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

IN THE MATTER OF

BELLEVUE SCHOOL DISTRICT

OSPI CAUSE NO. 2019-SE-0123

OAH DOCKET NO. 09-2019-OSPI-00873

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

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Jacqueline Becker in Bellevue, Washington on January 16, 17 and 22, and February 10, 2020. The Parents¹ of the Student whose education is at issue appeared and were represented Lara Hruska, attorney at law. The Bellevue School District (District) was represented by Susan Winkelman, attorney at law. Also present for the District was Heather Edlund, Executive Director of Teaching and Learning.

PROCEDURAL HISTORY OF THE CASE

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on September 5, 2019. The Complaint was assigned Cause No. 2019-SE-0123 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. The Parents filed an amended complaint on December 23, 2019, and the request to amend was granted effective December 31, 2019.

The original ALJ assigned to this matter was Dana Diederich. The matter was reassigned to ALJ Becker on December 17, 2019.

Evidence Relied Upon

Exhibits Admitted:

Joint Exhibits: J1 through J8.

Parents' Exhibits: P1 through P21.

District's Exhibits: D1 through D3.

Exhibits Not Admitted:

Exhibits C1, C2 and C3 were marked at the hearing and offered by the Parents but were not admitted.

¹ To help ensure confidentiality, names of parents and students are not used.

Witnesses Heard (in order of appearance):

The Student

The Student's Mother

Moira Farrell, special and general education teacher, Eastside Academics School

Dr. Sarah Peregrine Lord, Student's treating psychologist

Dr. Stacie Keirse, Student's treating psychologist

Ryan Rhodes, Assistant Director, Eastside Academics School

Marie Rose, teacher, Eastside Academics School

Brenda Arroyo, Assistant Principal, Highland Middle School (former District Special Education Director)

John Delport, District staff member

Benjamin Mast, School Psychologist, Interlake High School

Elizabeth Mizrahi, Assistant Principal, Stevenson Elementary School (former Assistant Principal, Highland Middle School)

Derek Gentry, special education teacher, Interlake High School

Michael Fritz, special education teacher, Highland Middle School

Post-Hearing Briefs

The parties' post-hearing briefs were timely filed on March 10, 2019.

Due Date for Written Decision

The due date for a written decision in this case was continued to thirty (30) calendar days after the close of record, at the request of the parties, by Order dated October 8, 2019. The record closed with the receipt of the post-hearing briefs on March 10, 2020, and the due date for the written decision is April 9, 2020.

ISSUES/REMEDIES

The issues to be considered at the due process hearing were amended on the record at the commencement of the hearing by the Parents. The issues for the due process hearing were:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) from January 9, 2019, to December 31, 2019, by:
 - i. failing to offer Individualized Education Programs (IEPs) for the Student on June 14, 2019, and November 25, 2019, that are reasonably calculated to deliver FAPE for the 2019-2020 school year;
 - ii. failing to consider during the IEP team meetings the impacts of the proposed transition of the Student from Eastside Academics School (EAS) to a traditional high school setting; and
 - iii. predetermining that EAS would not be considered or recommended as a placement option during the June 2019 and November 2019 IEP meetings;

- b. Whether EAS is the appropriate placement at which to provide the Student a FAPE;
- c. Whether any of the Parents' claims and/or requested relief are barred by the terms of the settlement agreement entered into by the parties on January 9, 2019; and
- d. Whether the Parents are entitled to their requested remedies, which include:
 - 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. Reimbursement for their being required to obtain private services for the Student at EAS for the 2019-2020 school year because of the District's failure to provide the Student with an IEP reasonably calculated to deliver FAPE;
 - iv. The implementation of an IEP that corrects the failures of the June 2019 and November 2019 IEPs; and
 - v. Prospective placement for the Student at EAS.

FINDINGS OF FACT

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

BACKGROUND

1. The Student is fifteen years old and has attended school in the District since kindergarten. He was originally identified as eligible for special education services while a kindergartener. J4 p. 5.² The Student was diagnosed with ADHD-Combined Type in March of 2011. J1 p. 5. The Student exhibited anxious behaviors as early as 2011 and underwent therapy at Seattle Children's Hospital. *Id.* He began seeing a therapist, Dr. Sarah Peregrine Lord, in October of 2015 for weekly sessions to address anxiety. J1 p. 10. The Student was diagnosed with Autism Spectrum Disorder by Dr. Stacie Keirse on April 6, 2018. P4 p. 14; J1 p. 6. He is eligible for special education services under the category of Autism. J1 p. 6; J4 p. 5. As of the fall of 2018, the Student was receiving special education services in the areas of written expression, social/emotional, and study skills. J2 p. 8.

2. The Student attended Highland Middle School (Highland) in the District for sixth and seventh grades. He also attended Highland for the beginning of his eighth grade year. The Student's grades for the 2017-18 school year (seventh grade), and the first quarter of the 2018-19 school year (eighth grade), were As, Bs and Cs. J6.

² Exhibits are cited by party ("P" for Parents; "D" for District; "J" for joint exhibits), 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 and the witness who offered the cited testimony. For example, a citation to Tr. at 80 (Mother) is to the Mother's testimony at page 80 of the transcript.

