

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Docket No. 07-2023-OSPI-01949

Seattle School District

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

Agency: Office of Superintendent of  
Public Instruction

Program: Special Education

Cause No. 2023-SE-0117

A due process hearing was held before Administrative Law Judge (ALJ) Jacqueline Becker on March 18, 19, 20 and 21, 2024, via zoom videoconference. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Whitney Hill and Chris Williams, attorneys at law. The Seattle School District (District) was represented by Susan Winkelman, attorney at law. Also present for the District were Rachel Disario, Senior General Counsel, and Amanda McNaughton, Special Education Supervisor.

**STATEMENT OF THE CASE**

**Procedural History**

The due process hearing request (Complaint) in this matter was filed on July 10, 2023. The matter was assigned to ALJ Becker. A prehearing conference was held on August 8, 2023, and the hearing was set for October 31 and November 1-3, 2023. An amended Complaint was filed on August 15, 2023, and the request to amend was granted. At a second prehearing conference held on October 20, 2023, the hearing dates were continued over the objection of the District to allow for pretrial summary judgment proceedings. The Parents subsequently withdrew several of their claims with prejudice, and summary judgment motions were not filed. Claims that were withdrawn with prejudice included claims pertaining to implementation of the Student's IEPs, and alleged failure by the District to provide the Student with the required amount of specially designed instruction.<sup>2</sup>

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

<sup>2</sup> Parents' Motion to Withdraw Issues for Hearing With Prejudice, filed November 3, 2023.

The due process hearing was rescheduled for March 18-21 by order dated November 9, 2023, and was held as set.

**Due Date for Written Decision**

The due date for a written decision in this matter is June 7, 2024.

**EVIDENCE RELIED UPON**

**Exhibits Admitted:**

District's Exhibits: D1-30

Parents' Exhibits: P9, P10, P14-16, P19, P21, P23-27, P30-32, P35, P37, P38, P41-43, P45-48, P51-57, and P59

**Witnesses Heard:**

Ms. Parent – Student's mother

Mr. Parent – Student's father

Amanda McNaughten – District Special Education Supervisor

Dr. Angie Gille – District occupational therapist (OT)

Laura Barringer – Head of Academy for Precision Learning (APL)

Kristin Ojala - Clinical Director at APL

Cassandra Szalay – Board Certified Behavior Analyst (BCBA) at APL

Cindy Easter – Special education teacher at APL

Dr. Karen Toth – Clinical psychologist

Dr. Lionel Enns - Clinical child psychologist and BCBA

Anastasiya Shapovalova - BCBA

Amy Forhan-Stocks – District special education teacher

Anne O'Leary – District physical therapist (PT)

Teri Elrand – District speech language pathologist (SLP)

## ISSUES

1. The issues heard in the due process hearing are:
  - a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE), specifically:
    - i. Whether the District failed to develop an appropriate Individualized Education Program (IEP) for the Student from June 2023 to the present which specifically includes:
      - (a) An appropriate educational placement; and
      - (b) Appropriate mental health and social/emotional supports;
    - ii. Whether the District inhibited meaningful parental participation by:
      - (a) Predetermining the Student's educational placement at the June 2023 IEP meeting; and
      - (b) Failing to provide progress reporting to the Parents with sufficient notice and time to enable review before the June 2023 IEP meeting.
  - b. And, whether the Parents are entitled to their requested remedies, including:
    - i. Declaratory relief finding that the District violated the IDEA;
    - ii. Declaratory relief finding that the Student was denied FAPE by the District 's actions;
    - iii. Compensatory special education and related services for the Student to allow him to obtain the educational benefit he would have received but for the District's violations of the IDEA and denial of FAPE, consistent with 20 U.S.C. §1415(i)(2)(c)(iii);
    - iv. An order that the District shall reimburse the Parents for any private evaluations, services, and tuition they paid or obtained for the Student between August 2023 and the present;
    - v. An order that the District develop an IEP going forward that is developed, reviewed, and revised in accordance with WAC 392-

172A-03090 that is appropriate and reasonably calculated to meet the Student's unique needs; and

- vi. Such other remedies as are just and appropriate.

### FINDINGS OF FACT

1. The Student is [REDACTED] and is in second grade. D1 p.6.<sup>3</sup> He has been eligible for special education services since preschool. The Student was diagnosed with autism spectrum disorder in March 2021. *Id.* at 7. The Student is very creative and enjoys doing arts and crafts. Tr. 279. He is friendly and social with family and family friends. *Id.*
2. The Student is verbal and was described by Mr. Parent as “talkative” and unafraid to talk to adults. Tr. 295.
3. The Student attended developmental preschool at Sand Point Elementary School in the District, and then attended kindergarten at View Ridge Elementary School (View Ridge) in the District. Tr. 65-69.
4. The Student underwent a reevaluation by the District in June 2022. He was determined to meet the special education eligibility criteria for autism. D1. The reevaluation noted that the Student required specially designed instruction (SDI) in communication, social/behavior, adaptive/life skills, and cognitive/academics. He also required OT, PT and SLP as related services. *Id.* at 6-8.
5. The June 2022 reevaluation summary noted that the Student has difficulty initiating and maintaining peer interactions, transitioning, controlling impulses, engaging in non-preferred tasks, playing safely with peers, responding appropriately when he does not get his way, and communicating socially. He was also determined to have difficulty with dressing himself, safety, toileting, and cleaning up. D1 p.6.
6. The reevaluation demonstrated that the Student has difficulty recognizing and labeling individual letters, decoding words, reading text with fluency and comprehension, learning, and recalling math facts, performing math operations, spelling, and writing sentences. As such, he required SDI in reading, math, and written language. D1 p.8.

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<sup>3</sup> Exhibits are cited by party (“P” for Parents; “D” for District), exhibit number, and page number. For example, a citation to P1 p.5 is to the Parent’s Exhibit 1 at page 5. The hearing transcript is cited as “Tr.” with references to the page of the cited testimony. For example, a citation to Tr. 80 refers to testimony at page 80 of the transcript.

7. The Student previously underwent a functional behavioral assessment (FBA) in February 2022. D2. Target behaviors that were identified by the FBA included: negative statements and work refusal, failure to respond to teacher prompts, elopement from the instructional area, wandering around the room and pulling items off shelves and tables, grabbing masks off other students, hitting, and kicking staff members and peers. *Id.* at 3.

8. In June 2022, the Parents asked that the Student be moved from View Ridge to a different school for the following school year. District staff suggested the Student move to a building with “Focus” and “Access” programs. P10 p.1.

9. The Student attended Olympic Hills Elementary (Olympic Hills) in the District for first grade during the 2022-23 school year. D10. His general education teacher was Christina Penticuff, and his special education teacher was Amy Forhan-Stocks.<sup>4</sup> *Id.* Ms. Forhan-Stocks felt the Student fit very well in her special education classroom, which had ten students. She found the Student to be very friendly and noted that he generally preferred the company of adults. Tr. 765-66. However, he interacted with peers to work on crafts, and sometimes at recess. *Id.*

10. The behavior technician (BT) who initially worked with the Student at Olympic Hills was named Michelle, and she was supervised by BCBA Amber Greget. D10 p.5; Tr. 78. Both were employed by an outside contractor called The Behavioral Institute.<sup>5</sup> Michelle had worked with the Student previously at View Ridge and she had a good relationship with him. Tr. 78.

11. The Parents received monthly behavior reports from The Behavioral Institute. Tr. 776; P21. Ms. Forhan-Stocks also took data on the Student’s IEP goal progress, and the BTs collected data, as well. Tr. 776-77.

