771 (Lewinsohn).) The purpose of including ORLA on-line classes was to allow the Adult Student more flexibility by attending two general education classes, one elective class, and one special education math class in person at Capital High School, and two on-line classes through ORLA, with twenty-minute eye breaks between classes. (D21, pp.7-8; Tr., pp.347-350 (Lewinsohn).) While the Adult Student’s ORLA classes were on-line, the Adult Student would be physically located at Capital High School and provided a Chromebook and workspace to attend the two ORLA on-line classes. (Tr., pp.349-350 (Lewinsohn).)

36. The District provided the Adult Student with a school office space (typically utilized by certificated staff at Capital High School) to attend ORLA classes and to perform schoolwork. (Tr., pp.630-632 (Epplin); 775-778 (Lewinsohn).) The Adult Student’s ORLA classes were delayed until late September 2018 because the Parent did not attend the ORLA parent orientation. (D21, pp.7-8; Tr., pp.255-256, 346-347 (Lewinsohn).)

37. On November 16, 2018, the District and the Parent engaged in a facilitated mediation. (Tr., pp.240-242 (Lewinsohn).) The parties reached an agreement that the District would reevaluate the Adult Student, the District would also fund an IEE by the provider of the Parent's choice, and the District would provide the Adult Student with a paraeducator.<sup>26</sup> (Tr., pp.240-242 (Lewinsohn).)

38. The District provided a paraeducator to assist the Adult Student with math homework, ORLA classes, and general safety and supervision during transitions, study time, and eye breaks. (Tr., pp.121-123 (Adult Student); 256-257, 349-350 (Lewinsohn).) The paraeducator's presence addressed the Parent's concern that the Adult Student was having difficulties with her classwork, finding office space to work, and traveling throughout the school. (D21, pp.7-8; Tr., pp.126-127 (Adult Student); 347-350 (Lewinsohn).)<sup>27</sup> It also addressed the District's concern about the Adult Student going to the administrative offices or nurse's office for eye breaks, but instead using her cell phone and not timely returning to classes or performing schoolwork. (*Id.*)

39. The February 12, 2018, IEP was not amended to reflect the parties' mediation agreement, but the District issued a PWN on January 23, 2019, reflecting that the Adult Student received "para support." (D15, p.1; Tr., pp.242-244, 349-352 (Lewinsohn).)

40. Capital High School's second quarter of the 2018-2019 academic year began on November 12, 2018, and ended on January 31, 2019. (D2, p.2; Tr., pp.210-211 (Lewinsohn).) The third quarter began on January 31, 2019, and ended on April 12, 2019. (*Id.*)

41. During the second quarter, the Adult Student was enrolled in a general education biology class (Ms. Boisvert), leadership class (Ms. Elam), special education math class (Mr. Epplin), a photo and video class, and a social affect class. (D17, pp.8-9, 13; Tr., pp.189-191 (Adult Student).)

42. During the third quarter, the Adult Student was enrolled in English, Spanish, physical education, physical science, math lab (Mr. Epplin), and choir. (D11, p.6.) For the third quarter physical education requirement the Parent requested that the Adult Student be allowed to attend personal training services outside of school. (D15, p.1; Tr., pp.242-245 (Lewinsohn).) The District agreed that the Adult Student could attend

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<sup>26</sup> The mediation agreement is not part of the record. The parties agree that the November 16, 2018, mediation agreement obligated the District to 1) provide a paraeducator for the Adult Student, 2) reevaluate the Adult Student, and 3) fund an IEE by a provider of the Parent's choice.

<sup>27</sup> The Adult Student engaged in conflict with multiple paraeducators assigned to her but declined to identify the paraeducators by name at the due process hearing. (Tr., pp.127-129 (Adult Student).)

personal training sessions during the last period of the school day for the physical education credit, and that the District would reimburse the Parent for the cost. (*Id.*) The February 12, 2018, IEP, was not amended, but the District issued a PWN on January 23, 2019, changing the Adult Student's school attendance minutes to 1520 for five school periods per day, five days per week to allow for the personal training sessions during the sixth period, five days per week. (*Id.*)

### **Implementation of the February 12, 2018, IEP**

43. Between February 12, 2018, and February 7, 2019, Mr. Dlugo implemented the February 12, 2018, IEP in the areas of adaptive and O&M. (Tr., pp.291-293 (Dlugo).) Mr. Dlugo provided more minutes of SDI and related services per month than were required. (*Id.*) The Adult Student and Mr. Dlugo would meet in a school office after the Adult Student's classes were completed for the day<sup>28</sup> and discuss the O&M lesson. (Tr., pp.292-296 (Dlugo).) Sometimes they would have "long discussions" about street crossings, landmarks, public transportation skills, but they would then "move out into the community" and implement the lessons. (*Id.*)

44. Mr. Dlugo offered to implement all the required O&M and adaptive SDI and related services during the period of January 4, 2019, through June 6, 2019, but the Adult Student was frequently absent from school or declined to leave the Capital High School campus and engage with the O&M lessons.<sup>29</sup> (Tr., pp.325-327, 329-331, 333-338 (Dlugo).) The Adult Student expressed that she often felt a general feeling of anxiety, and Mr. Dlugo passed this information on in the course of professional discussions with District staff, but Mr. Dlugo did not observe that the Adult Student's mental health impacted her ability to access her education. (Tr., pp.327-330 (Dlugo).)

45. Ms. McDonald was assigned as the Adult Student's TVI during the 2018-2019 academic year (Tr., pp.533-535 (McDonald).) Ms. McDonald provided the Adult Student with assistive technology, accommodations, and modifications listed in the February 12, 2018, IEP. (*Id.*) More specifically, Ms. McDonald instructed the Adult Student in coming to class prepared, organizing her materials, and using assistive technology and large print materials. (Tr., pp.534-536 (McDonald).)

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<sup>28</sup> O&M and adaptive services are part of the expanded curriculum and can be "time consuming" at "75 minutes three times a month," so Mr. Dlugo offered the opportunity to work after school to avoid interrupting the Adult Student's academic schedule. (Tr., p.295 (Dlugo).)

<sup>29</sup> The Adult Student expressed a number of reasons for refusing to participate in O&M services, including fear of sun exposure, anxiety about other District staff members, and general disinterest in the O&M services. (Tr., pp.325-327, 329-331, 333-338 (Dlugo).) Mr. Dlugo, at District expense, obtained sunscreen, an umbrella, and engaged with the Adult Student's concerns about going out into the community for services by trying to build her confidence and paying attention to her needs. (*Id.*)

46. Ms. McDonald actively served the Adult Student by providing an additional iPad for English class (because the Adult Student often came to class without her iPad), by loading applications on the Adult Student's iPad as requested and providing the Adult Student large print books and materials. (*Id.*) Ms. McDonald observed the other teachers and ensured that they provided the Adult Student with all requested materials, assistive technology, and that the accommodations and modifications in the February 12, 2018, IEP were implemented in the classroom. (Tr., pp.540-542 (McDonald).) Ms. McDonald observed that the Adult Student was able to successfully use an iPad, iPhone, the Doceri and Schoology platforms, a Chromebook, Bookshare, Speech-to-Text and Voiceover, and large print materials to access her education. (Tr., pp.553-557, 574-577, 5584-586 (McDonald).) Ms. McDonald often communicated with the Adult Student's teachers regarding the Adult Student's abilities to access materials and the teachers confirmed that the Adult Student could access learning materials and assignments, but she was not coming to class prepared. (Tr., pp.556-558 (McDonald).)

47. Ms. McDonald's observations of the Adult Student did not lead her to conclude that the Adult Student should be referred for a social / emotional evaluation or special education services in this area. (Tr., pp.538-540 (McDonald).) Ms. McDonald engaged with the Adult Student as a professional but found that the Adult Student needed stern instructions to ensure that tasks were completed, and follow-through occurred. (Tr., pp.540-542 (McDonald).) Ms. McDonald observed that the Adult Student was able to navigate the school environment and find classrooms, the restroom, and other locations. (Tr., pp.561-563 (McDonald).)

48. Mr. Epplin was assigned as the Adult Student's case manager and delivered math SDI beginning February 13, 2018. (Tr., pp.626-630 (Epplin).) When the Adult Student was in Mr. Epplin's classroom, he found the Adult Student to be competent in her math abilities and not in need of much instruction, but she was often absent from school and needed assistance catching up on assignments. (Tr., pp.631-633 (Epplin).) For math instruction, Mr. Epplin would provide enlarged print materials for Adult Student, or he would use digital materials that could be enlarged by the Adult Student on her iPad or Chromebook. (*Id.*) If the Adult Student was not able to access the math curriculum, she did not inform Mr. Epplin. (*Id.*) Mr. Epplin was responsive to the Adult Student's requests and ordered the Adult Student noise cancelling headphones and a large screen and large keyboard iPad Pro. (D21, p.17; Tr., pp.634-636 (Epplin).) Because the February 12, 2018, IEP accommodations required Mr. Epplin to keep the Adult Student in his class during testing, he required her to stay in class to receive exam assistance. (*Id.*) Lastly, Mr. Epplin ensured that the Adult Student had a personal laptop to watch a movie with the class. (*Id.*)

49. Mr. Epplin, as case manager for the Adult Student, also oversaw the implementation of the accommodations and modifications in the February 12, 2018, IEP, and he was unaware of any instance when a teacher, TVI, or specialist was not providing the required accommodations and modifications for the Adult Student. (Tr., pp.632-633 (Epplin).) Mr. Epplin also observed that the Adult Student was able to navigate through the school hallways and have conversations with him while walking to a classroom or office. (Tr., pp.670-671 (Epplin).)

### **HIB Investigation**

50. As part of the November 16, 2018, mediation agreement, Dr. Lewinsohn was designated as the “point person for the [Adult Student’s IEP] team,” and all the communications regarding the student’s program and placement were routed through her. (Tr., pp.355-356, 406-407 (Lewinsohn).) The Parent frequently emailed Dr. Lewinsohn. (D22<sup>30</sup>; Tr., pp.357-359 (Lewinsohn).)