3. The Student began to experience bullying in sixth grade. Tr. at 85 (Mother). He was called names by other students and was teased. *Id.* His Parents sought help from the District at various points, but did not feel they received adequate responses to the bullying. *Id.*

4. The Student's Mother described the Student's seventh grade (2017-18) year as "absolutely awful." Tr. at 87 (Mother). The Student stopped doing homework and his Mother would find crumpled worksheets in his backpack. The Student was bullied all year by other students who mimicked him and pretended to be his friend. The Student eventually "shut down" and would not talk to his Parents. When he was picked up at school, he would run to the car, hunched over, with a hoodie covering his head. He had consistent trouble sleeping and frequent stomachaches. When asked about the crumpled worksheets in his backpack, the Student would rock his body, cry and curl into a ball. When asked if he needed to complete the worksheets, he would repeatedly say that he did not know. *Id.* at 92.

5. The Student's Mother worked closely with him in seventh grade to assist with his schoolwork. She often emailed his teachers to find out what assignments needed to be done. See P13. The Student's language arts teacher advised his Mother, in May of 2018, to have the Student "answer at least one question" about the novel the class was reading so he could get credit for reading the book and completing the required journal entries. P13 p. 4. The teachers often sent work home for the Parents to complete with the Student. In language arts and social studies, a majority of the graded work was sent home to the Parents, and they would do it with the Student. Tr. at 99 (Mother). The Mother's impression was that "these teachers expected that Student and I were doing the work at home... so he got a nice grade, but I got a nice grade in the seventh grade. I went to seventh grade." *Id.* at 96. The Mother does not believe his grades were reflective of what the Student was actually producing in his classes. *Id.* at 99. The Mother told the teachers "over and over again" that the Student was having trouble completing his work. *Id.* at 100.

6. The curriculum was not modified for the Student, but he received accommodations such as a scribe and extra time. The Student's math grade in seventh grade was based solely on in-class tests, not on homework, but students are allowed to retake math tests in order to improve their grade. Tr. at 824 (Fritz).

7. Dr. Stacie Keirse³, Psy.D., is a clinical psychologist and mental health counselor. Dr. Keirse specializes in autism spectrum disorders and neuropsychology evaluations. She has a background in school psychology. Tr. at 266 (Keirse). Dr. Keirse completed a psychological evaluation of the Student on April 6, 2018. P2. Based on that assessment, she diagnosed him with attention deficit/hyperactivity disorder, generalized anxiety disorder, and autism spectrum disorder. During the assessment, the Student indicated a fairly positive attitude toward school and teachers, and denied having social stress, anxiety and depression. P4 p. 10. However, he ranked in the 71st percentile for his level of anxiety, and he revealed a history of negative peer interactions. The Student reported feeling that his peers thought he was "weird," that he had been

³ Dr. Keirse holds a Bachelor of Arts degree in psychology and a Bachelor of Science degree in neuroscience. She also holds a Doctorate degree in Clinical Psychology (Psy.D.). She is a licensed clinical psychologist and a licensed mental health counselor. P18.

made fun of and called names, that he was lonely, and that he had trouble making friends. P2; P4 p. 10. Dr. Keirsey opined that the Student had “significant anxiety with social interaction.” P2.

8. The Parents gave Dr. Keirsey’s evaluation to the District; the Student’s IEP was not changed to reflect the new information. Tr. at 102 (Mother).

9. Dr. Lord,⁴ Psy.D., is a licensed clinical psychologist with a specialty in child and family therapy. She has been the Student’s treating psychologist since October of 2015, and she meets with him weekly. The Student has reported harassment, intimidation and bullying (HIB) to Dr. Lord throughout the time she has worked with him. P3 p. 1. In May of 2018, Dr. Lord determined that the Student met diagnostic criteria for a single episode of moderate depression with suicidal ideation. The Student reported his depression was related to increasing incidents of HIB at school, and that he had not eaten lunch at school for the past year in order to avoid contact with the harassing students. He told Dr. Lord that he had “accidentally” watched a video on how to commit suicide on YouTube, and then he watched others. Tr. at 415 (Lord); P3 pp. 2-3. The Student asked Dr. Lord questions about the means of suicide and whether someone could kill themselves using a belt. The Student reported no imminent intent to harm himself and was assessed to be at moderate risk because he had access to a means (belt), was avoiding support, was socially isolated, and had made previous statements about wanting to hurt or kill himself. P3 pp. 2-3.

10. In response to the May 2018 interaction, Dr. Lord and the Student made a safety plan for him that included his Parents. It ensured that the Student did not have access to a belt, was not left alone at home, and had restrictions on the internet and YouTube. P3 p. 3.

11. When he was not in school over the summer of 2018, the Student’s mood improved and he enjoyed the “Aspiring Youth” social skills summer program in which he was enrolled. P3 p. 3; tr. at 103 (Mother).