12. On September 12, 2022, the Parents informed the District that they had selected Dr. Lionel Enns to conduct an independent educational evaluation (IEE) of the Student at District expense, which the District had previously agreed to fund. D28 p.3; Tr. 110. Dr. Enns has a PhD in school psychology and is trained as a clinical psychologist. He is also a BCBA. P48; Tr. 631.

13. Dr. Enns observed the Student for three hours at Olympic Hills on October 6, 2022. P19 p.8. He noted that the Student interacted very little with his peers. Tr. 644. Dr. Enns also reviewed records pertaining to the Student, including the June 2022

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<sup>4</sup> Ms. Forhan-Stocks has a bachelor’s degree in elementary education and an endorsement in special education. She has been a special education teacher in the District for 25 years. Tr. 762-63

<sup>5</sup> The District does not have behavior technicians on staff. It contracts with outside agencies for those personnel. Tr. 179-80.

reevaluation. P19 pp. 3-4. Dr. Enns interviewed the Student's BT during the observation but did not interview the Student's special education teacher or any other District staff members. Tr. 671-72.

14. Dr. Enns met at his clinic with the Student and Mr. Parent on November 23, 2022. After Mr. Parent left the Student with Dr. Enns for testing, the Student tipped over a chair, threw a game on the floor, rammed his chair into Dr. Enns' chair, tipped over a table, and stated "I hate you" to Dr. Enns. P19 p.12. Dr. Enns then called Mr. Parent to come back, and they determined that testing the Student would not be successful. Tr. 642.

15. Dr. Enns wrote in his evaluation report that he spoke to Ms. Parent after this incident and "she insisted that what had occurred was a trauma response." P19 p.12. Dr. Enns observed that "while this was possible, it was notable that [Student] had not appeared to escalate at any point and had appeared calm throughout the session." *Id.*

16. Despite being unable to administer any testing to the Student, Dr. Enns wrote a 21-page psychological assessment report based on interviews with the Parents, observation of the Student at school, and school and service provider records. P19 p.13. Dr. Enns' observations included that Olympic Hills was "an awkward fit" for the Student, and the Student struggled to maintain his behavior in the general education classroom, seeming to be a distraction to other students rather than someone truly included in activities. The Student was most successful at recess and in art class but did not interact at all with his peers during art class. Dr. Enns observed the Student's most challenging behavior to involve aggression toward both adults and peers. The aggression seemed to escalate when the Student was asked to perform a non-preferred activity. Dr. Enns opined that the Student "does not appear to possess requisite skills to engage with peers appropriately" on a consistent basis. He also observed the Student to be "extraordinarily impulsive and reactive." *Id.* at 13-15.

17. Dr. Enns issued a lengthy list of recommendations for the Student. P19 p.19.

18. Dr. Enns opined at the due process hearing that he did not think it was possible for the District to provide the Student with FAPE at Olympic Hills, in part because the Student's academic progress would be "glacially slow." Tr. 663.

19. Dr. Enns' report was uploaded into the District's database after he issued it. The Student's evaluation team never met formally to discuss this report. Tr. 191. The Parents did not request a meeting to discuss it. *Id.* at 242.

20. On October 7, 2022, the Student attempted to choke a kindergarten student, tried to poke the eyes of other students, scratched, and kicked a staff member, ran into the girls' bathroom, and attempted to choke a girl in the bathroom. P14.

21. Ms. Forhan-Stocks observed the Student's level of challenging behavior to be fairly stable until approximately February of the 2022-23 school year. After that, his problematic behaviors increased and remained elevated through the end of the school year. Tr. 768. The Student's dominant problematic behavior was physical aggression toward peers and staff. *Id.* at 769. He attempted to scratch and kick people at least weekly. *Id.* at 811. Other problematic behaviors included screaming, eloping, property destruction, whining, tantrums, and task refusal. *Id.* at 769-71.

22. Mr. Parent usually met the Student's bus after school and observed the Student to be very dysregulated by the time he got home after the lengthy bus ride. At times, Mr. Parent could hear the Student kicking the side panels of the bus as it arrived. Tr. 283-84. It took a while for him to calm down after he arrived home. *Id.*

23. The Parents received daily written reports about the Student's school day throughout the year. Tr. 283, 289.

24. An IEP meeting was held regarding the Student on November 28, 2022. At the meeting, the Parents informed the District that they wanted to change IEE providers due to the Student having a had a negative experience with Dr. Enns. D28 p.4.

25. In an e-mail to Dr. Enns sent on or about November 28, 2022, Ms. Parent stated that the Parents and some of the Student's therapists felt that the Student's negative response to Dr. Enns was trauma based. She then stated:

[Y]ou used a brief interaction you had with our six-year-old child to inform us that he "did not have empathy" ... suggesting he was on a path towards possible institutionalization or even incarceration.... During our call and conversation with my husband (in person) on 11/23, you also mentioned that [Student's] case was difficult and complicated, and you did not seem very confident that a complete evaluation was going to be possible. We are also concerned that you recommended to place [Student] in an ABA school structure such as APL before you concluded the evaluation. Based on these experiences and conversations with you, it appears to us that our child's needs may be out of your scope of expertise. For these reasons, we believe that it is best for [Student's] IEE to be conducted by a female provider with expertise in trauma-informed assessment, given his past experiences.

D28 pp.4-5.

26. Given that he administered no objective testing of any kind to the Student, and the Parents lacked confidence in Dr. Enns' observations and recommendations, Dr. Enns' report and testimony are given little weight.

27. An IEP was developed for the Student in November 2022. D3. The IEP contained twenty goals - five adaptive/life skills goals, three communication goals, three math goals, two reading goals, four social/behavior goals, and three written language goals. *Id.* at 8-27. It also contained ten accommodations including a visual schedule, frequent positive reinforcement, and a quiet area for sensory breaks. *Id.* at 28. The November 2022 IEP provided for general physical education (PE) and special transportation. *Id.* at 33.

28. The special education and related services matrix in the November 2022 IEP provided is as follows:

**Services 11/14/2022 - 11/13/2023**

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
<b>Related</b>							
No	Speech Language Pathology	SLP	SLP	90 Minutes / Monthly	Special Education	11/14/2022	11/13/2023
No	Occupational Therapy	OT	OT	100 Minutes / Monthly	Special Education	11/14/2022	11/13/2023
No	Physical Therapy	PT	PT	90 Minutes / Monthly	Special Education	11/14/2022	11/13/2023
<b>Special Education</b>							
No	ADAPTIVE/LIFE SKILLS	Special Education Staff	Special Education Teacher	100 Minutes / Weekly	Special Education	11/14/2022	11/13/2023
No	MATH	Special Education Staff	Special Education Teacher	175 Minutes / Weekly	Special Education	11/14/2022	11/13/2023
No	READING	Special Education Staff	Special Education Teacher	225 Minutes / Weekly	Special Education	11/14/2022	11/13/2023
No	WRITTEN LANGUAGE	Special Education Staff	Special Education Teacher	150 Minutes / Weekly	Special Education	11/14/2022	11/13/2023
No	SOCIAL/BEHAVIOR	Behavior Technician	Special Education Teacher	150 Minutes / Weekly	Special Education	11/14/2022	11/13/2023
No	SOCIAL/BEHAVIOR	Behavior Technician	Special Education Teacher	200 Minutes / Weekly	General Education	11/14/2022	11/13/2023
No	COMMUNICATION	SLP	SLP	30 Minutes / Monthly	Special Education	11/14/2022	11/13/2023

**Total minutes per week of building instructional time available for this student (excluding lunch):** 1775 minutes per week  
**Total minutes per week student is served in a special education setting:** 877.5 minutes per week  
**Percent of time in general education setting:** 50.56% in General Education Setting

**Supplementary Aids and Services:**

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
No	1:1 Counseling	Counselor	Counselor	50 Minutes / Weekly	Special Education	11/14/2022	11/13/2023
No	1:1 Behavior Tech monitored by BCBA and spec ed teacher	Behavior Technician	Special Education Teacher	1058 Minutes / Weekly	Special Education	11/14/2022	11/13/2023
No	1:1 Board Certified Behavior Analyst (BCBA) Direct service to student	BCBA	Special Education Teacher	210 Minutes / Weekly	Special Education	11/14/2022	11/13/2023



No	1:1 Behavior Tech monitored by BCBA and spec ed teacher	Behavior Technician	Special Education Teacher	1102 Minutes / Weekly	General Education	11/14/2022	11/13/2023
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D3 pp. 31, 32.