51. On December 18, 2018, the Parent emailed Dr. Lewinsohn a summary of harassment, bullying, and intimidation complaints the Adult Student lodged against Ms. McDonald, the assigned paraeducators, Mr. Epplin, Ms. Kronenberg (the school nurse), Mr. Dlugo, and other District staff. (D21, p.9; Tr., pp.350-351 (Lewinson).) The District contracted with a risk management investigator at Clear Risk Solutions to conduct a Harassment, Intimidation, and Bullying (“HIB”) investigation of the Adult Student’s allegations of misconduct and discrimination. (D21, pp.1-21; Tr., pp.346-347 (Lewinsohn).)

52. Dr. Lewinsohn and Dr. Grimm, the Dean of Students, held multiple meetings with the Parent regarding the paraeducators’ duties in November 2018, December 2018, and January 2019. (Tr., pp.349-352, 408-412 (Lewinsohn).) Due to the Adult Student’s complaints and because she repeatedly came to Dr. Grimm’s office after escalating the conflict with paraeducators, multiple paraeducators were assigned to the Adult Student between November 16, 2018, and March 28, 2019. (Tr., pp.121-129 (Adult Student); 243-245 (Lewinsohn).)

53. The HIB Investigator summarized his investigation in an HIB report dated March 13, 2020, and concluded that the evidence “does not substantiate a finding that any staff member at Capital High School or any Specialist working with [the Adult Student] violated Olympia School District Policies” prohibiting discrimination, harassment, intimidation, or bullying. (D21, p.21; Tr., pp.408-412 (Lewinsohn).)

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<sup>30</sup> Dr. Lewinsohn testified that she “went through the different emails that we had received and grouped them together so that it was clear how — what the responses were. And so, each of my replies to that group was in blue.” (Tr., pp.357-358 (Lewinsohn).) The emails exclude some emails from the Parent. (Tr., pp.429-430 (Lewinsohn).)

## 2019 Reevaluation

54. As a result of November 16, 2018, mediation, the District, and the Parent agreed that the District would conduct a reevaluation of the Adult Student and that the District would contract with the Parent's provider of choice for an IEE. (D14, pp.1-2; Tr., pp.240-242, 406-410 (Lewinsohn).)

55. On November 29, 2018, the District's school psychologist met with the Parent to obtain her consent to conduct the reevaluation, but the Parent "did not grant consent at that time." (D14, p.1; Tr., pp.241-243, 406-408 (Lewinsohn).) By January 7, 2019, despite multiple attempts to obtain the Parent's consent, the District received no response from the Parent. (*Id.*) The District proceeded with the reevaluation of the Adult Student on January 24, 2019, by asking the Parent to schedule appointments with District staff and by gathering the Adult Student's records for review. (*Id.*) The District notified the Parent by issuing a PWN on January 17, 2019. (*Id.*)

56. The District attempted to reevaluate the Adult Student between January 24, 2019, and March 20, 2019, but the Parent continued to refuse consent and "[the Adult Student] has been unavailable for testing due to numerous student absences during the testing window." (D18, p.1; D23, pp.1-2; Tr., pp.360-362 (Lewinsohn).) Dr. Lewinsohn emailed the Parent on March 7, 2019, asking the Parent to make the Adult Student available for the reevaluation, and noting that the Adult Student last attended school on February 7, 2019. (*Id.*)

57. The District issued a PWN on March 20, 2019, stating that it was extending the time for conducting the reevaluation to ensure that the Adult Student is evaluated in all the areas the Parent requested. (*Id.*) The District sought the Parent's consent for the extension of time, and the Parent made notes and comments on the "Parental Response" form but did not sign the consent form. (D20, pp.1-2.)

58. In January 2019 Mr. Dlugo was able to conduct an O&M reevaluation of the Adult Student in the area of Public Transportation by tasking the Adult Student with "planning a spur-of-the-moment trip from Starbucks to South Puget Sound Community College" using Intercity Transit. (D19, pp.23-24; Tr., pp.299-314 (Dlugo).) The Adult Student used her iPhone to plan the route, obtain departure times, locate the bus stop, use the payment machine, communicate with the bus driver, and she sat near the bus's digital sign so she could observe when she reached her bus stop. (*Id.*) The Adult Student also located a landmark on the college campus and conducted a similar return bus ride to Starbucks. (*Id.*) The Adult Student successfully conducted three street crossings but remained averse to using tools such as a white cane to aid her with navigation and improve her safety. (*Id.*)

59. The Adult Student also performed the activity of making purchases with “very minimal or no assistance.” (*Id.*) Mr. Dlugo recommended continued O&M services of “9 sessions at 90 minutes per year,” to assist with building confidence, using a white cane to cross streets, and develop paratransit skills. (*Id.*) Mr. Dlugo’s assessment led him to conclude that the Adult Student “was very intelligent,” and “has a strong ability to figure things out on her own.” (Tr., pp.338-339 (Dlugo).)

## **Draft 2019 IEP**

60. On January 24, 2019, the District issued a PWN informing the Parent that the Adult Student was entitled to an annual IEP revision because the February 12, 2018, IEP would “expire” on February 12, 2019. (D16, p.1; Tr., pp.246-248 (Lewinsohn).) The Parent requested a facilitated IEP meeting, and the District scheduled a facilitated IEP meeting with Sound Options on January 29, 2019. (*Id.*) The District prepared a draft IEP for the meeting. (*Id.*) The 2019 IEP Team consisted of the same individuals as the 2018 IEP Team, with the addition of Dr. Grimm. (D17, p.4; Tr., pp.298-299 (Dlugo); 248-250 (Lewinsohn).)

61. The Parent cancelled the facilitated January 29, 2019, IEP meeting and asked to postpone the meeting until after the 2019 Reevaluation and IEE were completed. (*Id.*) The District agreed to reschedule a facilitated IEP meeting in the future, but “to avoid having [the Adult Student’s] IEP expire, the team will continue with her current [February 12, 2018] IEP until a date can be agreed upon to review the [draft 2019] IEP. The team is updating the service matrix to reflect [the Adult Student’s] current services and her current state assessments.” (*Id.*)

62. The District further developed the draft 2019 IEP and sent a copy to the Parent on February 1, 2019. (D17, pp.1-3; Tr., pp.247-248 (Lewinsohn).) On February 5, 2019, the Parent emailed comments and the District added them to the draft 2019 IEP as parental concerns. (D17, p.6; Tr., pp.248-249 (Lewinsohn).)

63. The Parent and the Adult Student participated in a 2019 IEP team meeting on February 5, 2019, and it was understood by all participants that a facilitated IEP meeting would be held after the 2019 Reevaluation and IEE were complete. (D17, pp.2-4; Tr., pp.248-249 (Lewinsohn).)

64. In the draft 2019 IEP, District personnel expressed a concern “with [the Adult Student’s] attendance and that she is still looking on her phone during her scheduled eye breaks. As [the Adult Student] is so adept at using technology, she also needs to be monitored to ensure its proper use.” (D17, p.6.) The Adult Student’s general education biology teacher reported that:



*There is always an \*issue\* that needs to be addressed. Often taking 5min+ of class time to take care of. Before class, I'll speak with [the Adult Student] about what I have digitally shared via email (in PDF format as requested by [the Adult Student]). Sometimes there are issues with Tech. There are workarounds if she would let me know. If she doesn't, she'll sit the entire class w/o doing something and then let me know of the issue right as she is leaving. [The Adult Student] wants 1:1 time to talk her through her work. This, I feel, is due to her missing so much class and being "lost" on return. In a class of 31, I do not have the time to do this for every absence. Often she'll not do work until a [study break] when she comes in and works with me personally to do individual assignments. Again, I feel this lack of communication is to get out of the [school] work until she can be told she is doing it "right" vs. taking a risk and possibly getting it wrong when working with her peers. [The Adult Student] is very smart. She is very capable of high-level work. She needs help changing from enabled to empowered (like most teens).*

(D17, p.8.)

65. Similarly, the Adult Student's Leadership teacher reported that:

*[The Adult Student] participates on occasion when it suits her needs . . . The main thing she does is play on her phone. It doesn't impede others, but it does keep her from socializing and participating in what is happening in the room around her . . .*

(D17, p.8.)

66. In the draft 2019 IEP Mr. Dlugo proposed O&M goals of "traveling through the hallways at the same time as her peers, improving her independence in navigating congested areas from 1 of 6 class switching periods to 6 of 6 class switching periods." (D17, p.9.) Mr. Dlugo also confirmed that the Adult Student ". . . was recently able to independently plan a route on public transit using a smartphone app in 1 of 4 trials." (D17, p.11; Tr., pp.324-326 (Dlugo).) Mr. Dlugo proposed two goals for planning a route on public transit and executing the route plan. (*Id.*) Mr. Dlugo also noted that the Adult Student was able to independently make two street crossings on December 10, 2018, and that she should have a goal of "bringing all required tools and materials to class." (*Id.*)

67. Mr. Epplin noted that the Adult Student was enrolled in a special education math class and that:

*when she is in class and when she has her assistive technology out, [the Adult Student] typically does a good job following along and taking notes. However, she often needs to be reminded to get out her iPad and turn on the necessary apps. When given an assignment, [the Adult Student] typically works quickly and she is generally accurate in her work. Sometimes she works too quickly and leaves out some steps, leaving her answers incomplete. She does ask questions when she doesn't understand, and she works well with the teacher. She does not work as well with paraeducators and has requested not to sit next to paraeducators in class. Her current grade is a B+.*

(D17, p.10; Tr., pp.661-663 (Epplin).) Mr. Epplin proposed a series of goals for the Adult Student to achieve as a result of his assessment and included the goals in the draft 2019, IEP. (*Id.*)

68. During the February 5, 2019, IEP meeting, the Parent and the Adult Student did not request braille instruction and did not raise concerns about the implementation of the February 12, 2018, IEP. (D17, p.6; Tr., pp.248-249 (Lewinsohn).) However, the Parent informed the 2019 IEP Team that: “[The Adult Student] is superior in her literature and writing capabilities . . . She is an excellent photographer and poem writer.” (*Id.*) The Parent also indicated that she was concerned about the Adult Student’s anxiety at school, role of paraeducator support, vision support and accommodations, community access, peer relationships, and regular eye breaks. (*Id.*)

69. Under the summary for “the student’s assistive technology devices and service needs,” the proposed draft 2019 IEP reflects that “[the Adult Student] uses an iPad and her phone to take pictures, e-mail, access the document camera and teacher computer screen [through Doceri], check Schoology, and access large print materials.” (D17, p.6.)

70. The draft 2019 IEP also reflected that “[The Adult Student] is legally blind but does read print and is not in need of braille instruction.” (D17, p.7.)