12. During the Student’s eighth grade year (2018-19), the Highland building was undergoing a remodel and the school was located at a different building with physically smaller classrooms. The Student found his classes to be overwhelming and “really noisy.” He testified at the due process hearing that “a lot of the kids, especially some of the kids who were harassing me, would just mess around and even harass – in eighth grade even harass the teacher.” Tr. at 50 (Student). The Student bought a lock that could be rapidly opened by touch for his locker because he was getting bullied in the locker bay area. Tr. at 105 (Mother). He also stopped eating both at home and at school. *Id.*

13. The Parents had requested that a boy who had bullied the Student in seventh grade not be in any of his classes in eighth grade. When the Student attended his first physical education class of eighth grade, the offending boy was in the class. The Student went to the office and reminded the staff they had promised that particular boy would not be in any of the Student’s classes, and the boy was moved. Tr. at 876 (Mother).

⁴ Dr. Lord holds Bachelor of Arts degrees in psychology and anthropology. She also holds a Doctorate degree in Clinical Psychology. She is a licensed psychologist and is board certified in couples, child and family therapy. She currently serves as a clinical supervising faculty member in the Department of Clinical Psychology at Antioch University. P20 p. 1; tr. at 388 (Lord).

14. The Student's Parents observed him to have a high level of anxiety about school during eighth grade. He often had such a severe headache upon being picked up after school that his mother had to pull her car over to allow him to vomit. Tr. at 228 (Mother). He would cry on the floor when he had to do homework, and would hit himself on the head repeatedly, saying "I can't do this, I don't know, I don't know." *Id.* at 229.

15. In September of 2018, the Student was diagnosed with "failure to thrive" by his treating psychiatrist because he was no longer on the growth chart for children his age. This was due in part to his failure to eat at school, and his psychiatrist recommended reducing his ADHD medication in order to increase his appetite.⁵ P3 p. 3. This is an unusual and alarming diagnosis, in Dr. Lord's opinion. Tr. at 397 (Lord). After the dosage reduction, the Student's food consumption at home increased significantly, but he continued to avoid eating lunch at school. *Id.*

16. The Student described his time at Highland as "really loud," "really toxic," and "stressful." Tr. at 42 (Student). He became depressed and "just ended up giving up and just didn't care about [his] grades or any of that." *Id.* at 43. The teachers in some of his classes would write material on the board "really fast and then erase it" such that the Student could not keep up or understand. He felt he could not get help despite raising his hand because there were so many people in the classes. *Id.* at 45-46. The Student was harassed during science class in seventh and eighth grades, and found the experience to be "really hard on me because I would just be on the lookout just to make sure they don't come near me, whatever, because I know if they came near me they were going to start harassing me." *Id.* at 48-49.

17. Many of his middle school grades were As and Bs. The Student perceived the teachers "took pity on me and cared about me and wanted me to succeed, even though from the work I don't think I ever did really good." Tr. at 54-55 (Student). His Mother completed much of the schoolwork for him. When doing homework, the Student's Mother typed for him and "sometimes just gave [him] the answers." *Id.* at 55. His Mother would prompt him for ideas, scribe for him, and help him find answers to homework questions in written materials. It came to the point where he never did his homework alone; she always assisted. *Id.* at 320-21 (Mother).

18. On October 31, 2018, the Student "stood up for himself" at school after another student pushed him in math class. The Student told the boys who had been bullying him to "leave him alone." Tr. at 111-113 (Mother). After the incident, the offending students continued to mock the Student, laughing at him and saying, "Leave me alone," in a sneering-type voice. The Student was afraid to go back to school so his Parents kept him home while they consulted with District personnel. *Id.* at 111-113, 879.

19. On October 31 and November 2 of 2018, written reports of HIB were made to the District by the Student and a teacher at Highland. The reports indicated that HIB of the Student had occurred in the classroom, the hallway, and his math and science classes. The reported HIB included: imitating the Student; refusing to leave him alone; making rude, threatening, or critical remarks or gestures; making the Student a target of jokes, teasing or name calling; and shoving the Student in class. P5 pp. 12-13. Ms. Mizrahi, Assistant Principal of Highland, conducted an investigation into the alleged HIB. She concluded the Student's experiences fell within the

⁵ The Student had been taking the same medication at the same dosage since first grade. This was the first time he had "fallen completely off the growth curve." Tr. at 885 (Mother).

District's definition of bullying, and that three boys had engaged in name calling and mimicking of the Student for an extended time. The Student had avoided school due to these interactions and Ms. Mizrahi determined the incidents had "a substantial impact on his education." P5 p. 1. She put in place a safety plan that included the three boys having no contact with the Student. Class schedules were changed for two of the boys to prevent them from having classes with the Student. The third boy remained in the Student's science and math classes, but was forbidden from having any contact with the Student. P5 p. 7. The three boys also apologized to the Student in person. P5 pp. 1, 4-5.

20. When the Student returned to school after the safety plan was in place, one of the offending boys had been moved into the Student's computer class. This violated the safety plan and caused the Student to panic. Tr. at 879 (Mother). Ms. Mizrahi referred to this as a "hiccup" in the implementation of the plan, but conceded that it had a profound effect on the Student's confidence in the District's ability to keep him safe at school. Tr. at 657, 670-71 (Mizrahi).