29. As can be seen from the matrix, the IEP provided the Student with 50 minutes per week of counseling services. D3 p.31. It also provided direct BCBA services for 210 minutes per week, as well as 1058 minutes per week of behavior tech services monitored by a BCBA in special education, and 1102 of behavior tech minutes monitored by a BCBA in general education. *Id.* at 31-32.

30. The prior written notice (PWN) proposing to implement the IEP set out two options for delivery of the counseling services – talk therapy with a social worker, or monthly observation and feedback to staff from Brooks Powers Group. D3 p.35. The Parents were given the choice. *Id.* They decided on direct talk therapy and asked for a female counselor because they felt the Student responded better to female staff. D4 p.8; Tr. 184.

31. The PWN also noted that “compensatory counseling services were offered” due to counseling time that was missed while the District located a provider. D3 p. 35.

32. Some of the goals in the November 2022 IEP were identical or very similar to goals the Student had had since preschool. Tr. 102. The Student had a goal pertaining to managing his coat since preschool. *Id.*; P9 p.10. He had a goal pertaining to cleaning up since preschool. Tr. 102-04. The Student had also been working on 1:1 math correspondence and letter identification since preschool. *Id.* This apparent lack of goal progress and mastery caused the Parents to be concerned that the Student was not progressing. *Id.* at 106.

33. The Student’s behavior intervention plan (BIP) was updated on November 28, 2022. D4. The target behaviors were those that were identified in the February 2022 FBA. *Id.* at 4. The PWN proposing to initiate the BIP states, “[Student] continues to have challenging behavior and has experienced frequent dysregulation and needed greater levels of support and intervention to access learning.” *Id.* at 8.

34. The Student underwent an OT evaluation as part of the IEE in late November and early December 2022. The evaluation was conducted by occupational therapist Sara Sciarrino. P24. The evaluation notes that the Student is able to dress himself with the exception of zipping a zipper and fastening buttons. He had no issues with toileting at home but had had accidents at school. The report notes that the Student is good at climbing but had a hard time running and balancing. He had significant difficulty writing

letters but could hold a pencil with a functional grasp. *Id.* at 3-4. The evaluation is quite thorough and included observations of the Student at home and at school, as well as administration of several standardized assessments.

35. The OT evaluation recommended a quiet workspace, movement breaks, use of a weighted blanket or vest, as well as individual OT therapy directed at visual motor integration, fine motor skills, handwriting, and adaptive behavior, among other things. P24 pp. 16-20.

36. The Student also underwent a speech language pathology IEE in late November 2022, conducted by SLP Kelly Krefft. P25. Ms. Krefft's clinic, Seattle Therapy Skills for Life, has been providing private SLP services to the Student since April 2021. Ms. Krefft recommended that the Student participate in weekly speech language therapy for at least 60 minutes per week. P25 p.9. The recommendation is unclear as to how much of this would be private therapy and how much would take place at school.<sup>6</sup>

37. During the 2022-23 school year, the Student was unable to consistently focus for 20 minutes per day on adaptive skills instruction. Tr. 793. Sometimes he could focus longer than 20 minutes, and sometimes for less than a minute. *Id.* at 793-94. The same was true for math and reading SDI, but by the middle of the school year he could attend to math for longer periods. *Id.* at 794-95. The Student was most successful in one-to-one and small group instruction. *Id.* at 797.

38. Although the November 2022 IEP stated that the Student spent 50.56% of his school day in general education, that was not always the case. He had access to general education but did not always attend the general education activities. Tr. 791-93. If the Student expressed a need to go to the "sensory room" rather than a general education activity, Ms. Forhan-Stocks tried to honor that request and allow him to go. The sensory room had items that the Student could bounce on and a "body sock" that helped him calm his body. *Id.* at 863-64.

39. On December 8, 2022, the Student's BT, Michelle, was replaced by a BT named Trinity. On January 9, 2023, Trinity was replaced by a BT named Kendra Lee. D13; Tr. 80.

40. In February and March 2023, the Student underwent a neuropsychological and educational evaluation IEE by Dr. Karen Toth. P27. Dr. Toth was selected by the Parents after they declined to continue the IEE with Dr. Enns. Dr. Toth is a licensed clinical psychologist and has a PhD in child clinical psychology. She has been an

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<sup>6</sup> At the time of the due process hearing, the Student was receiving 30 minutes of private speech therapy per week. He had previously received 50 minutes per week until his therapist moved out of the area. Tr. 133-34. The timing of this change in minutes per week is not clear.

assistant professor of psychiatry and behavioral sciences at the University of Washington. P51. Dr. Toth regularly reviews IEPs, BIPs, and evaluations of students as part of her practice. Tr. 527.

41. As part of the IEE, Dr. Toth administered several assessments and questionnaires to the Student and his Parents, and interviewed teachers and others who worked with the Student during an observation at Olympic Hills. P27 p.4. Dr. Toth did not obtain input from District staff via questionnaires or other assessment measures. This was an oversight on her part. Tr. 547-76.

42. Dr. Toth observed the Student at Olympic Hills for two hours on the morning of January 31, 2023. P27 p.11. She observed the Student's BT, Kendra, "not doing anything" to instruct the Student during carpet time in the general education classroom. Dr. Toth further observed that Kendra did not try to include the Student in the activity during PE class. Dr. Toth further observed that, when she suggested to Kendra that a fragile craft project the Student had brought with him to school should be left inside during recess, Kendra stated that the Student would not want to do that. P27 p.11; Tr. 553.

43. Dr. Toth did not observe the Student in a special education setting. Tr. 582.

44. Dr. Toth determined that the Student is weak in verbal comprehension, has deficits in visual-motor integration and motor coordination, exhibits repetitive behaviors, has difficulty with attention, and has deficits in emotional and cognitive regulation. P27 pp. 6-11.

45. Dr. Toth further determined that the Student has Autism Spectrum Disorder, as well as Attention Deficit/Hyperactivity Disorder – Combined Type. P27 p.13. She concluded that the Student's cognitive functioning is at borderline intellectual disability level, but that his academic functioning is on par with his cognitive abilities. *Id.* She opined that the Student's capacity for learning is likely greater than what he demonstrates due to his tendency to get distracted by and perseverate on things that interest him, which impacts the time available to learn other things. Tr. 531, 546.

46. Doctor Toth concluded that the Student was not making gains in his IEP goals and had an aide "who at the time of my observation did not have the skills typically expected for a 'behavior technician.'" P27 p.13. Dr. Toth opined that the Student was having minimal demands placed on him at school so as to avoid him becoming dysregulated. Tr. 559.