71. The 2019 IEP Team also created a “Secondary Transition” plan that included consideration of the Adult Student attending a local community college in the area of English through the Running Start program. (D17, pp.12-16.)

72. The 2019 IEP Team incorporated November 16, 2018, mediation agreement terms that required paraeducator support for math and nursing support for eye breaks, and also increased the Adult Student’s SDI as follows:

Concurrent	Services	Service Provider	Monitor	Frequency	Location	Start Date	End Date
Special Education							
No	Math	Special Education Teacher	Special Education Teacher	55 min / 5 Times per week	Special Education	02/06/2019	02/06/2020
No	Vision Services	TVI	TVI	20 Minutes / 5 Times Weekly	General Education	02/06/2019	02/06/2020
No	Adaptive	Student Specific Paraeducator	Special Education Teacher	55 Minutes / 2 Times Monthly	General Education	02/06/2019	02/06/2020
No	O&M	O&M Specialist	O&M Specialist	75 Minutes / 2 Times Monthly	Special Education	02/06/2019	02/06/2020
No	Math	Student Specific Paraeducator	Special Education Teacher	25 Minutes / 2 Times Daily	Special Education	02/06/2019	02/06/2020
Related Services							
No	Nursing	Nursing Support	Special Education Teacher	25 Minutes / 2 Times Daily	Special Education	02/06/2019	02/06/2020

(D17, p.24.) The Adult Student would receive 812.5 minutes of SDI in the special education setting and attend the general education setting 54.48% of the time. (*Id.*) The draft 2019 IEP also included the following “Supplementary Aids and Services” for the Adult Student, providing a “student specific paraeducator” for 139 minutes, five times per week in the general education environment, and 113 minutes, five times per week in the special education environment. (*Id.*) The draft 2019 IEP also contained the same accommodations, modifications, and supports for school personnel as the February 12, 2018, IEP. (D17, pp.20-21.)

73. At the February 5, 2019, IEP meeting, the 2019 IEP Team agreed to provide the Parent with monthly progress reports, and the Parent requested additional time to review the proposed goals. (D17, 27.) The 2019 IEP Team agreed to schedule another IEP meeting by February 15, 2019, and the District issued a PWN giving notice of the continuance and the Parent’s concerns. (*Id.*) The parties did not meet on February 15, 2019, or thereafter, because the Parent refused to participate in an IEP meeting, but the District continued to email the Parent and attempt to reschedule. (D23, p.1; Tr., pp.360-361 (Lewinsohn).)

### **Adult Student’s Attendance and Transfer to Everett School District**

74. Between January 4, 2019, and January 25, 2019, there were fifteen school days. (D2, p.1.) The Adult Student attended school on approximately 5 to 8 occasions

during this period.<sup>31</sup> (D2, p.1; Tr., pp.135-136 (Adult Student); 210-213, 361-362 (Lewinsohn).) On January 25, 2019, the District issued a letter to the Parent notifying her that the Adult Student had been absent from school without excuse for seven to ten days during this period. (D8, p.1; Tr., pp.213-214 (Lewinsohn).) The letter stated that the District would “like to work together to improve your student’s attendance and reduce the possibility” of filing documentation with the Community Truancy Board.<sup>32</sup> (*Id.*)

75. Between January 28, 2019, and March 28, 2019, there were thirty-nine school days.<sup>33</sup> (D2, p.1.) The number of days the Adult Student attended school between January 28, 2019, and February 7, 2019, is unknown. The Adult Student did not attend school between February 7, 2019, and March 28, 2019. (Tr., pp.135-136 (Adult Student); 212-213, 361-362 (Lewinsohn).)

76. On March 22, 2019, the District issued a second letter to the Parent notifying her that the Student had an “unusually large number of absences.” (D7, p.1; Tr., pp.212-213 (Lewinsohn).) The letter stated:

*“We are concerned about [the Adult Student], who has been absent for an excessive number of days during this school year. . . If there are special circumstances involved with the absences or tardies that we may not know about, or if you have any other questions, please contact [Daniel Grimm, Dean of Students].”*

(*Id.*) The Adult Student did not attend school after March 22, 2019, and was considered withdrawn from, or “dropped out” of, Capital High School on March 27, 2019. (D6, p.1, D25, p.1; Tr., pp.211-212, 361-362 (Lewinsohn).)

77. However, the District wanted to complete the 2019 Reevaluation of the Adult Student, so Dr. Lewinsohn emailed the Parent and asked her to “keep any appointments that have already been made with staff and continue to work on scheduling any appointments that have not yet been set up.” (D25, p.1; Tr., pp. 362-363 (Lewinsohn).)

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<sup>31</sup> The Adult Student’s attendance records are not part of the record, but based on the 2018-2019 academic calendar (D2, p.1) and the letters issued to the Parent regarding the Adult Student’s attendance (D8, p.1), it appears that there were only between 5 and 8 school days that the Adult Student could have attended school at the District between January 4, 2019, and January 25, 2019.

<sup>32</sup> The District is subject to the “Becca Bill,” which mandates that “all parents in this state of any child between eight and eighteen years of age shall cause such child to attend the public school of the district in which the child resides, and such child shall have the responsibility to and therefore shall attend for the full time when such school may be in session . . .” RCW 28A.225.010(1).)

<sup>33</sup> The District’s schools were closed from February 11, 2019, through February 14, 2019, due to a severe snowstorm. (D2, p.1; Tr., pp.135-136 (Adult Student); 360-361 (Lewinsohn).)

78. Beginning January 4, 2019, and thereafter, the Adult Student was absent from school by choice and with the permission of the Parent. (Tr., pp.135 (Adult Student); 849, 870 (Parent).) The Parent and the Adult Student moved out of the District to Mill Creek, Washington, in the Spring of 2019. (Tr., pp.103, 189 (Adult Student).) On June 9, 2019, the District received a request for the Adult Student's educational records from the Henry M. Jackson High School in Everett School District. (D4, p.1; Tr., pp.211-212 (Lewinsohn).) The District provided the Adult Student's educational records to the Everett School District on June 11, 2019. (D5, p.1; Tr., pp.374-375 (Lewinsohn).)

79. The Adult Student attended Henry M. Jackson High School for the 2019-2020 and 2020-2021 academic years, but she did not graduate. (Tr., pp.106-107, 185-188 (Adult Student).) The Adult Student did not work or attend school between June 2021 and January 2022. At the time of the due process hearing, the Adult Student worked at a natural holistic pet store in Mill Creek, Washington and lived with the Parent. (Tr., pp.185-188 (Adult Student).) The Adult Student worked 28 hours per week as a customer service representative. (Tr., pp.187-189 (Adult Student).) The Adult Student started attending Everett Community College in early 2022, where she participated in an interpersonal communication class and a math class. (*Id.*)

#### **IEE Performed by Dr. Gayle Fay**

80. The Parent selected, and the District contracted with, Dr. Gayle Fay on or about April 8, 2019, to perform an IEE as per the May 29, 2018, PWN and November 16, 2018, mediation agreement. (D26, p.1; Tr., pp.363-364 (Lewinsohn).) On May 28, 2019, Dr. Lewinsohn emailed the Parent an "Authorization for Release Exchange Records 2010-1" form and asked her to sign the form so that the District could provide Dr. Fay with the Adult Student's educational records, including previous evaluations and IEPs. (D30, p.1; Tr., pp.370-371 (Lewinsohn).) The Parent did not sign and return the form, and on June 27, 2019, Dr. Lewinsohn sent a second copy of the consent form to the Parent. (D33, p.1; Tr., pp.372-373 (Lewinsohn).) The District never received a signed copy of the Authorization for Release Exchange Records 2010-1 from the Parent.<sup>34</sup> (Tr., pp.373-374 (Lewinsohn).)

81. Dr. Fay conducted a "standard domain neuropsychology assessment" of the Adult Student between May 2019 and August 2019. (P16, pp.1-15; Tr., pp.30-32 (Fay).) At the time of the assessment, Dr. Fay was unaware of the details of the Adult Student's diagnosis of "oscillopsia," and came to learn of the impact of her diagnosis after she completed the IEE. (P16, pp.1-15; Tr., pp.32-34 (Fay).)

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<sup>34</sup> The Parent testified: ". . . And to note about Dr. Fay (sic) not having records, I intentionally did not want Dr. Fay (sic) to have records. I wanted Dr. Fay to do it as non-bias, and I didn't want her to have any input from the school district." (Tr., pp.846-847 (Parent).)

82. Dr. Fay was not provided with and did not review the Adult Student's educational records (including previous evaluations and IEPs), and "had no idea of what the [educational] program was or how it was being scaffolded for [the Adult Student]." (P16, p.2; Tr., pp.47-48 (Fay); 687-688 (Parnell).) Beyond the contract with the District to perform the IEE, Dr. Fay did not communicate with any District personnel. (Tr., p.58 (Fay).) Dr. Fay did not interview or obtain information from District staff regarding how the Adult Student participated in the school setting for either the BASC-3 assessment, or other social / emotional assessments. (Tr., pp.379-380 (Lewinsohn).)

83. Dr. Fay also had "no knowledge of how the [Adult Student] read while at the [District]." (Tr., pp.50-51 (Fay).) Dr. Fay did not evaluate or assess the Adult Student in the area of reading, but believed the Adult Student could read because "she interfaced with some of [Dr. Fay's] materials." (Tr., pp.51-53 (Fay); 681-682 (Parnell).) Dr. Fay assessed the Adult Student in writing, concluding that she "showed superior visual spatial and fluid reasoning skills. She has strong written language skills with a strong writing voice." (D16, p.14; Tr., pp.52-53 (Fay).) Dr. Fay administered the WIAT-II assessment which expired in 2005. (Tr., pp.381-382, 796-797 (Lewinsohn).) The WIAT-III was in effect between 2015-2020 and would have been the appropriate instrument to evaluate the Adult Student in writing.<sup>35</sup> (*Id.*)

84. Dr. Fay completed the IEE on August 8, 2019, but the District received Dr. Fay's IEE report in September or October 2019, when the Adult Student was no longer enrolled at the District. (Tr., pp.375-376 (Lewinsohn).)