21. The Student remains frightened that HIB will occur again if he returns to the District. *Id.* at 879 (Mother). Dr. Lord's professional opinion is that the HIB caused the Student to experience trauma symptomology, including intrusive and repetitive thoughts, and fear. *Id.* at 392 (Lord). The Student's Parents believe the bullying experience at Highland had a profound effect on the Student and is "locked in his core." *Id.* at 113-116 (Mother). They are concerned that the Student will be unable to trust and learn in a large school environment due to fear and anxiety, and the physical symptoms the Student experiences as a result. *Id.*

22. On November 9, 2018, the Student was removed from the District and placed by his Parents at EAS in Bellevue. Tr. at 899 (Mother).

23. Dr. Lord opined in a letter dated November 16, 2018, that the HIB, and repeated isolation and overt threats at school, "were extremely detrimental" to the Student's well-being and self-esteem, and that he had been progressively decompensating by exhibiting increased anxiety, avoidance of eating during the school day, depressive symptoms and suicidal ideation. P3.

24. The ALJ finds that the HIB the Student experienced at Highland had a significant negative effect on his mental and physical health. He is fearful that the HIB, depression, and difficulties completing schoolwork will recur if he returns to a District school setting.

THE FALL 2018 REEVALUATION AND DECEMBER 2018 IEP MEETING

25. A reevaluation of the Student had been underway when he left Highland, and it was subsequently completed. J1. The reevaluation was conducted primarily by Sara Hasunuma, District school psychologist. J1 p. 5.

26. The reevaluation report notes that the Student is sociable toward adults, is easily distracted, and requires many "redirects" to start and complete his work. It further notes that the Student has difficulty maintaining positive peer relations, regulating his anxiety, and focusing on assignments. J1 p. 6. The reevaluation also states that the Student struggles in the area of writing. He has difficulty spelling, generating ideas quickly, and using correct grammar and sentence structure. *Id.*

27. A social/emotional assessment was performed as part of the reevaluation on December 7, 2018. J1 p. 13. At this time, the Student had been at EAS for approximately one month. According to the Behavior Rating Inventory of Executive Function (BRIEF), the Student's "emotional regulation" was reported to be clinically elevated by Mr. Fritz,⁶ the Student's special education and math teacher at Highland. J1 pp.13-14. Based on his experience with the Student at Highland, Mr. Fritz expressed concerns regarding the Student's "ability to adjust well to changes in environment, people, plans, or demands, react to events appropriately, and be appropriately cautious in his approach to tasks and check for mistakes." J1 p. 14. Mr. Fritz rated the Student's "emotional control" in the clinically elevated range, noting that the Student overreacts to small events. *Id.*

28. In his portion of the assessment, the Student reported he has difficulty in several areas, including: controlling impulses; being aware of his functioning in social settings; adjusting to changes in the environment, people, plans or demands; and performing tasks. J1 pp. 13-14. The Student also reported that he is easily overwhelmed. *Id.*

29. The Student was administered the Kaufman Test of Educational Achievement-Third Edition (KTEA-3) on October 25, 2018, and was found to be in the "low" range for written expression, spelling, and written language composition; and the "below average" range for writing fluency. J1 pp. 26, 28. The Student was also assessed in the area of Fine Motor Skills on December 7, 2018. It was determined that he had a functional pencil grasp, and his fine motor skills were not adversely impacting him in the academic setting, but that he may benefit from dysgraphia accommodations. *Id.* at 30. The medical-physical portion of the reevaluation notes that the Student is smaller than average for boys his age, and that his ADHD medication was being "held" to allow for weight gain. *Id.* at 10. The reevaluation recommends that the Student receive Specially Designed Instruction (SDI) in written expression, social-emotional, and study-skills, as well as accommodations for dysgraphia. *Id.* at 7-8.

30. The Student's IEP was reviewed and updated to reflect the reevaluation data on December 20, 2018. The IEP was written by Mr. Fritz. J2 p. 3; tr. at 839 (Fritz). The IEP notes that the Student could cope with anxiety-inducing situations only 0-25% of the time, and that he withdraws and avoids tasks by engaging with his computer or phone. J2 p. 8.

31. Before the December 2018 IEP was drafted, the Parents gave the District releases to obtain information from the Student's health care providers and the staff at EAS. The District did not contact any health care providers or anyone from EAS. Tr. at 226 (Mother). Written input from five EAS teachers was provided by the Parents and subsequently incorporated into the IEP. *Id.* at 225-26; J2 pp. 7-8.

32. An IEP meeting was held on December 20, 2018. By this time, the Student had been at EAS for approximately six weeks and was experiencing much less anxiety. His Mother described

⁶ Mr. Fritz holds a bachelor's degree from Purdue University (the subject matter of the degree was not made clear at the hearing). He also holds a master's degree in education, specifically in teaching language arts. He is certificated to teach special education in grades K-12 and holds a reading endorsement. Tr. at 812, 866 (Fritz). Mr. Fritz worked with the Student for all of seventh grade and part of eighth grade, and was the Student's special education case manager for seventh and eighth grade. Mr. Fritz was the Student's co-teacher for seventh grade math, and also taught the Student's support classes, such as School Skills Success. *Id.* at 813.

the change as “night and day.” Tr. at 227 (Mother). The Student would now go to sleep on his own, was no longer having stomachaches, and was having fewer headaches. He appeared happy when she picked him up from school and would talk about his day. *Id.* at 228.