47. Dr. Toth further concluded that the Student requires "more flexibility and individualized instruction than he can find in the special education classrooms" in the

District. She strongly urged that the Student be placed at a nonpublic agency (NPA) school such as APL because he was not making progress in the District and was not engaged sufficiently in academics.<sup>7</sup> P27 p.13; Tr. 556. Dr. Toth opined that APL would be a better fit for the Student than the District “because of the individualized trained behaviorist that would be with him all day that could actually cut through some of the behavior pieces that were getting in the way of his learning.” Tr. 560. She opined, “There is absolutely no reason why there would be so little progress over two and three years.” *Id.* at 562.

48. In March 2023, Ms. Parent brought cupcakes to school to celebrate the Student’s birthday. She stayed for part of the day and went to art with the Student’s class. She observed that the children with disabilities were all at the back of the art classroom, with their instructional assistants, and did not interact with the general education students. Tr. 97. This was upsetting to Ms. Parent, and she later emailed the school principal to ask why this had happened. *Id.* Ms. Parent did not observe the Student at Olympic Hills on any other occasions. *Id.* at 144.

49. In April 2023, the District had spring break for a week and Student also missed some school days due to illness. Tr. 216. His behavior at school escalated after those absences. *Id.* He said to staff members that he did not have to listen to them because he was going to attend a new school. *Id.* at 217; D7 p. 3. The Parents had not told the Student that, however. Tr. 217; D7 p.3.

50. In April 2023, APL staff members came to Olympic Hills to observe the Student. Tr. 233.

51. On May 15, 2023, the Student’s evaluation team met to consider the results of Dr. Toth’s IEE. D5. Dr. Toth attended the meeting. Other attendees included the Parents, Ms. Forhan-Stocks, school psychologist Erika Walther, Marcus Woods (clinical Director of The Behavioral Institute), PT Anne O’Leary, Ms. McNaughten,<sup>8</sup> OT Angie Gille, Anastasiya Shapovalova, Ms. Penticuff, and Myra Toledo (Olympic Hills principal). D30. A video recording of this zoom meeting was entered into evidence at the due process hearing as exhibit D30.

52. At the May 15 meeting, the District informed Ms. Parent that Ms. Greget, the BCBA who supervised the Student’s BT, had gone out on maternity leave. Ms. Parent

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<sup>7</sup> A nonpublic agency is a private school that meets and complies with numerous requirements set forth in WAC 392-172A-04095.

<sup>8</sup> Ms. McNaughten has bachelor’s degrees in psychology and Spanish, and a master’s degree in special education. She has experience as a special education teacher and a special education program specialist. Tr. 172-73.

had not been previously informed that Ms. Greget would be on leave. D30 There was also discussion as to who was supervising Kendra, the Student's BT. Dr. Toth stated that she observed Kendra to "just let the Student do what he wanted." Mr. Woods stated that he was supervising Kendra remotely, that Kendra was working with the Student on building tolerance for various tasks, and that no challenges regarding the Student had been identified until recently. *Id.* Ms. Parent requested that Mr. Woods come supervise in person, and there was discussion as to whether Kendra had the necessary training to be a BT. *Id.* Ms. Forhan-Stocks commented that Kendra was fairly new at the time Dr. Toth had observed the Student but was now successfully helping the Student accomplish more work. Ms. Penticuff described Kendra as "awesome." *Id.*

53. The PWN issued to document the discussion of the May 15<sup>th</sup> meeting states:

The district is required to consider the IEE results. If there is new information that the district agrees with regarding the provision of FAPE to [Student], the IEP team will add it to an IEP amendment or a new reevaluation. The district is not required to adopt all of the recommendations contained with an IEE but must give parents a prior written notice regarding decisions made about the recommendations from an IEE.

D5 p.3.

54. On May 17, 2023, Dr. Toth submitted to the Parents and the District an addendum to her IEE report. P31; D20 p.3. Dr. Toth stated she felt "compelled" to submit an addendum in response to the hostility she perceived was directed toward her from Ms. McNaughten at the May 15<sup>th</sup> meeting. P31 p.1. The addendum provides details regarding when and where Dr. Toth observed the Student during the observation at Olympic Hills. The addendum also reviews the Student's IEP goals from 2021-22 and concludes the District provided the Student with inadequate instruction and an inappropriate program that school year. *Id.* at 2.

55. Dr. Toth's addendum goes on to review IEP goals for the 2022-23 school year and notes that more than half of the goals were in areas where the Student showed minimal to no progress the year before.<sup>9</sup> P31 p.2. Specifically, Dr. Toth reported:

[Student's] current IEP (2022-2023) has a total of twenty goals. Of those, almost half of these goals were continued as written from his prior

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<sup>9</sup> Dr. Toth received assistance analyzing the Student's progress data from the Parents' education advocate who has a PhD in immunology and is adept at analyzing data. Tr. 540-41, 605-06.

IEP (nine goals; 45% continued). Another three goals were revised into similar goals, all of which had no progress or no progress data from the prior year. Altogether, more than half of the total goals on [Student's] current IEP are in areas where he showed minimal to no progress in the previous year (12 goals; 60% of total goals). Thus, the majority of [Student's] current IEP has been written to reflect expected mastery over two years of instructions (2021-2023) rather than one year (2022-2023).

*Id.* Dr. Toth repeated her prior conclusion that the Student was not making gains in his IEP goals and required “more flexibility and individualized instruction” than he could receive in the District. She strongly requested that the Student be placed at an NPA such as APL. *Id.* at 2-3.

56. In late May 2023, the Student started taking medication for ADHD. The Parents subsequently noted an increase in impulsivity at home, and also noted an uptick in reports of the Student being verbally aggressive at school based, on daily reports. D24.

57. On June 2, 2023, the Parents were notified by Ms. Walther, District school psychologist, that Dr. Toth's IEE findings did not necessitate a reevaluation of the Student by the District. D23. Ms. Walther stated that a reevaluation could be called for when information would substantially change a student's eligibility category or their recommended areas of SDI and related services, but she did not see those changes being necessitated for the Student. *Id.*

58. On June 6, 2023, the District issued a PWN refusing to initiate a reevaluation of the Student. D6. It states, “[T]he Olympic Hills team is not recommending a formal reevaluation at this time.” *Id.* at 3. The reasons for this were (1) the information in the IEE would not substantially change the Student's eligibility category, and (2) the IEE does not indicate that the Student's areas of SDI should be changed. *Id.*

59. As of June 16, 2023, the Student had made the following progress toward his IEP goals:

Adaptive/life skills: managing coat – Significant progress

Adaptive/life skills: cleaning up – Some progress

Adaptive/life skills: bathrooming<sup>10</sup> – Goal met

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<sup>10</sup> “Bathrooming” is the term that was used throughout the exhibits and testimony to refer to the Student following a specific cleanliness routine while using the bathroom at school.

Adaptive/life skills: personal information – Little or no progress

Adaptive/life skills: scissors – Goal met

Math: rote counting – Some progress

Math: 1:1 correspondence - Little or no progress

Math: patterns – Goal met

Reading: letter identification – Significant progress

Reading: literal comprehension questions - Little or no progress

Written language: printing first name - Significant progress

Written language: generating ideas to write – Some progress

Written language: drawing pictures with details – Goal met

Social/behavior: repair communication - Some progress

Social/behavior: peer interactions – Some progress

Social/behavior: PE skills – Some progress

Social/behavior: motor skills – Some progress

Communication: articulation – Significant progress

Speech language pathology: answering questions – Significant progress

Speech language pathology: telling a three-part story – Some progress

D8.