### **Due Process Proceeding**

85. The Parent, through legal counsel, filed the due process hearing request with OAH on January 4, 2021.<sup>36</sup>

86. The Parent, through legal counsel, filed with OAH a due process hearing request regarding the Everett School District on October 20, 2020. (OAH Docket No.: 10-2020-OSPI-01182 / 2020-SE-0156. (Tr., pp.948-949 (Adult Student).) The Adult Student accused Everett School District staff of bullying, intimidation, and harassment. (Tr., pp.949-950 (Adult Student).) This matter was dismissed on September 29, 2021, as per a settlement agreement enforced by the Snohomish County Superior Court, Cause 02-2-021119-31. (Tr., pp.871-872 (Parent); See also,

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<sup>35</sup> "...the way the test are normed is based on a certain population of students that they are testing at the time, and they update those as they go. And so, you have more current norms with the newer version that are more accurately representative of the current population." (Tr., p.415 (Lewinsohn).)

<sup>36</sup> The Parent, through legal counsel, filed a federal tort claim against the District on July 21, 2023. (Tr., pp.871-872 (Parent).)

April 26, 2021, Order Granting Leave to Withdraw from Representation of the Parent.)

### CREDIBILITY FINDINGS

1. The Administrative Procedures Act provides that “[a]ny findings based substantially on credibility of evidence or demeanor of witnesses shall be so identified . . . Findings of fact shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” Revised Code of Washington (RCW) 34.05.461(3) and (4). Credibility is that quality in a witness that renders their testimonial evidence worthy of belief. *Black’s Law Dictionary* (4<sup>th</sup> Edition 1968).

2. When making a credibility determination, a finder of fact will take into consideration the sum of the following factors, as well as other factors that may be identified: 1) the time between the event, the initial report, and the testimony; 2) the conditions of the event; 3) visual, auditory, and intellectual acuity; 4) attention / focus of the observer; 5) relative expertise; 6) detail of recall; and 7) corroborative evidence.

3. When evaluating conflicting testimony, the finder of fact will question assertions that change over time, evaluate available corroborative evidence, interpret differences in behavior and opinion carefully, evaluate the presence of suggestive or leading questions, identify a witness’ goals and biases, and consider whether a witness was coached or altered their testimony after hearing the testimony of other witnesses. Also, a finder of fact should account for the first-hand knowledge, attitude, demeanor, capacity for candor, consistency of testimony, plausibility, and motivation of the witnesses. The totality of the circumstances and the logical persuasiveness of the parties’ respective positions should be reviewed.

4. In making a credibility finding, the tribunal need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the evidence be deemed clear, cogent, and convincing. It is only necessary to determine what most likely happened. *In re Murphy*, Empl. Sec. Comm’r Dec. 2d 750 (1984). This is because the ALJ is in the best position to observe the parties and evaluate the evidence presented to resolve conflicts regarding material points. *Crain v. Emp’t Sec. Dep’t*, 2023 Wash. App. Lexis 455 (Wash. Ct. App. 2023).

5. The Washington Supreme Court and Courts of Appeal have consistently held that when determining whether a decision is supported by sufficient evidence, a reviewing court will not substitute its judgment for that of the administrative law judge regarding determination of witness credibility or the weight of the evidence.

*Smith v. Employment Sec. Dep't*, 155 Wn. App. 24., 10 (2010) citing *Hahn v. Dept of Ret. Sys*, 137 Wn App. 933, 942, 155 P.3d 177 (2007) and *Affordable Cabs, Inc., v. Emp't Sec. Dep't*, 124 Wn. App. 361, 367, 1010 P.3d 440 (2004); see also *Hung Dang v. Dep't of Health, Med. Quality Assur. Comm'n*, 10 Wn. App.2d 650 (2019); *Kraft v. Dep't of Soc. & Health Servs.*, 145 Wn. App. 708, (2008); *Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App.48 (2009). Notably, however, an agency head, commission, or board, with authority to conduct a de novo review of an administrative law judge's initial or recommended order is not required to defer to the administrative law judge's witness credibility determinations when conducting a de novo review. *Hardee*, 152 Wn. App.48, 59 (2009).

6. Federal district courts do not perform a de novo review of final orders issued as per RCW 34.05, RCW 28A.255, WAC 10-08, and WAC 392-172A. *Ojai Unified Sch. Dist. v. Jackson*, 4 F3d 1467, 1471 (9<sup>th</sup> Cir.1993). A federal district court, when reviewing an ALJ's findings, must consider the credibility findings carefully and endeavor to respond to the resolution of each issue, but the federal district court is not permitted to simply ignore the ALJ's credibility findings. See, *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9<sup>th</sup> Cir. 1987) and *Capistrano Unified School Dist. v. Wartenberg*, 59 F.3d 884, 891 (9<sup>th</sup> Cir. 1995).

#### ***Credibility Findings: Parent Rebuttal Testimony***

7. The issues in this case are restricted to the period of January 4, 2019, through June 6, 2019. The Adult Student's legal representative Mr. Altman did not call the Parent to testify as part of the Adult Student's case in chief, and stated on the record on the first day of the proceedings that the Parent would only offer rebuttal testimony. Even though the Parent took over as the Adult Student's suitable representative, she was present during the entirety of the proceedings and heard all the witnesses' testimony. As a result, the Parent was only allowed to offer time limited rebuttal testimony. (*Order Setting Due Process Hearing; Order Scheduling and Limiting Testimony; Order for Submission of Exhibits*, July 14, 2023; *Second Order Setting Due Process Hearing; Order Scheduling and Limiting Testimony; Order for Submission of Exhibits*, August 24, 2023; *Third Order Setting Due Process Hearing; Order Scheduling and Limiting Testimony; Order for Submission of Exhibits*, September 29, 2023.)

8. On every material issue the Parent's rebuttal testimony conflicted with Mr. Epplin, Ms. McDonald, Mr. Parnell, Mr. Dlugo, and Ms. Lewinsohn. This appears to reflect the Parent's advantage of listening to all the witnesses testify before she offered her rebuttal testimony. Therefore, her testimony is unreliable in comparison with the District's staff that did not have such an advantage.



9. An extensive period of time has passed since the events between January 4, 2019, and June 9, 2019, and a review of the Parent's rebuttal testimony and the documentary evidence shows that her memories are incomplete and unsupported by the documents admitted. Further, the Parent's statements have changed over time and appear to be in responsive to isolated circumstances. For these reasons, the Parent's rebuttal testimony is not worthy of consideration.

10. The Parent offered her opinion about the special education services the Adult Student needed, but she does not have any expertise in the areas of braille, social / emotional behavior, reading, writing, and O&M special education, so her opinion testimony lacks sufficient foundation. The Parent's testimony is also primarily hearsay and not based on the Parent's personal knowledge and involved events that happened prior to January 4, 2019. Therefore, it is irrelevant to the issues presented by the Due Process Hearing request.

11. Notably, the Parent has made it clear on the record that her primary motivation is to advance a tort claim. (Tr., pp.703-706 (Parent).) The Parent's rebuttal testimony, therefore, appears designed to elicit financial reward, rather than to demonstrate that the District failed to implement the SDI, related services, and accommodations and modifications the Adult Student was entitled to receive.

12. Even so, the Parent's testimony lacks any corroborative documentary or testimonial evidence except the rebuttal testimony of the Adult Student, testimony which the Parent elicited. (See *infra*, Credibility Findings: Adult Student Testimony.) In fact, the Parent's own exhibits do not support any of the Parent's rebuttal testimony, and most of her statements were revealed on cross-examination to be implausible, inconsistent, and lacking in candor.

13. The only two instances where the Parent's testimony appears credible and is corroborated by the Adult Student's testimony, and not contradicted by the District's witnesses, is the Parent's testimony that 1) the Adult Student was absent from school with the Parent's permission between January 4, 2019, and June 9, 2019, and 2) the Parent declined braille instruction for the Adult Student in 2009.

14. On the other hand, the District's witnesses independently testified without hearing the other witnesses' testimony, and therefore their testimony significantly more reliable than the Parent's rebuttal testimony. Further, the testimony of each District witness was corroborated by the other District staffs' testimony, as well as by the documentary evidence.

15. Considering the above cited factors and the logical persuasiveness of the parties' respective positions, it is concluded that the Parent's uncorroborated

rebuttal testimony in its entirety lacks relevance, foundation, and credibility when compared to the other witnesses and documentary evidence in the record. Therefore, none of the above findings of fact are made based on the testimony of the Parent, except regarding the Parent giving the Adult Student permission to be absent from school between January 4, 2019, and June 9, 2019, and the Parent declining braille instruction for the Adult Student in 2009.

### ***The Adult Student's Testimony Lacks Credibility***

16. While the Adult Student was under the age of eighteen during the period at issue, she was an adult (ages nineteen and twenty) during the due process hearing. (Tr., p.103 (Adult Student).) The evidentiary record and transcript show that the Adult Student's vision disability does not impact her cognitive function or ability to communicate, and there is no evidence in the record that she suffers from a mental health or psychological disorder or disease that would prohibit her from imparting credible testimony. All the witnesses testified that the Adult Student is a very intelligent person who is capable of self-advocacy and clear communication.

17. The transcript also shows that the Adult Student was able to understand the questions asked during the hearing, sought clarification when needed, and that she self-advocated on a number of occasions. During the hearing, the ALJ observed that the Adult Student displayed a confident demeanor, visually engaged with the exhibits shown on her iPad and cell phone and assisted her legal representative and suitable representative with her case.

18. The period at issue is January 4, 2019, through June 6, 2019, and therefore the credibility of the Adult Student's testimony will be assessed for this period in relation to the specific issues raised. The Adult Student's testimony regarding the events prior to January 4, 2019, or regarding events outside the issues alleged in the Due Process Hearing Request will not be assessed for credibility because it is irrelevant to these proceedings.<sup>37</sup>

19. First, the Adult Student repeatedly stated that she could not remember most of the events or the period of time they are alleged to have occurred. For the period of January 4, 2019, through June 9, 2019, the Adult Student repeatedly testified that she could not remember her classes, paraeducators, or the accommodations, modifications, and assistive technology she used. (Tr., pp.930-934, 949-951 (Adult Student).) The Adult Student's testimony also reflected an absence of specifics

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<sup>37</sup> The Findings of Fact are based on the District staff's testimony and documentary evidence and supported by citations to the transcript and exhibits. Where the District staff's testimony and documentary evidence is reflected in a finding of fact with a citation *infra* but is also identified as contradicting the Adult Student's testimony, the statements, documents, and citations are not repeated here.

regarding her claims. For example, the Adult Student testified that she told District staff that she was feeling anxious, isolated, and overwhelmed, but the Adult Student could not identify who she talked to about her feelings besides Mr. Dlugo. (Tr., pp. 121-122 (Adult Student).) The Adult Student also testified she was “promised social and emotional resources” by Dr. Lewinsohn, but she could not remember when she was informed or what the resources were. (Tr., pp.152, 163-164 (Adult Student).)