33. The December 2018 IEP calls for the Student to spend 73.41% of his time in the general education setting, and for him to receive SDI in written expression, study skills, and social-emotional. J2 p. 22. The prior written notice (PWN) from January 7, 2019, which refers to the IEP meeting, notes that the District rejected the Parents’ request for educational placement in a private day school. *Id.* at 26. The reason for rejecting this option is that it would not be the Student’s least restrictive environment (LRE). The PWN, which was written by Mr. Fritz, also states:

The team considered parents [sic] input that Student is presenting with less anxiety produced behaviors (per parents: stating he doesn’t want to come to school, decreased eating and sleeping, and stating he has no friends). However, Student does not present with the same level of anxiety when attending his neighborhood school, has been making progress on his IEP goals and attained passing grades in all his courses up until he was withdrawn from school.

Id. at 26.

34. For reasons that were not made clear at the due process hearing, the Parents and the District entered into a settlement agreement on January 9, 2019. The agreement is entitled “Settlement Agreement and Waiver and Release of Claims Arising Out of the Individuals with Disabilities Education Act” (Agreement). J8. The “recitals” section of the Agreement provides, in part, that the Parents unilaterally placed the Student at EAS. J8 p. 1.

35. The “agreements” section of the Agreement provides that the District will reimburse the Parents for the tuition they paid to EAS for the 2018-19 school year. It further provides:

Should the Student return to the District prior to the end of the 2018-2019 school year or upon return for the 2019-2020 school year, the Parent will provide the District 30 days’ written notice, the District will no longer pay any tuition to EAS and the District’s most recent placement offer will be implemented for the remainder of the school year unless otherwise directed by the Student’s IEP team.

J8 p. 1.

36. The Student attended EAS for the remainder of the 2018-19 school year. Due to the settlement agreement, the District viewed the Student as no longer enrolled in the District. Tr. at 568 (Arroyo).

THE JUNE 14, 2019 IEP

37. The Student’s Parents contacted the District regarding the Student’s placement for the 2019-20 school year, and an IEP team meeting was scheduled for June 14, 2019 (June 2019 IEP meeting). Tr. at 231 (Mother). The purpose of the meeting was to “discuss ninth grade placement options and adjust [the] IEP accordingly.” J3 p. 1. The Parents provided written input from

teachers at EAS which was incorporated into the IEP. Tr. at 232 (Mother). The Parents also provided a letter from Dr. Lord and a letter from the Student. *Id.*

38. The letter from Dr. Lord, dated June 7, 2019, states that, upon transferring to EAS, the Student reported and demonstrated a reduction in suicidal ideation and depression. He was also sleeping better and experiencing fewer stomachaches and somatic anxiety symptoms. P10 pp. 1-2. Dr. Lord also states, “The data from his self-report and normed assessments suggest that Student’s functioning might be significantly reduced if he were to return to his prior academic environment.” *Id.* at 4. Dr. Lord further opined that, when faced with the topic of changing schools, the Student experiences traumatic intrusive memories and fixates on his fear in a way that is consistent with trauma symptomology, and his autism poses a challenge to his mental flexibility. P19 p. 3.

39. The Parents did not feel the District was receptive to the information they provided. Tr. at 233 (Mother). Materials provided by the Parents for the IEP meeting were reviewed by District staff members at a “prior meeting” the day before the IEP meeting. *Id.* at 549-50 (Arroyo). Materials provided by the Parents were distributed to Mr. Fritz, Mr. Perlman, and Ms. Mizrahi by Ms. Arroyo via email at 7:05 P.M. the night before the 8:00 A.M. IEP meeting. P21. The materials were subsequently forwarded to District staff members who were not on the IEP team by Mr. Perlman via an email, in which he stated, “If you would like some reading entertainment to get you through Friday.” *Id.*

40. The June 14, 2019 IEP was drafted by Mr. Fritz. Tr. at 569 (Arroyo). It is similar to the IEP of December 2018, and it incorporates the findings from the fall 2018 reevaluation, including the ratings by Mr. Fritz. J3 p. 10. The IEP notes that the Student was able to cope with anxiety-inducing situations 0-25% of the time and that he withdraws and avoids tasks by engaging with his computer or phone. *Id.* at 9. Under “progress monitoring data,” the IEP notes that, as of October 31, 2018, the Student had only one missing assignment. *Id.* at 14.

41. The June 2019 IEP calls for the Student to spend 73.41% of his time in the general education setting for the week of June 14-21, 2019, and then 73.83% of his time in general education for the 2019-20 school year. J3 p. 23. It also calls for him to receive SDI in written expression, study skills, and social-emotional. *Id.* It does not call for a modified curriculum for the Student. *Id.* at 511-13. It does not set out a transition plan whereby the Student would gradually be acclimated to the public school environment if a District school placement were to be recommended by the team.