60. Notably, the Student improved his ability to count, from being able to count from one to six, to counting from one to thirteen. He became very independent in the bathroom and was able to follow the bathroom routine 4 out of 5 times, up from zero times. D8. The Student was able to identify 19 letters five out of five times, up from identifying five letters. He was able to write his name independently and legibly 50% of the time, up from zero percent of the time. He increased his accuracy in answering who/what/where questions from 30% to 75%. *Id.*

61. The IEP goal progress reports prepared by the District do not take into account the length of time a student has been working on a particular goal. Tr. 227. The Parents were concerned that the Student did not make gains in his academic skills as compared to same-age peers. *Id.* at 290.

62. During the 2022-23 school year, the Student had OT with Dr. Gille<sup>14</sup> once per week for 30-45 minutes in a group setting. Tr. 356-57. Dr. Gille described the Student's overall progress in OT as positive. At times he would be very engaged, and at other times he was difficult to engage because he did not want to transition to new activities. *Id.* at 354-55. The Student did not exhibit aggressive or violent behavior in OT sessions though he may have slammed something onto the table at times. *Id.* at 356.

63. On Friday, June 23, 2023, Ms. Forhan-Stocks sent a paper copy of the Student's IEP progress report home with the Student in preparation for an upcoming IEP meeting the following Monday. D22 p.1. The date she sent this report home is somewhat unclear in that Ms. Forhan-Stocks informed the Parents by email on Monday, June 26<sup>th</sup> that she sent the progress report home "last Friday." *Id.* The undersigned interprets this to mean Friday, June 23<sup>rd</sup>, although the District asserts in its briefing that the date referred to was Friday, June 16<sup>th</sup>. District's Post-Hearing Brief (District's Brief) at 21. Ms. Forhan-Stocks' testimony does not clarify what she meant by "last Friday," but since the progress reporting goes through June 21<sup>st</sup>, it is more logical to find that the relevant Friday on which the report was sent was June 23<sup>rd</sup>. D22 p.5.

64. The Parents did not see the IEP progress report because it was mixed in with the Student's art projects. Tr. 141. Ms. Parent requested a copy of the progress report from Ms. Forhan-Stocks via email on the morning of June 26, 2023. Ms. Forhan-Stocks then responded that she had sent it "last Friday," and Mr. Parent then located it. *Id.* at 162.

65. On the morning of June 26, 2023, Mr. Woods emailed the June behavioral progress report to the Parents and Ms. Forhan-Stocks. P38 p.1. Mr. Parent testified that this was the first time the Parents had seen a report like this. Tr. 305. However, at least two similar reports were sent to the Parents in October and November of 2022. P21. The June report consists of ten pages of data and graphs regarding the Student's behavior. It graphs the frequency of target behaviors, such as eloping, over the entire school year. One of the charts shows that the Student had from zero to six or eight

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<sup>14</sup> Dr. Gille has a bachelor's degree in rehabilitation psychology, and master's and doctorate degrees in occupational therapy. She has an educational staff associate (ESA) certificate from Washington state, as well as an occupational therapy license. Tr. 353. She has worked in the District for ten years and owns her own OT practice. *Id.* at 353-54.



instances of physical aggression per day in the March through May time periods, but zero to 24 occurrences per day in June. His instances of verbal disruption increased from zero to four instances per day in March, to zero to nine per day in May, and zero to 21 per day in June. Instances of elopement and whining/crying decreased. P38 p.5.

66. The behavior progress report characterizes the Student as having responded positively to the behavior strategies that were implemented, and states that his behavior was stable. P38 p.5. The report acknowledges, however, that noncompliance, propriety disruption and verbal disruption were trending upward. *Id.*

67. The last two pages of the report set out data that appears to relate to IEP goals, such as managing a coat, cleaning up, bathrooming, and communication. That data shows the Student's progress on almost every skill measured decreased. For example, cleaning up decreased from 81% of trials in March to 24 % in June. P38 p.10. "Asking for a break" decreased from five out of five steps correct in March to zero out of five correct steps in June. *Id.* There was no testimony to explain this data, or how, when and by whom it was collected. Consequently, little weight is given to this data, but it does appear to represent a concerning trend.

68. The Parents did not ask to postpone the IEP meeting in order to have more time to review the progress data. Tr. 142-43. Ms. Parent does not think it "would have made much difference" if she had had additional time to review the progress reports. Tr. 161. She was very discouraged at the time and did not think the District would agree to change the Student's placement. *Id.*

69. An IEP meeting regarding the Student was held on June 26, 2023, in response to the Parents' concerns regarding "IEP goal retention, current progress of IEP goals, and recommendation of placement."<sup>12</sup> D7 p.3; D26. The Parents requested the meeting because they wanted to discuss placing the Student at APL, based on the recommendation of Dr. Toth. Tr. 163. Parent attorney Williams attended the meeting, as did District attorney Rachel Disario. *Id.* at 251.

70. The District has placed other students at APL pursuant to their IEPs. Tr. 195.

71. Prior to the June 26 IEP meeting, District members of the IEP team met to discuss the agenda for the meeting and the Parents' proposal that the Student be placed at APL. Tr. 235. At this District meeting, which lasted approximately 30 minutes, Ms. McNaughten encouraged team members to share their opinions on the Student's placement at the upcoming IEP meeting. *Id.* at 235-36, 242. She voiced this encouragement because she has observed people become nervous at meetings that

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<sup>12</sup> The District OT was not present at the meeting and the Parents had agreed to excuse her. Tr. 215.

lawyers attended, and she encouraged the District team not to be afraid to speak up. *Id.* at 251. Ms. McNaughten testified that she formed her own opinion about the Student's placement at the June 26 IEP meeting, but her thoughts prior to the meeting were that the Student seemed to be making progress, but behavioral concerns needed to be discussed. *Id.* at 236- 38.

72. The Parents had an opportunity to discuss the Student's progress and ask questions at the June 26 IEP meeting. Tr. 140-41. The Parents did not request changes to the IEP other than that the Student be moved to APL. *Id.* at 168, 244. Ms. Parent and Ms. McNaughten both recall that many of the District staff members provided input and stated they felt the Student should stay at Olympic Hills. *Id.* at 165, 215.

73. Ms. Forhan-Stocks felt the Student was making progress at Olympic Hills and his stamina for academic participation had increased. When he first started in her class, he often could not focus on academics for more than a minute. But that improved with time, and he became able to stay in a reading group. Tr. 846-47, 849. By the end of the school year, the Student played with his peers at "stations" activities in the special education classroom. *Id.* at 852.

74. Ms. Forhan-Stocks testified that while she does not recall the opinion she voiced at the meeting as to the Student's placement, she is certain she would have given her truthful, professional opinion. Tr. 820. She does not recall attending a meeting with other District staff members before the IEP meeting. *Id.* at 815-16.

75. The Parents did not ask for a follow up meeting after the June 26 meeting. Tr. 142.

76. Mr. Parent felt that the District members of the IEP team had already made up their minds and did not want to listen to the Parents. He did not feel the District was collaborating in good faith. Tr. 299. He recalls Ms. Forhan-Stocks being the "leading advocate" that the Student should remain in the District. *Id.* at 308. He felt the District team members, particularly Ms. McNaughten, "undercut and devalued" Dr. Toth's IEE and her conclusions. *Id.* at 310-11. He also felt the District was focusing too much on nonacademic area goals, such as OT goals. *Id.* at 329.

77. Mr. Parent described feeling at the meeting that "the clock was ticking" because a final decision on enrollment at APL needed to be made soon because tuition would be due starting in July. Tr. 300. Mr. Parent described having had high expectations when the 2022-23 school year started and ending the year with very low expectations. *Id.* at 300-01. He felt that the 2022-23 school year was "the last chance" and "we needed to knock this out of the park this year after the prior years." *Id.* at 302-03.