20. The Adult Student consistently and repeatedly relayed misinformation about O&M and adaptive special education services, but her testimony largely concerned events prior to January 4, 2019. However, the Adult Student testified that she is generally not able to use public transportation or use / count money, and that she had not been “taught anything from [Mr. Dlugo].” (Tr., pp. Tr., pp.117-118, 179, 936-938, 944-945 (Adult Student).) This statement, and similar statements, are contradicted by the documentary evidence and Mr. Dlugo’s testimony about the Adult Student’s ability to make purchases and transport herself to and from a community college and perform street crossings.

21. More specific to the issues presented, the Adult Student made accusations that Mr. Dlugo did not implement the required O&M and adaptive services during the period of January 4, 2019, through June 9, 2019. However, the Adult Student contradicted her own testimony on this point because she also testified that she was frequently absent from school, and she did not know specifically the O&M and adaptive services she was supposed to receive or when those services were not provided. In contrast, Mr. Dlugo submitted for the 2019 IEP an O&M assessment performed in January 2019, demonstrating that he continued to work with the Adult Student on O&M and adaptive services.

22. The Adult Student also contradicted her claim that she did not receive paraeducator services by admitting she was given multiple paraeducators that accompanied her during the period of January 4, 2019, through February 7, 2019. (Tr., pp.119-130.) Importantly, the Adult Student could not identify the paraeducators assigned to her and her assertions are inconsistent with Mr. Epplin’s testimony that a paraeducator was present in math class, but the Adult Student did not want paraeducator assistance when she was in his class.

23. The Adult Student testified that she did not receive math instruction as required, but she did not identify if the lack of instruction occurred prior to January 4, 2019, or after January 4, 2019. (Tr., pp. 119-120 (Adult Student).) Even so, as found above, Mr. Epplin testified that he gave her one-on-one instruction and assisted her with exams when she was at school from January 4, 2019, through June 9, 2019.

24. The Adult Student claimed she was not given large print books and was not given assistive technology beyond her iPad. (Tr., pp.930-932 (Adult Student).) This testimony is contradicted by all the District staff witnesses, as well as all the documentary evidence in the case reflecting that the District provided multiple assistive technology resources including a Chromebook, multiple iPads, noise cancelling headphones, a laptop, digital applications, and other resources. Further this testimony is contradicted by Mr. Epplin and Ms. McDonald who both identified with specificity that the Adult Student was given large print materials when she could not access materials digitally.

25. The Adult Student testified that she felt that she could not learn in the classroom environment, but she also testified that she used the Bookshare, Schoology, and Doceri program:

*. . . . I had an iPad. On that iPad, there was a program called Doceri. There was that same program also on the teacher's computer, so they were able to connect their computer to the Elmo projector for the classroom in which they were using to show the students the paperwork. And through the application, I was also able to see that same picture on my iPad. And so that was the primary thing that was used during class time. Otherwise, I just followed along, like, virtually like everybody else. There was nothing particularly out of the ordinary other than the use of the application.*

(Tr., pp.118-119 (Adult Student).)

26. The Adult Student described her desire to learn braille to assist her with eye fatigue, but she also readily admitted that she can read printed text. (Tr., pp.177-178 (Adult Student).) Additionally, the ALJ observed the Adult Student use her cell phone and an iPad to visually read text at the due process hearing. (Tr., pp.950-953 (Adult Student) (ALJ Beebe).) The Adult Student testified that she and the Parent would text each other on their cell phones during the school day during the 2018-2019 academic and that she could read the text messages which were enlarged to 30-point font on her cell phone, and that she could text back using the cell phone keyboard. (Tr., pp.951-953 (Adult Student).)

27. The Adult Student testified that the District had not created a transition plan for the Adult Student. (Tr., pp.944-946 (Adult Student).) However, there is a secondary transition plan in the record as part of the draft 2019, IEP.

28. Both the Parent and the Adult Student's legal representative relied on leading questions to elicit self-serving and seemingly coached responses from the Adult

Student. Given the nature of the questions asked, the Adult Student's testimony lacks reliability because her answers were either not based on her personal knowledge, or they were intended to respond to the leading nature of the inquiry.<sup>38</sup>

29. As stated above, in making a credibility finding, the tribunal need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the evidence be deemed clear, cogent, and convincing. It is only necessary to determine what most likely happened. Here, it is concluded that the District staff's testimony is corroborated by each other's testimony as well as the documentary evidence. However, the Adult Student was not able to remember important details, and her testimony is uncorroborated by the documentary evidence. Further, the Adult Student repeatedly contradicted herself and relayed self-serving statements in response to leading questions. Thus, it is concluded that, unless cited above in support of a finding of fact, the Adult Student's testimony lacks credibility and is accorded no weight in comparison to the corroborated and detailed testimony of District staff.

## CONCLUSIONS OF LAW

### **A. Jurisdiction**

1. 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 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).

### **B. IDEA**

2. 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. School Districts are required to "provide every student who is eligible for special education between the ages of three and twenty-one years, a free appropriate public education program ("FAPE")." WAC 392-172A-02000; 34 C.F.R. Part 300.

3. 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 IDEA, as follows:

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<sup>38</sup> During the Adult Student's rebuttal testimony when she answered questions propounded by the Parent, the Adult Student was admonished multiple times that she was under oath and expected to tell the truth. (Tr., pp.899-900, 911-912, 922-923, 936-937, 941, 943, 952-954 (ALJ Beebe).)

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

Rowley, *supra*, 458 U.S. at 206-207 (footnotes omitted).

**C. The Adult Student Failed to Raise Certain Claims in Her Due Process Hearing Request, and Therefore the Claims will not be Considered.**

**1. Applicable Law**

4. A party may not raise new issues during a due process hearing that were not raised in the due process hearing request unless the other party agrees. WAC 392-172A-05100(3); 20 U.S.C. § 1415(f)(3)(B). “Administrative and judicial review in IDEA cases is specifically limited to the issues raised in the due process [hearing request], unless the parties agree otherwise.” *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 \*34-35 (W.D. Wash. May 8, 2019), *aff'd sub nom. Crofts v. Issaquah Sch. Dist. No. 411*, 2022 U.S. App. LEXIS 907 (9th Cir. 2022) (upholding ALJ’s refusal to address claims raised for first time in post-hearing brief where Parents cited no evidence that parties agreed to expand scope of due process hearing).

5. Even so, “[a] party may amend its due process hearing request only if: (a) the other party consents in writing to the amendment and is given an opportunity to resolve the due process hearing request through a resolution meeting . . . ; or (b) the administrative law judge grants permission . . . not later than five days before the due process hearing begins.” WAC 392-172A-05085(6).

6. This is consistent with the Washington Administrative Procedures Act (“APA”) requiring that a notice of hearing include a statement of the issues (RCW 34.05.434) and that prehearing orders identify all issues for resolution and provide an opportunity for the parties to object. WAC 10-80-130.

7. An exception to this rule is when an issue was actually tried by consent of the parties at an administrative hearing. *M.C. v. Antelope Valley Union High School Dist.*, 858 F.3d at 1196; *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS 37815 \*15-16 (E.D. Cal. Mar. 7, 2019), *aff'd* 810 Fed. Appx. 588 (9th Cir. 2020); see also *Issaquah Sch. Dist.*, at \*37 (holding that parents failed to show any of claims not considered by ALJ were tried by consent, contrasting with *Antelope Valley*: “[b]oth

sides in *Antelope Valley* ‘presented extensive evidence,’ including witness testimony, regarding the omitted claim”).

## 2. Analysis

8. The Adult Student’s claims are set forth in the January 4, 2021, Due Process Hearing Request and repeated verbatim in subsequent prehearing orders that list the issues in this matter. (See *supra* pp.1-5.) The District’s Response specifically states that it is only responding to the claims asserted in the Due Process Hearing Request. (District’s Response, pp.1-4.)

9. During the initial prehearing conference on February 1, 2021, the Adult Student’s legal representative confirmed that the claims alleged in the due process hearing request were the entirety of the Adult Student’s claims under the IDEA. The Parent and Adult Student were advised during a May 31, 2022, prehearing conference that:

*The Adult Student raised the possibility of amending the Complaint at the [May 31, 2022] prehearing conference. Specifically, the Adult Student raised the possibility of amending the Complaint to include an issue of whether she should be limited to the two-year statute of limitations. WAC 392-172A-05080(2). The due process hearing is presently set over 11 half-days beginning September 12, 2022. This matter has been pending for hearing since the Complaint was filed on January 4, 2021, which means by the time the hearing is set to begin in September, the complaint will have been pending for more than 20 months. The parties were informed during the above prehearing conference that any request or motion to amend the Complaint which would result in continuing the due process hearing past September will require truly extraordinary circumstances as the Complaint has been pending for over 17 months to date. The Adult Student and the District both have vested rights in a timely adjudication of the Adult Student’s Complaint. The Adult Student is therefore advised to file any amendment to her Complaint as soon as possible.*

(*Tenth Prehearing Order*, p.1 (June 7, 2022).) At no time did the Adult Student, the Parent, or the Adult Student’s legal or suitable representatives request to amend the issues presented in the Due Process Hearing Request.

10. At the prehearing conference on April 10, 2023, the parties also confirmed on the record that the issues in the matter were the same as those in the Due Process Hearing Request. (*Prehearing Conference Audio Recording*, April 10, 2023.) Finally,

on the first day of the hearing, the Due Process Hearing Request issue statements were read into the record and the parties again confirmed that these are the issues presented for hearing. (Tr., p.10 (ALJ Beebe; P. Thompson; K. Altman).)