42. The IEP contains four goals for the Student; two pertain to social-emotional, one pertains to study skills, and one pertains to written expression. J3 pp. 17-18. The two social-emotional goals read as follows:

Social-Emotional – Skill: Perspective Taking while working with others

By 01/06/2020, when given instruction on problem solving techniques while working with a peer or a small group of peers, Student will listen and accept other view points and opinions without emotional distress (ex: putting head down, moving away from group, refusal to participate) improving perspective taking and ability to work with others from staying engaged (ex: stays with group, listens, asks questions, nods, makes eye contact) in the task with a peer or small group of peers

for 3/5 opportunities to staying engaged (ex: stays with group, listens, asks questions, nods, makes eye contact) in the tasks with a peer or small group of peers for 4/5 opportunities as measured by monthly teacher collected data.

Social-Emotional: Regulation

By 01/06/2020, when given an anxiety inducing task or situation (e.g. writing, group work) Student will recognize his level of anxiety that requires a break and ask his teacher/staff member to take a break that does not involve using his computer or phone improving his ability to accurately self-monitor and cope with an anxiety inducing task or situation from 0% of the time to 50% of the time as measured by monthly teacher observation and data collection.

J3 p. 17.

43. The IEP notes that public/private separate day school was considered for one week of school, June 14-21, 2019, but was rejected because “non-academic benefit cannot be satisfactorily achieved” J3 p. 24. Public/private separate day school is not marked as having been considered for the 2019-20 school year. *Id.* at 25.

44. The June 2019 IEP meeting was attended by the following people:

The Parents

Michael Fritz, District special education teacher
Matthew Perlman, District general education teacher
Liz Mizrahi, Assistant Principal, Highland Middle School
John Delpont, District staff member
Brenda Arroyo, District Special Education Director
Lisa McDaniel, District language arts teacher
Moira Farrell, special education and general education teacher, EAS
Ryan Rhodes, Assistant Director, EAS

Mr. Delpont and Ms. Arroyo had never met or observed the Student. Tr. at 514 (Arroyo).

45. Ms. Arroyo⁷ is currently an assistant principal at Highland. She was District Director of Special Education from 2016 to June of 2019. Tr. at 489 (Arroyo). Ms. Arroyo became involved in the Student’s educational program after she was made aware that his Parents were considering out of District placement for him. *Id.* at 491-92. Ms. Arroyo’s understanding of the Student was that he did not experience anxiety or somatic complaints while at Highland. *Id.* at 510. She does not recall if she knew of his sensitivity to noise. *Id.* at 570. Her understanding from the information presented to her as a member of the IEP team was that any anxiety the Student was experiencing had not been impacting his ability to participate in classes at Highland or to work along with his peers. *Id.* at 521. She thought the Student had received social-emotional support in his seventh

⁷ Ms. Arroyo holds bachelor’s degrees in psychology and family consumer science. She also holds a master’s degree in education with an emphasis in special education, and an educational administrator certificate. Tr. at 489 (Arroyo).

grade year at Highland, and had been successful, despite his depression and suicidal ideation. *Id.* at 524.

46. Mr. Fritz's professional opinion, as expressed at the due process hearing, is that the Student was successful and thriving at Highland because he had good grades and worked hard. Tr. at 822, 840 (Fritz). Ms. Fritz did not agree that the Student should have been moved to EAS in eighth grade. *Id.* at 835. Mr. Fritz did not observe manifestations at school of any of the concerns raised by Dr. Lord. *Id.* at 837. Dr. Lord's input did not affect Mr. Fritz's opinion regarding the needs of the Student; Mr. Fritz formed his impressions about the Student solely on what he himself had observed, primarily that the Student was quiet and successful. *Id.* at 838. Mr. Fritz was surprised at reports of the Student's suicidal ideation because he never saw that side of the Student at school. *Id.* at 850. Mr. Fritz did not know the Student got headaches and stomachaches, or that he vomited after school. *Id.* at 850. Mr. Fritz knew essentially nothing about EAS other than the size of the student body; size is the factor upon which he based his assessment that EAS would not be the Student's least restrictive environment (LRE). *Id.* at 840-41.

47. The June 2019 IEP meeting lasted about 15-30 minutes because placement was discussed first. The District did not agree to place the Student at EAS for the following school year. Tr. at 233 (Mother); J3 p. 26. The Parents perceived that the District's decision regarding placement had already been made by the time the meeting started. Tr. at 891 (Mother). According to the Mother, the District was "only willing to give us the IEP we had in December before we left, and they were willing to use that IEP and that was it." *Id.* at 233. The District said, "No, flat out no," to reconsidering the recommended placement. *Id.* The District's attorney stated at the meeting that interim placement of the Student at EAS pending an evaluation would not be agreed to and that the Student's placement should be at Interlake High School (Interlake), which is his neighborhood high school.⁸ Tr. at 547 (Arroyo). No reason was given for the refusal to consider an interim placement at EAS pending evaluation. *Id.* at 235 (Mother).