78. Ms. Parent felt that the Student “was doomed” in the District and nothing else could be done for him. She felt he needed a new setting. Tr. 156.

79. Anastasiya Shapovalova<sup>13</sup> is a BCBA and owner of Acorn & Oak Behavioral & Educational Services. Tr. 682. Ms. Shapovalova has been the Student’s private ABA provider since the summer of 2021. *Id.* at 684-85. Ms. Shapovalova currently oversees the Student’s home program and the BT who works directly with him at home. *Id.* at 685-86. Ms. Shapovalova was a member of the Student’s IEP team during the 2022-23 school year. *Id.* at 694. She does not work on academics with him and has never observed the Student at school. *Id.* at 688, 719.

80. Ms. Shapovalova recalls the Parents and Dr. Toth going over the Student’s progress with the IEP team at the June 26, 2023, IEP meeting. Tr. 715. Dr. Toth discussed past IEPs and how long certain goals had been in the Student’s IEPs. *Id.* Ms. Shapovalova recalls the District team members disagreeing with the Parents and Dr. Toth regarding the Student’s progress. *Id.* at 716.

81. Ms. Shapovalova recommended at the IEP meeting that the Student be placed in a setting where he was with the same group of peers throughout the day and did not have to move between a general education and a special education setting. Tr. 716. She did not recommend private placement or District placement; rather, she described generally the setting that she thought would work best for the Student. *Id.* at 738-39.

82. Anne O’Leary<sup>14</sup> was the Student’s physical therapist during the 2022-23 school year. Tr. 878. She observed that the Student could work hard on goals when he was focused and motivated, and at other times it was hard to get him focused and engaged. *Id.* at 880. The Student saw Ms. O’Leary once per week, without his BT pursuant to Ms. O’Leary’s request. She did not observe him engage in behaviors such as aggression, screaming, or throwing things. *Id.* at 880-881. She noted that “he was dysregulated a lot,” however. *Id.* at 896.

83. Ms. O’Leary did not attend the meeting with District staff where the agenda for the June 26 IEP was established. At the IEP meeting, her position was that the Student should remain in the District for another year so that he could have stability. Tr. 896. She testified at the due process hearing that she was “on the fence” about whether the Student should go to APL because she could not know what would help the Student in

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<sup>13</sup> Ms. Shapovalova has a master’s degree in psychology with an emphasis on ABA. Tr. 682. She has been a BCBA since 2009. *Id.* at 683.

<sup>14</sup> Ms. O’Leary has a doctorate in physical therapy and is a licensed physical therapist. Tr. 874.

the future, but her first choice was that he stay in the District. Ms. O’Leary did not express her “on the fence” feelings at the IEP meeting. *Id.* at 898-99.

84. The District’s 2022-23 school year ended on June 30, 2023. D29.

85. On July 7, 2023, the District issued a PWN to document the June 26 IEP team meeting. D7 p.3; D26. The PWN states that the school team rejected placement of the Student at an NPA, and that the Parents disagreed with this decision. The District offered continued placement of the Student in a District Focus program. D7 p.3.

86. The July 7 PWN further states that the Parents were concerned that the Student had become more dysregulated after spring break in the 2022-23 school year. The Student was upset before going to school, and very dysregulated when he arrived home from school. D7 p.3. The school team responded that the Student was making “a tremendous amount of progress until April of this year.” They noted there had then been an attitude change and his behavior began to escalate. *Id.*

87. The July 7 PWN states that the IEP team was concerned that they had not been able to implement all of the Student’s interventions due to escalated behavior and the school year ending. D7 p.3.

88. The July 7 PWN noted that the Student had made progress on 17 of his 20 IEP goals despite the behavioral challenges. He had met four goals, had made significant progress on five goals, had made some progress on eight goals, and had made little or no progress on three goals. The Student’s elopement behavior had improved, and he had progressed in social communication. D7 p.3.

89. The July 7 PWN goes on to state, “The school team shares parent concern about [Student’s] behavior however, they plan to improve it with the support of [Student’s] BCBA/BT team from Behavior Institute. Marcus Woods, Clinical Director at Behavior Institute, said that [Student] needs new motivators and that they will work on new reinforcements. He also agreed to do a new FBA for him. He confirmed that they could improve [Student’s] recent behavior change at school.” D7 p.3.

90. The Parents did not express concerns about Mr. Woods at the June 2023 IEP meeting. Ms. McNaughten believes the District would have been open to looking into other providers had it been asked to do so. Tr. 220.

91. The school team’s decision to reject an NPA placement for the Student was based, in part, on “monthly BCBA reports.” D7 pp. 3-4. Ms. McNaughten, who wrote the PWN, did not see monthly BCBA reports and does not specifically know what reports were provided by Mr. Woods. Tr. 223.

92. On July 7, 2023, the Parents, through their attorney, informed the District that they were planning to unilaterally place the Student at APL in the fall of the 2023-24 school year, and would be seeking reimbursement from the District for the cost of that placement. P41.

93. On July 10, 2023, the Parents filed the Complaint in this action.

94. On July 19, 2023, the District issued a PWN refusing to change the Student's educational placement and responding to the request for reimbursement for private placement. D27. The District denied the request for reimbursement and stated that it had offered the Student FAPE in his least restrictive environment. The District reiterated the progress the Student had had made based on his progress report of June 2023. *Id.* The District also reiterated the plan for Behavior Institute to address the Student's behavior and to conduct a new FBA in order to develop a new BIP. *Id.*

95. The Student began attending APL in the fall of 2023. APL is an NPA with a total student body of 70. Ninety percent of the students have disabilities. Tr. 382, 393. Currently, 16 students are placed at APL by school districts, six of whom are placed by the District. *Id.* at 382. There are 12 children in the Student's class at APL, as well as two teachers and an instructional assistant. *Id.* at 385.

96. The Student's fall progress report from APL indicates that the Student is "developing standards" or "approaching standards" in language arts, reading, and math. P43. His progress report regarding behavior states that the Student has made "slow and variable progress." P46 p.7.

97. During the period of April through December 2023, the Student received 4-8 hours per week of ABA therapy in the home. P45 p.2.

98. Ms. Parent has observed the Student to be happy when he is picked up from APL. Tr. 130. She reports that he gets weekly counseling sessions, and he is beginning to understand phonetics and can spell simple words. *Id.* at 131. He is making friends and has had some playdates. Ms. Parent emphasized that she feels the Student is safe when he is at school now and this is very important to her. *Id.* at 131-32. APL is close to the family's home, so Ms. Parent has more opportunities to see the Student at drop off and pick up. *Id.* at 144.

99. Laura Barringer is the Head of School at APL. She has a master's degree in special education and is a certificated special education teacher. Tr. 380. Ms. Barringer testified at the due process hearing and provided information about APL and the Student's classroom.

100. Kristin Ojala is the clinical director and co-executive director at APL. Tr. 404. She has a bachelor's degree in psychology and a master's degree in education. She is also a BCBA. *Id.* at 404-05.

101. At the time of the due process hearing, the Student was working on counting from one to ten and on recognizing the digits one through five. Tr. 485. He can identify all 26 capital letters and can consistently identify ten lower case letters. *Id.* at 486. The Student does not receive SLP, PT or OT at APL. *Id.* at 148. The Student had half-day BT support at APL when he started, but it was increased to full day in January 2024. *Id.* at 149.