11. During the hearing, however, the Adult Student presented wide ranging and irrelevant testimony and evidence regarding events that do not implicate the IDEA and claims not alleged in the Due Process Hearing Request. Throughout the hearing the ALJ reminded the Adult Student's legal and suitable representatives that these claims were not before the tribunal, and the District repeatedly objected to testimony and evidence, asserting that it did not consent to the trial of any issues except those alleged in the Due Process Hearing Request. (Tr., pp.122-125, 168, 172-173, 329, 332-335, 655, 661, 663-664 (P. Thompson; ALJ Beebe).)<sup>39</sup>

12. The law is clear: the issues to be decided are the issues raised in the due process hearing request and noticed for hearing in prehearing orders. The court is not required to wade through the record to find evidence of claims not asserted in the due process hearing request. *E.M. v Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, (9<sup>th</sup> Cir 2011), citing *Greenwood v. FAA*, 28 F.3d 971, 977 (9<sup>th</sup> Cir. 1994); see *United States v. Dunkel*, 927 F.2d 955, 956 (7<sup>th</sup> Cir. 1991) ("Judges are not like pigs hunting for truffles buried in briefs"). Further, the District is entitled to notice of the Adult Student's claims such that it may prepare a complete defense. (Id.; RCW 34.05.461.) Therefore, the only issues that the tribunal can resolve in this matter are those raised specifically in the Due Process Hearing Request, and other potential claims will not be addressed in this Order.

**D. The Adult Student's Claims that Occurred Prior to January 4, 2019, are Barred by the Statute of Limitations**

***1. Applicable Law***

13. The Washington regulation concerning the IDEA statute of limitations provides in relevant part:

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<sup>39</sup> The District repeated its position regarding these claims in its closing brief:

*During the course of the hearing in this matter it became readily apparent that the [Adult Student's] case is only spuriously related to the IDEA and issues reflected in the February 2, 2021, prehearing order. The testimony of the Student and Parent, besides lacking credibility, was rambling, digressive, and unfocused, touching only tangentially, if at all on the issues. The [Adult Student's] true aim is to use this proceeding as a springboard and discovery device for her pursuit of a lawsuit for monetary damages against the District based on her false claims that the District staff treated her unfairly. See A.R., et al., v. Olympia School District No. 111, Case No. 3:23-cv-05661-TMC."*

(District's Post-Hearing Brief, p.2, fn.2.) The Parent informed the tribunal that she wanted this matter resolved prior to the Adult Student's 21<sup>st</sup> birthday because she and the Adult Student intended to pursue other potential and pending lawsuits. (Tr., pp. 705-706 (Parent).)



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

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

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

WAC 392-172A-05080(2). The Washington regulation is substantially similar to the statute of limitations in the IDEA. See 20 United States Code (USC) §1415(b)(6)(B) and §1415(f)(3)(C); 34 Code of Federal Regulations (CFR) §300.507.

14. In *Avila v. Spokane School District 81*, 852 F.3d 936 (9<sup>th</sup> Cir. 2017), the Ninth Circuit Court of Appeals interpreted the statute of limitations set forth in the IDEA. In a question of first impression for the Ninth Circuit, the court held that “the IDEA’s statute of limitations requires courts to bar only claims brought more than two years after the parents...`knew or should have known’ about the actions forming the basis of the complaint.” *Id.* at 937. Under this standard, known as the discovery rule, a claim is timely “so long as the complaint is filed within two years of the known or should have known (KOSHK) date.” *Collette v. D.C.*, 2019 U.S. Dist. LEXIS 128520 (D.D.C., August 1, 2019).

15. The determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999). An IEP is “a snapshot, not a retrospective.” *Id.*

16. Like IEPs, the appropriateness of an evaluation must be determined in light of what was known, or should have been known, at the time the evaluation was conducted. Also, whether an evaluation is appropriate should not be judged in hindsight. This is the so-called snapshot rule. See *Adams v. Oregon*, 195 F.3d 1141, 31 IDELR 130 (9<sup>th</sup> Cir. 2001).

## **2. Analysis**

17. Much of the Adult Student’s testimony and evidence focuses on events that occurred prior to January 4, 2019, specifically the January 25, 2018, Reevaluation and the February 12, 2018, IEP.

18. The District asserted in the first line of the January 14, 2021, District's Response the affirmative defense that the Adult Student's claims that implicate events prior to January 4, 2019, are barred by the statute of limitations. (District's Response, p.1.) In addition to raising the affirmative defense in its written pleadings, the District consistently argued at the due process hearing that "this case is about what occurred from January 4<sup>th</sup> of 2019, by the choice of the Parent, until the [Adult Student] no longer was a student at the Olympia School District in [June 6, 2019]." (Tr., pp.92-93 (P. Thompson); see also, 122-125, 168, 172-173, 329, 332-335, 655, 661, 663-664 (P. Thompson; ALJ Beebe).) The District again asserts in its closing brief that any claims regarding events that occurred prior to January 4, 2019, are barred by the statute of limitations. (District's Closing Brief, pp.18-21.)

19. The District is correct. Because the Parent's legal representative filed the Due Process Hearing Request on January 4, 2021, the only claims allowed by WAC 392-172A-05080(2) must have occurred within two years of that date, *i.e.* January 4, 2019. Therefore, all the Adult Student's claims that the Parent knew or should have known about prior to January 4, 2019, are barred by the statute of limitations.

20. The Parent and the Adult Student's legal representatives argued that general principles of fairness and the need for a full administrative record should allow for the full presentation of evidence regarding events and claims prior to January 4, 2019. However, the Parent and Adult Student's legal representatives did not assert at any point that the Parent did not know, or should not have known, of the events and claims prior to January 4, 2019, or that the District made misrepresentations or withheld information from the Parent. Even if the Parent or the Adult Student's legal representatives made such assertions, however, the exhibits and testimony admitted into the record demonstrate that the Parent attended all reevaluation and IEP meetings, the District provided the Parent with information upon request, the District issued PWNs when taking each action, and that the Parent was heavily involved in communication with the Adult Student, District staff, and Dr. Lewinsohn. Thus, the evidence in the record would support a finding that the Parent knew, or should have known, of the events prior to January 4, 2019, and that there is no evidence that the District withheld information from the Parent.

21. Given the pleadings, transcript, and evidence presented, then, it is concluded that any claims that reflect events that occurred prior to January 4, 2019, are barred by WAC 392-172A-05080(2), and the exceptions to the statute of limitations do not apply in this case.

**E. Implementation of the February 12, 2018, IEP from January 4, 2019, through June 9, 2019.**

**1. Applicable Law**

22. Every school district in the State of Washington “shall provide” each student three to twenty-one years of age a free appropriate public education (“FAPE”) program. WAC 392-172A-02000. Once a student is determined eligible for special education services (SDI, related services, accommodations, modifications, etc.) a school district must have an IEP in place that is reasonably calculated to offer a student a FAPE given her unique circumstances. WAC 392-172A-03090; WAC 392-172A-03105; *Andrew F. v. Douglas County Sch. Dist.*, 580 U.S. 386, 137 S.Ct. 988, 999 (2017).

23. An IEP is a “written statement for each student eligible for special education services that is developed, reviewed, and revised in a meeting in accordance with WAC 392-172A-03095 through 392-172A-03100.” WAC 392-172A-03090. Once an IEP is completed, the school district is obligated to implement the IEP in conformity with its provisions. WAC 392-172A-03105(2)(b).

24. A failure to implement an IEP is both a procedural violation, and a substantive violation. 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:

“[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).

25. Violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

(i) *impeded the child’s right to a free appropriate public education;*

*(ii) significantly impeded the Parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the Parent's child; or*

*(iii) caused a deprivation of educational benefits.*

WAC 392-172A-05105(2). An ALJ's "determination whether a student received FAPE must be based on substantive grounds." WAC 392-172A-05105(1).

**2. *The District was Obligated to Implement the February 12, 2018, IEP between January 4, 2019, and June 9, 2019.***

26. The first issue presented is which IEP the District was required to implement during the period of January 4, 2019, through June 9, 2019.

27. It is not disputed that, after determining that the Adult Student was eligible for special education services on January 25, 2018, the District was obligated to offer the Adult Student an IEP that provided her with FAPE. It is also not disputed that the District offered the Adult Student the February 12, 2018, IEP from February 12, 2018, through June 9, 2019. Thus, it is concluded that the District was obligated to implement the February 12, 2018, IEP during the period of January 4, 2019, through at least February 12, 2019.

28. However, there is also an issue regarding whether the District was to implement the draft February 5, 2019, IEP beginning February 12, 2019. The District was required by WAC 392-172A-03110(3) to review the Adult Student's February 12, 2018, IEP by February 12, 2019, to determine whether the annual goals were being met, and to:

*(b) Revise the IEP, as appropriate to address:*

*(i) Any lack of expected progress toward the annual goals described in WAC 392-172A-03090(1)(b) and in the general education curriculum if appropriate;*

*(ii) The results of any reevaluations;*

*(iii) Information about the student provided to, or by, the parents, as described under WAC 392-172A-03025;*

*(iv) The student's anticipated needs; or*

*(v) Other matters*

WAC 392-172A-03110(3). The draft 2019 IEP was not finalized by February 12, 2019, and the February 12, 2018, IEP expired on February 12, 2019.

29. The case of *Anchorage School Dist. v. M.P.* 689 F.3d 1047 (9th Cir. 2012), stands for the general proposition that a district cannot blame the parents for its failure to properly and timely develop an IEP. See also *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038, 1045 (9th Cir. 2013) (difficulty in working with parent did not excuse school district's failure to include him in IEP meeting when he was willing to participate). In *M.P.*, the parents refused to attend an IEP meeting to update the Student's annual IEP and instead provided written commentary. *M.P.*, 689 F.3d, 1050. As a result of the impasse, the district continued to use an IEP that was outdated by two years. *Id.*, at 1052-53. The court determined that the district had two options: it could continue working with the parents to develop a mutually acceptable IEP, or it could unilaterally revise the IEP and then file an administrative complaint to obtain approval of the proposed IEP. *Id.*, at 1056. It could not, however, "ignore its affirmative duty under the IDEA by postponing its obligation to revise the outdated IEP." *Id.*

30. Like the case of *M.P.*, here it cannot be said that the District ignored its affirmative duty to annually review and amend the February 12, 2018, IEP. The evidence clearly shows that the District scheduled 2019 IEP Team meetings on January 29, 2019, February 5, 2019, and February 15, 2019, but the Parent requested to delay the finalization of the draft 2019 IEP until the IEE and 2019 Reevaluation were completed and that the Parent refused to attend further 2019 IEP Team meetings.