48. Ms. Arroyo recalls the June 2019 IEP meeting felt rushed. When the District members of the IEP team said, "We want to move forward with the placement as is," i.e. at Interlake, the Parents did not want to continue the meeting. Tr. at 511 (Arroyo). Mr. Delport recalls the District's attorney said essentially, "This is our offer," regarding placement, and the Parents or their attorney said something to the effect of, "There's no point continuing – we're done." *Id.* at 718 (Delport). The placement recommendation was not substantively discussed at all. *Id.* According to the Mother, the District essentially said, "We'd sure like to tell you what you want to hear but we can't," and that was the end of the conversation. *Id.* at 235 (Mother). According to the Mother, the District personnel "smirked" and said "no" to everything the Parents asked regarding placement at EAS. *Id.* at 880-81.

49. The June 2019 IEP was set to take effect on the same day as the meeting occurred. There was no discussion at the IEP meeting of a transition plan for the Student to move from EAS back to the District. The Parents asked if the Student could "ease back in" by possibly taking a class at

⁸ There is no indication in the exhibits that a District attorney or a Parent attorney attended the IEP meeting, but the testimony indicates that attorneys were present.

a District school while remaining at EAS. The District did not agree to this and did not agree to develop a transition plan. Tr. at 234-235, 880 (Mother).

50. Mr. Delpont⁹ did not know the Student's case very well at the time of the June 2019 IEP meeting. He had "been pulled into the meeting" and had "skimmed the notes." He did not voice objection to the District's offer of Interlake. Tr. at 681-62, 718 (Delpont).

51. The IEP team decided to reevaluate the Student, partly because of the input from Dr. Lord. Tr. at 525 (Arroyo). According to Ms. Arroyo, a reevaluation was also warranted due to concerns about how the Student may adjust to the public school setting after having been at a private school. Ms. Arroyo opined that consideration of a transition plan would be called for by the IEP team in order to address the concern. *Id.* at 533. After the meeting, Ms. Arroyo had questions about the Student's progress at EAS that she normally would have followed up on, but she did not do so because she was transitioning to a new job. *Id.* at 537-38.

52. The "Prior Written Notice (Amendment)" (PWNA), issued after the June 2019 IEP meeting, notes the District proposed that the Student be placed at Interlake, and that he undergo a reevaluation. J3 p. 26. The PWNA also states that the Student's Parents "received reimbursement by the Bellevue School District for a private day school from December 2018 - June 2019 under the agreement that if the Student returns to the BSD it will activate the IEP that was developed on 12/22/2018." *Id.*

53. The PWNA further states, as reasons EAS was rejected:

The most recent reevaluation does not support this placement as Student's least restrictive environment. The team has considered parent and outside provider's input and determined that his developed goals, as a result of his more recent evaluation, dated 12/10/2018, are aligned to his social/emotional needs and support his participation in general education classes alongside his peers from his neighborhood school. The district can implement his IEP at Interlake High School. In addition, the team has increased specially designed instruction in the area of social/emotional to accelerate his progress on goals. While at Highland Middle School, Student made progress on goals and had passing grades.

J3 p. 26.

54. The Student completed the 2018-19 school year at EAS. He returned to EAS in the fall of 2019, at the Parents' expense, and has continued to attend EAS for the 2019-20 school year.

55. The ALJ finds the testimony from various witnesses who attended the June 2019 IEP meeting to be generally consistent. Consequently, it is found that the District offered placement at Interlake and was unwilling to discuss or consider other alternatives. It is found that the District

⁹ Mr. Delpont holds the equivalent of a bachelor's of education degree (obtained in South Africa). He also holds a Ph.D. from the University of Washington in education with a focus on educational programming. Tr. at 701-03 (Delpont).

special education teacher who drafted the June 2019 IEP had made up his mind, prior to the meeting, that EAS was not an appropriate placement for the Student. It is found that the District refused to consider interim placement of the Student at EAS pending an evaluation and offered no reason for this refusal.

THE NOVEMBER 2019 REEVALUATION AND THE NOVEMBER 25, 2019 IEP

56. The reevaluation proposed at the June 2019 IEP meeting (reevaluation) was conducted by Dr. Benjamin Mast, Psy.D., in the fall of 2019.¹⁰ As part of the reevaluation, Dr. Mast observed the Student at EAS. Tr. at 610 (Mast).

57. The Student expressed in multiple ways during the reevaluation that loud noises trigger his stress. The reevaluation report notes the Student appreciates how much quieter it is at EAS compared with Highland, and finds himself socializing more there and having more friends. J4 p. 38. When asked about the time he spent at Interlake for this reevaluation, the Student described the environment at Interlake as “really loud.” Tr. at 68 (Student). He also specifically told Dr. Mast during the reevaluation that he is worried about going to a public high school. *Id.* at 639 (Mast).

58. The reevaluation report notes, under Summary of Qualifications and Functioning:

Both Student and adults around him observed difficulties with emotional responses to stressful or otherwise triggering situations. When anxious or stressed, he can “shut down” and become unresponsive to redirection or encouragement. Sensitivity to loud noises and crowds are identified as environmental triggers for panic or stress.

J4 p. 6. The reevaluation also notes:

Care should be taken to balance the reduction of stressful or anxiety-provoking situations with structured exposure to these situations. Some amount of distress must be experienced in order for stress tolerance to be developed. For instance, while avoiding large crowds or noises may temporarily provide relief of stress, Student should also receive scaffolded exposure to these situations so he can develop the ability to cope, as he will not be able to avoid these situations for his entire life.