102. Dr. Toth observed the Student at APL on December 13, 2023, for two hours. P47. She noted the Student to be "a little escalated" that day. He only engaged with adults and "never once initiated with a peer, in the classroom or at recess." The BT working with him did not assist the Student to join in games with peers. *Id.* at 1-2.

103. Dr. Toth described the Student as having more stable behavior and mood at APL, and less dysregulation. She attributes this in part to the location of APL, which is five minutes from his home and does not require a long bus ride, whereas the bus ride home from Olympic Hills took 30 minutes or more. P47 p.3; Tr. 161. Dr. Toth notes that the Student has more opportunity to build community at APL and that the environment feels safer to his Parents. P47 p.3. Dr. Toth opined that "direct measures of progress have been difficult to analyze because data was taken in different ways at [the District] versus APL, making it difficult to make straight comparisons." She opined that APL is the correct learning environment for the Student to allow him to move forward academically, and notes that his classroom is calmer and quieter. Dr. Toth further notes that the teachers and BTs at APL have specific strategies when working with the Student and these have been successful. *Id.* at 4.

104. Dr. Toth's conclusions about the Student's progress are based in large part on information provided by the Parents. Tr. 590-92.

105. The Parents sought to have Marcus Woods testify at the due process hearing but could not locate him. Tr. 211 (representation by attorney Williams). Parent attorney Hill emailed Mr. Woods a subpoena and attempted to reach him at the phone number listed on District reports. On February 29, 2024, Ms. Hill emailed District attorneys Winkelman and Disario and asked for contact information for Mr. Woods. P57. The Parents did not attempt to serve Mr. Woods personally due to the cost involved and the fact that they did not know where to find him. Tr. 271 (representation by attorney Hill).

106. Ms. Winkelman spoke with Mr. Woods after the first day of the due process hearing. He told her he was on paternity leave and acknowledged receiving a subpoena

by email but not by personal service. Ms. Winkelman attempted to schedule Mr. Woods to testify, but he did not appear. Tr. 272-73 (representation by attorney Winkelman).

107. Ms. Parent searched Mr. Woods' name on the Washington State Department of Health provider credential website. The results show that he has an active credential as a licensed assistant behavior analyst that was first issued on January 3, 2022, and expires on May 5, 2024. P53; P54.

108. Tuition at APL is \$2400 per month. P56; Tr. 320. The Parents are seeking reimbursement for expenses of the Student attending APL, but no other reimbursement. Tr. 343 (representation of attorney Hill).

## CONCLUSIONS OF LAW

### **Jurisdiction and Burden of Proof**

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The Parents are seeking relief and therefore bear the burden of proof in this case. The U.S. Supreme Court and Washington courts have generally held that the burden of proof in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981); *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797 (1999); *Hardee v. Dep't of Social & Health Services*, 172 Wn.2d 1, 4 (2011). Therefore, the Parents' burden of proof in this matter is preponderance of the evidence.

### **The IDEA and FAPE**

3. Under the IDEA, a school district must provide a free and appropriate public education (FAPE) to all eligible children. In doing so, a school district is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197 n.21, 200-201 (1982).

4. In *Rowley*, the U.S. Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. The first question is whether the state has complied with the procedures set forth in the IDEA. The second question is whether the IEP developed under these procedures is reasonably calculated to enable the child to receive educational benefits. "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." *Rowley*, 458 U.S. at 206-07.

5. Procedural safeguards are essential under the IDEA, particularly those that protect the parent's right to be involved in the development of their child's educational plan. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

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

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

6. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 999 (2017). The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry. 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. 580 U.S. at 400. The "essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.* at 399. Accordingly, an IEP team is charged with developing a comprehensive plan that is "tailored to the unique needs of a particular child." *Id.* at 391. Additionally, the Student's "educational program must be appropriately ambitious in light of his circumstances . . ." *Id.* at 402.

7. In reviewing an IEP, "the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.* at 399 (emphasis in original). The determination of reasonableness is made as of the time the IEP was developed. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is "a snapshot, not a retrospective." *Id.*



Whether the District failed to develop an appropriate IEP for the Student from June 2023 to the present which specifically includes an appropriate educational placement, and appropriate mental health and social/emotional supports:

8. As set forth above, a school district must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of his circumstances.” *Endrew F.*, 580 U.S. at 399. The IDEA “cannot and does not promise any particular educational outcome.” *Id.* at 398 (citations omitted). When determining whether an IEP is appropriate, the question is whether the IEP is reasonable, not whether it is ideal. Moreover, the determination of whether an IEP is reasonable is made as of the time the IEP was developed.

9. In the present case, the Parents contend that the June 2023 IEP did not provide the Student with FAPE because he was not actually making progress in the District and his IEP goals were rolled over from year to year. Specifically, the Parents argue that the District’s measures of the Student’s progress were “falsely inflated” because the IEP goals “were either reduced or carried over.” Parents’ Post-Hearing Memorandum (Parents’ Memorandum) at 28. It bears repeating that the issue before this tribunal is not whether the IEP that was developed for the Student in November 2022, and the goals therein, were appropriate. That issue was not identified for hearing and falls outside the time period for consideration that was identified by the Parents, i.e., whether the *June 2023* IEP was appropriate.<sup>15</sup> This does not mean, however, that the Parents cannot argue that the Student was actually failing to make progress as indicated by his IEP goals having to be repeated or revised downward from year to year.

10. The Parents do not contend now, and did not request in June 2023, that the June 2023 IEP’s goals should be revised. Rather, they point to the goals themselves as evidence that the Student was not making progress because many goals were carried over from the previous year, essentially giving the Student two years to achieve goals that were intended to last for only one year. As found above, IEP goal progress reports prepared by the District do not take into account the length of time a student has been working on a particular goal, so a goal being rolled over from year to year is

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<sup>15</sup> A party requesting a due process hearing may not raise issues during the hearing that were not raised in the complaint unless the other party agrees. WAC 392-172A-05100(3); 20 U.S.C. § 1415(f)(3)(B). “Administrative and judicial review in IDEA cases is specifically limited to the issues raised in the due process complaint, 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*, 22 F.4<sup>th</sup> 1048 (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). This is consistent with Washington administrative law requiring that a notice of hearing include a statement of the issues (RCW 34.05.434) and that prehearing orders identify all issues and provide an opportunity to object. WAC 10-80-130.

not obvious from the progress reports. And, had a student made little to no progress from year to year on the same goals, that would indicate a lack of progress. That is not what occurred here, however. Dr. Toth's analysis of the Student's progress shows primarily that he made little progress on many IEP goals in the 2021-22 school year. However, his progress improved in the following school year. As discussed in the findings of fact, the Student did make progress on almost all of his IEP goals in the 2022-23 school year, though clearly not as much as the Parents would have liked. But parental preference regarding progress is not the determining factor. Rather, the fact that a student makes progress on only some IEP goals does not mean that his IEP fails to provide him with FAPE. *J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786, 801 (9<sup>th</sup> Cir. 2008)(IEPs provided FAPE to twins who progressed in some areas, despite emergence of new problematic behaviors); *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1123 (9<sup>th</sup> Cir. 2011)(student was provided with FAPE even though his progress was not constant or linear); *Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221*, 375 F.3d 603, 616 (7<sup>th</sup> Cir. 2004)(IEP was appropriate even though efforts to address student's behaviors were not successful). "A student is not denied FAPE simply because the district's proposed educational plan provides less educational benefit than what a student's parent might prefer." *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS 37815 \*21-22 (E.D. Cal., March 7, 2019). Moreover, the fact that a student's disruptive behaviors have not been eliminated does not demonstrate that the student was denied FAPE. *Id.*

11. Analysis of this issue should not be muddied by the Parents' attempt to interject IEP implementation failure claims under the guise of failure to make progress. See Parent's Memorandum at 37-39 (arguing that the District identified services that would help the Student make progress and meet his IEP goals, but then failed to provide a "significant portion" of those services thereby rendering the Student unable to make adequate progress; and asserting that neither the Student's BT nor her supervisor had the appropriate credentials to perform their duties under the IEP thereby, denying the Student FAPE). These arguments do not change the fact that the Student made progress in the District on most of his IEP goals. Rather, they tend to support a conclusion that if the Student's IEP were to be implemented with fidelity going forward, he would make increased progress.