31. Even so, the District continued to work on the development of a mutually acceptable 2019 IEP by timely reviewing the February 12, 2018, IEP and offering a draft 2019 IEP that 1) updated the service matrix to list the Adult Student's current SDI and related services, 2) added accommodations and modifications, 3) included the most recent State assessment scores, 4) added general education teacher input, 5) included Parent input from the February 5, 2019, IEP meeting, 6) added O&M and Math goals and present levels of performance, 7) summarized the current assistive technologies used by the Adult Student, 8) reflected the terms of the parties' November 16, 2018, mediation agreement, and 9) included a secondary transition plan.

32. Further, the Adult Student was not without an IEP after February 12, 2019, because on January 28, 2019, the District issued a PWN that stated it would continue to offer and implement the February 12, 2018, IEP until the parties agreed on a finalized 2019 IEP. While offering an IEP that is over one year old is not an ideal educational program for the Adult Student, the Parent's request to delay and failure to attend 2019 IEP Team meetings necessitated the circumstance.

33. The Adult Student has not produced any testimony or evidence that shows the District should have implemented anything but the February 12, 2018, IEP during the period of January 4, 2019, through June 9, 2019. Therefore, it is concluded that the District was obligated to continue to implement the February 12, 2018, IEP between February 12, 2019, and June 9, 2019.

**3. The District was Obligated to Implement the February 12, 2018, IEP Only on the Days the Adult Student Attended School.**

34. Next, the unusual circumstances of this case require a determination of when the District was obligated to implement the February 12, 2018, IEP. The Adult Student claims that, due to anxiety created by District staff's bullying, intimidating, and harassing behavior, she did not attend school on a significant number of days between January 4, 2019, and February 7, 2019, and did not attend at all between February 7, 2019 and June 9, 2019. As a result, the Adult Student did not receive special education services and she believes she is owed compensatory education for the missed services. Essentially, the Adult Student asserts that the District is at fault for her non-attendance, resulting in a material failure to implement the IEP between January 4, 2019, and June 9, 2019.

35. The District asserts that the Adult Student's non-attendance at school amounted to a personal choice and was not connected to the District's actions. Therefore, the District was only obligated to implement the February 12, 2018, IEP on the days the Adult Student attended school. The District also argues that it made extensive efforts to address the Adult Student's nonattendance during the period of January 4, 2019, until the Adult Student dropped out on March 28, 2019.

36. A school district is only obligated to implement a student's IEP on the days that the student attends school. In *Letter to Balkman*, 23 IDELR 646 (1995) and *Letter to Copenhaver*, 108 LRP 33574, the Office of Special Education Programs ("OSEP") advised that a school district is only obligated to compensate a student for SDI and related services a student does not receive due to an absence from school if the reason for the absence is connected to the District's actions or schedule (i.e. unavailable staff, field trips, etc.). If a student is absent for personal reasons, then the school district does not have to compensate the student for missed services and is not obligated to provide those services on the days the student is absent. (*Id.*)

37. The record supports the conclusion that the Adult Student was absent from school between January 4, 2019, and June 6, 2019, for reasons not connected to the District. First, the Adult Student testified that she was absent from school by choice with the permission of the Parent, and this is corroborated by the Parent's testimony that she did not require the Adult Student to attend school.

38. Second, while the Adult Student claims that her general feelings of anxiety and mental health prevented her from attending school during the period at issue, the record shows that the District addressed the possibility by inviting the Parent and Adult Student to meet with Mr. Grimm the dean of students, offered to conduct a reevaluation in social / emotional, offered to fund an IEE in the area of social / emotional, provided paraeducator support, and addressed the Adult Student's current circumstances in the 2019 IEP development process. While the Adult Student presented the testimony of Dr. Wood to show the Adult Student suffered from mental health problems, Dr. Wood's testimony was vague as to the Adult Student's diagnoses and did not pertain to the period at issue. Notably, the Adult Student did not produce any medical records that show she suffered from mental health problems or that she had anxiety to such an extent she could not attend school.

39. Next, the result of the HIB investigation also supports a conclusion that the Adult Student's absences were her choice and unconnected to the District. The Adult Student testified that she was anxious, and her mental health suffered because of harassment, intimidation, and bullying by District staff, and therefore she did not come to school. As concluded above, the Parent's and Adult Student's testimony on this issue lacked credibility and the independent HIB Investigation revealed that the Adult Student's claims were unsupported.<sup>40</sup>

40. The only conclusion to be reached based on the evidence available is that the Adult Student chose to be absent from school between January 4, 2019, and June 9, 2019, with the permission of the Parent, for reasons unconnected to the District. Given that the Adult Student's absences from school were not connected to the District, it is concluded that the District was only obligated to materially implement the February 12, 2018, IEP on the days that the Adult Student attended school between January 4, 2019, and June 9, 2019.

41. As per the findings of fact above, the Adult Student attended school on an unknown number of days between January 4, 2019, and February 7, 2019. For the period of February 8, 2019, through June 9, 2019, the Adult Student did not attend school. Between June 9, 2019, and the end of the 2018-2019 academic year, the Adult Student was enrolled in the Everett School District. Given the Adult Student's absences and transfer out of the District, it is concluded that the District was only obligated to implement the February 12, 2018, IEP on the days the Adult Student attended school between January 4, 2019, and February 7, 2019.

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<sup>40</sup> As found above, the Adult Student also ceased attending WSSB and Everett School District for the same or similar reasons.

**4. *The Adult Student has Not Shown that the District Failed to Implement the Student's February 12, 2018, IEP in the Areas of Reading and Writing and Braille instruction.***

42. As discussed above and set forth in the Due Process Hearing Request, the Adult Student has specifically alleged that the District failed to implement the February 12, 2018, IEP in the areas of reading, writing, and braille instruction. The first consideration is whether the District was even obligated to provide the Adult Student with special education in the areas of reading, writing, and braille instruction as per the February 12, 2018, IEP.

43. The record supports the District's position that it did not have any obligation to provide the Adult Student with special education services in the areas of reading, writing, and braille because the Adult Student was not eligible in these areas as per the January 25, 2018, Reevaluation. The District also correctly identifies that the February 12, 2018, IEP did not require the District to provide special education services in the areas of reading, writing, and braille. Given the plain text of the January 25, 2018, Reevaluation and February 12, 2018, IEP it is concluded that the District was not obligated to implement special education services in the areas of reading, writing, and braille.

44. The Adult Student has conflated her claim of implementation of the February 12, 2018, IEP, with claims that 1) the January 25, 2018, Reevaluation was inappropriate because she was not evaluated in the areas of reading, writing, and braille, and 2) the February 12, 2018, IEP was not reasonably calculated to ensure she made progress in reading and writing given her vision impairment because it did not include braille instruction. As concluded in Section C above these claims were not properly raised in the Due Process Hearing Request and will not be considered. Further, as concluded in Section D above, these claims are also barred by the statute of limitations because the claims were not raised within two years of either the January 25, 2018, Reevaluation or the February 12, 2018, IEP. For these additional reasons, it is concluded that the Adult Student has not carried her burden.

45. The Adult Student also claims that District did not implement the February 12, 2018, IEPs accommodations and modifications by providing assistive technology and therefore the Adult Student should have been instructed in braille. The Adult Student specifically argues that she was entitled to braille instruction as per WAC 392-172A-03110(2)(a), which provides:

*[w]hen considering special factors unique to a student, the IEP team must: . . . (iii) in the case of a student who is blind or visually impaired, provide for instruction in braille and the use of braille unless the IEP*



*team determines, after an evaluation of the student's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the student's future needs for instruction in brail or the use of braille), that instruction in braille or the use of braille is not appropriate for the student.*

As found above, the January 25, 2018, Reevaluation and February 12, 2018, IEP specifically stated that the Adult Student's vision impairment did not require braille instruction. Therefore, this claim is also barred by the statute of limitations because it was raised more than two years after January 25, 2018, Reevaluation and February 12, 2018, when the IEP was initially completed and implemented.<sup>41</sup>

46. Regardless, the record is replete with evidence that the Adult Student is capable of visually reading at an average rate using enlarged print, and successfully uses multiple assistive technologies to access her education. While the Adult Student's eye fatigue is cause for concern, the District scheduled the Adult Student for multiple eye breaks between classes as per the February 12, 2018, IEP and November 16, 2018, mediation agreement, and implemented the eye breaks using the nurse's office and a paraprofessional. Furthermore, the evidence shows the Adult Student was capable of writing at an above average level and did not need assistance with writing or keyboarding.

47. The Adult Student relies on her testimony and Dr. Fay's report in support of her argument that the District should have implemented braille instruction as part of the February 12, 2018, IEP. First, as concluded above, the Adult Student's testimony on this issue lacked credibility because she can read visually with assistive technology and large print materials. Therefore, the Adult Student's testimony is given no weight. Second, the Adult Student's reliance on Dr. Fay's report is misplaced. Dr. Fay's IEE is insufficient to support her conclusion because 1) Dr. Fay was not aware of the Adult Student's vision impairment and how it impacted her ability to read, 2) Dr. Fay did not review the Adult Student's educational record and programming, or previous evaluations, 3) Dr. Fay did not evaluate the Adult Student in reading, and 4) Dr. Fay's writing evaluation revealed that the Adult Student was a strong writer. Thus, the Adult Student has not carried her burden and has not shown that braille instruction was required for the Adult Student to access her education.

48. On its surface, the Adult Student's claim that the District failed to implement the February 12, 2018, IEP in the areas of reading, writing, and braille appears to be a cause for concern as she is a visually impaired person with specific rights under the

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<sup>41</sup> The determination of reasonableness is made as of the time the reevaluation is completed and the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). A reevaluation and an IEP are "a snapshot, not a retrospective." *Id.*

IDEA. However, a thoughtful and thorough review of the evidence and the record shows that the February 12, 2018, IEP did not require the District to provide SDI and related services in the areas of reading, writing, and braille, so it would be untenable to hold the District accountable for any failure to do so.

49. Instead, the evidence supports a conclusion that the Adult Student is an average visual reader and strong writer who uses assistive technology and large print materials to successfully access her education. Therefore, the District was not obligated to provide the Adult Student with special education in the areas of reading, writing and braille. Moreover, the District implemented the February 12, 2018, IEP by supplying assistive technology, eye breaks, large print materials and other modifications and accommodations. Given these circumstances, then, it is concluded that the Adult Student has failed to carry her burden and is not entitled to any relief.

***5. The Adult Student has Failed to Show that the District Did not Implement the February 12, 2018, IEP in the Areas of Counseling / Mental Health / Psychological Services***

50. The Adult Student has claimed that the District promised her counseling, mental health, and psychological services, but failed to provide these services during the period at issue. The District asserts that 1) the February 18, 2018, IEP did not require the District to provide these special education services, and 2) the District offered to reevaluate the Adult Student in the area of social / emotional on multiple occasions, but the Parent refused to consent.

51. The District is correct. The February 12, 2018, IEP does not require the District to provide the Adult Student with counseling, mental health, or psychological services. Because the February 12, 2018, IEP does not require the provision of these services, the District cannot be held responsible for any failure to provide the services. Again, the Adult Student has not carried her burden and has not shown that the District failed to meet its obligations to her under the February 12, 2018, IEP.

52. The Adult Student again conflates her claims regarding the appropriateness of the January 25, 2018, Reevaluation and February 12, 2018, IEP with her claims of implementation of the February 12, 2018, IEP. As concluded above in Section C, the Adult Student did not properly raise any claims regarding the January 25, 2018, Reevaluation, and eligibility determination in the area of social / emotional, or the February 12, 2018, IEP contents. Even if the Adult Student did raise the claims, as per the conclusions above in Section D, any such claims would be barred by the statute of limitations.

53. Even so, the Adult Student did not produce any documentary or testimonial evidence that she suffers from a mental health condition or social / emotional disabilities. The Adult Student only presents her own self-serving statements that she had feelings of anxiety and that at some point in an unspecified meeting Dr. Lewinsohn promised her counseling services. However, as concluded above, the Adult Student's testimony regarding these events lacks credibility and is given no weight.

54. The Adult Student also relies on Dr. Fay's report, but Dr. Fay's report is given little or no weight because she did not review any of the Adult Student's educational records or talk with the District's staff, and Dr. Fay's report was completed after the Adult Student left the District on June 9, 2019. Finally, the Adult Student presented the testimony of Dr. Wood, but he was unable to testify as to the specifics of the Adult Student's mental or emotional health during the period at issue.

55. Certainly, the record does reflect that at the February 12, 2018, IEP meeting the Parent challenged the eligibility determination in the area of social emotional and requested a reevaluation. But the record also shows that on May 29, 2018, the District agreed to use public funds to pay for an IEE performed by the provider of the Parent's choice. The Parent did not select a provider for ten months, but eventually selected Dr. Fay in April 2019. Ultimately, the Parent received an IEE from the provider of her choice on August 8, 2019.

56. Regarding the District's agreements on February 12, 2018, May 29, 2018, and November 16, 2018, to reevaluate the Student in the area of social / emotional, the Parent prevented the reevaluation by refusing to give written consent. When a parent does not provide consent for a reevaluation requested by a school district, the school district may, but is not required to, pursue the reevaluation of the student by using the consent override due process procedures WAC 392-172A-03000(1)(e). If the district does not pursue due process to override a parent's lack of consent, the district does not violate its obligation to conduct an evaluation. WAC 392-172A-03000(1)(f). Here, the Parent refused to consent to the District's three offers to reevaluate the Student. Therefore, the District did not have an obligation to reevaluate the Adult Student in the area of social / emotional until the Parent provided the requisite consent.

57. On this issue, then, the Adult Student has not carried her burden and has not shown that the District failed to implement the February 12, 2018, IEP in the areas of counseling, mental health, or psychological services because the District was not obligated to provide these special education services to the Adult Student.

**6. *The Adult Student has Failed to Show that the District Did Not Implement the Adult Student's February 12, 2018, IEP in the Areas of Orientation and Mobility.***

58. The Adult Student claims that Mr. Dlugo did not implement O&M and adaptive SDI required by the February 12, 2018, IEP during the period at issue. The District argues that either Mr. Dlugo did implement the services, or the Adult Student was absent from school preventing implementation of services.

59. The February 12, 2018, IEP requires the provision of two 75-minute sessions of O&M services per month and one 75-minute session of adaptive services per month. Mr. Dlugo testified that he attempted to provide the Adult Student with the required O&M and adaptive services during the period of January 4, 2019, through February 7, 2019, but the Adult Student was either absent during their scheduled lessons or she declined to participate in the lessons. Given that the Adult Student was largely absent from school between January 4, 2019, through February 7, 2019, it can be concluded that the Adult Student more likely than not missed school on the days the two O&M sessions and one adaptive session were offered by Mr. Dlugo.

60. As concluded above, on this issue the Adult Student offered testimony that lacked credibility. The transcript shows that the Adult Student could not remember if she received O&M and adaptive services during the period of January 4, 2019, through February 7, 2019, or she made statements regarding the provision of O&M and adaptive lessons that occurred during time periods prior to January 4, 2019. Moreover, the Adult Student's testimony that she did not receive the O&M and adaptive services is directly contradicted by Mr. Dlugo's testimony and all the available documentary evidence.

61. Given these circumstances, it is concluded that it is more likely than not that Mr. Dlugo offered the O&M and adaptive services in the February 12, 2018, IEP during the period of January 4, 2019, through February 7, 2019, and either the Adult Student declined the services or was absent from school. Therefore, it is concluded that the Adult Student failed to carry her burden and is not entitled to any relief.

**F. The Adult Student has Not Carried Her Burden as to Her Final Claim.**

**1. *Applicable Law***

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

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

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

- (i) *Consider the use of positive behavioral interventions and supports, to address behavior, in the case of a student whose behavior impedes the student's learning or that of others; and*
- ...
- (v) *Consider whether the student needs assistive technology devices and services.*

WAC 392-172A-01025.

63. The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry that must focus on the unique needs of the student at issue. As the U.S. Supreme Court has made clear, “A focus on the particular child is at the core of the IDEA,” and an IEP must meet a child’s “*unique needs.*” *Endrew F.*, 137 S.Ct. at 999 (emphasis in original). “An IEP is not a form document,” and the “essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.* “Above all, an IEP team is charged with developing a ‘comprehensive plan’ that is ‘tailored to the unique needs of a particular child.’” *L.C. on behalf of A.S. v. Issaquah Sch. Dist.*, 2019 WL 2023567 at \*21, 119 LRP 18751 (W.D. Wash. 2019)(quoting *Endrew F.*, 137 S.Ct. at 994), *aff’d sub nom. Crofts v. Issaquah Sch. Dist. No. 411*, 2022 U.S. App. LEXIS 907 (9th Cir. 2022).

***2. The Adult Student has Not Carried Her Burden and Has Not Shown that the District Failed to Offer Her an IEP that “Adequately Considered the Student’s Specific Situation and Needs Related to Vision Impairment and Other Disabilities.”***

64. The Adult Student’s final claim is a confusing, vague, overbroad statement that implies that, despite everything the District did over a period of two years to provide the Adult Student with access to her education, the District simply did not fulfill the Adult Student’s needs (educational or otherwise).

65. It is the District's position that this claim is a "oblique attempt by the [Adult Student] to argue in a different way that the Student should have received specially designed instruction in the area of social / emotional or related services, and to challenge the District's January 25, 2018, Reevaluation and February 12, 2018, IEP." The District's position is supported by the fact that the Adult Student cites to the *Andrew F.* case in the issue statement and this case addresses whether an IEP is reasonably calculated to ensure that a student can make progress in light of their unique circumstances.

66. Given the vague, overbroad, and confusing nature of the issue statement, and the specific citation to *Andrew F.*, it is concluded that the Adult Student is again attempting to challenge the January 25, 2018, Reevaluation and February 12, 2018, IEP. As concluded above, the Adult Student's claims regarding the January 25, 2018, Reevaluation and February 12, 2018, IEP were not properly raised and are barred by the statute of limitations.

67. The Adult Student may also be challenging the February 5, 2019, IEP, which was never finalized or implemented because the Parent asked for a facilitated meeting in the future and refused to attend IEP meetings after February 5, 2019. While the Adult Student may have substantive claims regarding the February 5, 2019, IEP, it would be unfair to allow these claims to proceed given that the February 5, 2019, IEP was never finalized due to the actions of the Parent.

68. Even so, the Adult Student did not produce any evidence or testimony regarding why she believed that the February 5, 2019, IEP was not reasonably calculated to allow the Adult Student to progress given her unique circumstances. On the other hand, Dr. Lewinsohn, Mr. Dlugo, Mr. Epplin, and Ms. McDonald all testified about their efforts to develop an annual IEP for 2019 using the Adult Student's present levels of performance, state assessment scores, and parental concerns, and by proposing new goals.

69. Given the vague, confusing, and overbroad nature of the claim, as well as the evidence in the record, it is concluded that the Adult Student has not carried her burden and has not shown that the District violated the IDEA or *Andrew F.* by offering the February 12, 2018, IEP or the February 5, 2019, IEP.

#### **G. Requests for Relief**

70. Because the Adult Student has failed to carry her burden on any of the above claims, the Adult Student's request for compensatory education, and other requested relief, is denied.

## ORDER

Based on the above findings of fact and conclusions of law, it is THEREFORE HEREBY ORDERED:

1. The Adult Student has not shown that the District failed to implement the Adult Student's February 12, 2018, IEP in the areas of reading and writing or by failing to instruct the Adult Student in braille;
2. The Adult Student has not shown that the District failed to implement the Adult Student's February 12, 2018, IEP in the areas of orientation and mobility and adaptive;
3. The Adult Student has not shown that the District failed to implement the Adult Student's February 12, 2018, IEP in the areas of counseling / mental health / psychological services;
4. The Adult Student has not shown the District failed to offer her an IEP that adequately considered the Adult Student's specific situation and needs related to vision impairment and other disabilities;
5. The Adult Student's remaining claims are barred by the statute of limitations;
6. The Adult Student failed to properly raise her remaining claims in her due process hearing request; and
7. The Adult Student's requests for relief are DENIED.

SERVED on the date of mailing.



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Courtney Beebe  
Administrative Law Judge  
Office of Administrative Hearings

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

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

Parent/Adult Student

[REDACTED]

via First Class Mail and  
via E-mail

[REDACTED]

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Dated February 16, 2024, at Seattle, Washington.

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Representative  
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cc: Administrative Resource Services, OSPI