12. The only change the Parents requested be made to the Student's IEP at the June 2023 meeting was that he be placed at APL. While the Parents may have preferred APL as a placement, they have not demonstrated by a preponderance of evidence that a move to an NPA was necessary for the Student to receive FAPE. The Parents' expert, Dr. Toth, opined that the Student has a mild intellectual disability, and his academic functioning is on par with his cognitive abilities. Thus, any expectation on the Parents' part that the Student would or should keep pace with his nondisabled, same-age peers

may have been unrealistic, and the evidence shows that the Student was progressing in the District. It is therefore concluded that the Student's June 2023 IEP enabled him to make progress appropriately in light of his circumstances, and that continued placement in the District was appropriate.

13. With respect to the allegation that the June 2023 IEP did not contain appropriate mental health and social/emotional supports, it is unclear what the Parents contend should have been in the IEP. This issue was not addressed in the Parents' Memorandum and the Parents did not request additional mental health and/or social/emotional supports for the Student at the June 2023 IEP meeting. It is therefore concluded that the Parents have not met their burden to prove this issue.

Whether the District inhibited meaningful parental participation by predetermining the Student's educational placement at the June 2023 IEP meeting and failing to provide progress reporting to the Parents with sufficient notice and time to enable review before the June 2023 IEP meeting.

14. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342, 344 (9<sup>th</sup> Cir. 2007). A school district's belief that its proposed placement in public school is appropriate does not establish predetermination so long as it is willing to consider other placements. *Id.* at 345. Predetermination of a student's placement is a procedural violation that can deprive the student of FAPE. According to the Ninth Circuit, a school district violates IDEA procedures "if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003). However, a parent does not have veto power over an IEP provision and a district need not accept a parent's placement preference. *Id.* at 1131-33.

15. The fact that a district may have come to an IEP meeting with pre-formed opinions regarding placement is not dispositive of the issue, so long as district team members were willing to listen to the parent and the parent had the opportunity to make objections and suggestions regarding the IEP. *L.C. v. Issaquah*, 2019 U.S. Dist. LEXIS 77834 at \*21 (W.D. Wash. May 8, 2019), *aff'd sub nom. Crofts v. Issaquah Sch. Dist. No. 411*, 22 F.4<sup>th</sup> 1048 (9<sup>th</sup> Cir. 2022). A school district is required to come to the IEP table with an "open mind" but not a "blank mind," and the district may come with a draft IEP for discussion but must not have finalized its placement decision prior to the meeting. *D.M. v. Seattle*, 2016 U.S. Dist. LEXIS 122519 at \*10 (citing *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1263 (E.D. Va. 1992)). A school district violates

the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. *K.D. ex rel. C.L. v. Dep't of Educ., Hawaii*, 665 F.3d 1110, 1123 (9th Cir. 2011). Predetermination violates the IDEA because the IDEA requires that the placement be based on the IEP, not vice versa. *Id.* A parent is not prevented from participating in the IEP process if the school district first prepares an offer to be discussed at the meeting instead of conducting a “free-wheeling discussion and then creating an offer.” *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179, 1186 (9th Cir. 2016).

16. In the present case, the Parents were provided a full opportunity to participate in the June 2023 IEP meeting and had their attorney in attendance. The fact that some District staff members met before the IEP meeting does not demonstrate that a decision was predetermined. Rather, every District witness who testified about the IEP meeting described reaching a decision based on their own consideration of the issue. The evidence clearly shows that District members of the IEP team listened to the Parents’ position and concerns, but ultimately felt the Student was making progress at Olympic Hills and should remain placed in the District.

17. For these reasons, it is concluded that the Parents have not met their burden to prove that the District’s decision regarding the Student’s educational placement was predetermined.

18. With respect to the allegation regarding progress reporting, the evidence does not establish that the District failed to provide progress reporting to the Parents sufficiently ahead of the June 2023 IEP meeting. Although the Parent located the IEP progress report on the morning of the IEP meeting, that was due in part to their failure to locate the report in the Student’s backpack on the Friday before, when it had been sent home by Ms. Forhan-Stocks. Although the Parents did receive a behavioral report from Mr. Woods on the morning of the meeting, they had received similar behavioral reports regarding the Student at other times. Significantly, the Parents did not ask for the meeting to be rescheduled in order to allow them more time to review data, nor did they ask for any sort of follow up meeting after the June 26, 2023, IEP meeting. Significantly, Ms. Parent did not think it would have made much difference if she had had additional time to review the progress reports because she was discouraged and did not feel the District would agree to place the Student at APL.

19. The evidence does not support a contention that the Parents were unable to meaningfully participate in the June 2023 IEP meeting due to the timing of their receipt of the Student’s progress reports. Rather, the evidence indicates that the Parents were given a full opportunity to participate but were not in agreement with the opinions voiced

by the District team members. There is no evidence as to what, if anything, might have changed if the Parents had more time to review the progress data.

Whether the Parents are entitled to reimbursement for the cost of the Student's unilateral placement at APL

20. WAC 392-172A-04115(3) provides:

If the parents of a student, who previously received special education and related services under the authority of a school district, enroll the student in a private preschool, elementary or secondary school, or other facility without the consent of or referral by a school district or other public agency, a court or an administrative law judge may require a school district or other public agency to reimburse the parents for the cost of that enrollment if the court or administrative law judge finds that a school district or other public agency had not made a free appropriate public education available to the student in a timely manner prior to that enrollment and that the private placement is appropriate.

21. As discussed above, the Parents have not met their burden to prove that FAPE was not available to the Student in the District. Consequently, the issue of whether the Student's placement at APL is appropriate need not be reached because the Parents are not entitled to reimbursement for the cost of the Student's unilateral enrollment.

**ORDER**

The Parents have not established that the Seattle School District violated the IDEA or that the Student was denied FAPE. Accordingly, the Parents are not entitled to any relief and their requests for relief are DENIED.

SERVED on the date of mailing.



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Jacqueline Becker  
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:

Parents

via First Class Mail

  
Whitney Hill  
Chris Williams  
Cedar Law PLLC  
113 Cherry Street  
PMB 96563  
Seattle, WA 98104-2205

via E-mail  
whitney@cedarlawpllc.com;  
chris@cedarlawpllc.com;  
emma@cedarlawpllc.com

Rachel C. Disario  
Senior Assistant General Counsel  
Seattle School District  
PO Box 34165, MS 32-151  
Seattle, WA 98124-1165

via E-mail  
rcdisario@seattleschools.org  
dacamacho@seattleschools.org

Susan Winkelman  
Pacifica Law Group LLP  
1191 Second Avenue, Suite 2000  
Seattle, WA 98101

via E-mail  
susan.winkelman@pacificallawgroup.com  
grace.mcdonough@pacificallawgroup.com

Dated June 4, 2024, at Olympia, Washington.

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Representative  
Office of Administrative Hearings  
P.O. Box 42489  
Olympia, WA 98504-2489

cc: Administrative Resource Services, OSPI