Id. Dr. Mast explained this assertion at the due process hearing. According to Dr. Mast, the treatment for anxiety is not to remove the anxiety-provoking stimuli altogether, but rather to allow exposure to the stimuli in order to develop the skills to cope with them. Tr. at 623 (Mast).

59. “Scaffolded exposure” requires working with a therapist and using a particular technique. Tr. at 625 (Mast). The technique works as follows: in a therapeutic setting, a “fear ladder” with steps is developed. The ladder is filled in with increasing amounts of exposure to the anxiety-provoking stimuli. Then, a setting of exposure is chosen that is far enough up the ladder to

¹⁰ Dr. Mast holds undergraduate degrees in communication and psychology, a master’s of education degree in child psychology, and a doctorate of psychology in school psychology. Tr. at 603, 630 (Mast).

generate an anxiety response, but not so much anxiety as to be overwhelming. The therapy helps the anxious person slowly work their way up the ladder. *Id.* at 624-25. Dr. Mast opined that scaffolded exposure therapy for noise and crowds is one of the Student's needs. *Id.* at 632. There are professionals within the District who are capable of providing the therapy. Dr. Mast was unable to point to any research establishing that scaffolded exposure works for noise sensitivity. *Id.* at 632, 636.

60. Both Dr. Lord and Dr. Keirsej opined that sensory sensitivities, such as noise sensitivity, do not improve with exposure, and there is no method by which to "treat" or reduce the sensitivity. Tr. at 405 (Lord); 315-16 (Keirsej). Rather, the sensitive individual needs to learn coping skills and techniques, while avoiding isolation and separation from others. Tr. at 405 (Lord).

61. Sensory sensitivity is a major factor to consider for children like the Student who are on the autism spectrum. Such students may be overwhelmed by large, chaotic-type areas. Noise and light can bother them. The environment can be stressful and overwhelming and can trigger an anxiety response. Children such as the Student may require a long time to recover from even a small amount of sensory stimulation. Constant over-stimulation can cause them to dysregulate and be less able to engage in academics. Tr. at 279-80 (Keirsej).

62. During the reevaluation, the Behavior Assessment System for Children - Third Edition (BASC-3) was administered to the Student, as was the Screen for Child Anxiety Related Disorders (SCARED). J4 pp. 13-14. The results show the Student has difficulty with social cues and understanding what to do in social situations. He is easily stressed and worries about things both in and out of his control. The results were "significant" for hyperactivity, and were "at risk" for anxiety, depression, attention problems, and withdrawal. The Student's self-assessment on the SCARED showed that he was not experiencing significant levels of anxiety that impact his daily functioning, and that he is no longer "shy" and no longer gets headaches and stomach aches at school. *Id.* at 14.

63. As part of the reevaluation, the Student was also administered the Wechsler Individual Achievement Test - Third Edition (WIAT-III). He achieved a mathematics composite score in the below average range, which represents his overall math ability. His performance on both the calculation and math problem-solving tests also fell within the below average range. J4 pp. 25-26. The Student's overall rank in mathematics was in the fifth percentile, problem solving was in the ninth percentile, and numerical operations was in the fourth percentile. J4 p. 27. Classroom observation by Dr. Mast suggested that the Student relies heavily on use of a calculator. *Id.*

64. The reevaluation recommends the Student receive SDI in math, social emotional, study skills, and writing. J4 p. 8.

65. A meeting was held on November 4, 2019 to discuss the reevaluation. J4 p.1. Ms. Farrell,¹¹ special and general education teacher at EAS, attended the meeting. She perceived there to be consensus among the evaluation team that the Student's placement at EAS was working well and he was thriving. Tr. at 155 (Farrell).

¹¹ Ms. Farrell holds a bachelor's degree in education, and a dual certification in general education K-8 and special education K-12. Tr. at 121, 218 (Farrell). She is a certificated special education teacher. *Id.* at 122.

66. A new IEP was developed by Mr. Gentry¹² after the reevaluation (November 2019 IEP). Mr. Gentry is a special education teacher at Interlake and is the Student's case manager. Tr. at 742-43 (Gentry). He has never met the Student. *Id.* Mr. Gentry obtained the input from the EAS teachers contained in the November 2019 IEP from the reevaluation; he did not contact the EAS teachers himself. *Id.* at 744. He did not speak to the Student's mental health providers. *Id.* at 754. The draft November 2019 IEP places the Student at Interlake.

67. Prior to drafting the November 2019 IEP, Mr. Gentry had been contacted by Ms. DeJong, Director of Special Education for the District. She informed Mr. Gentry that the Student was undergoing an evaluation, and when it was complete, Mr. Gentry needed to develop an IEP. Tr. at 806 (Gentry). His understanding was that the Student would be placed at Interlake and the IEP should reflect that placement even though the Parents wanted him to continue at EAS.¹³ *Id.* at 794. "Private day school" is not marked as having been considered as a placement option in the November 2019 IEP. J5 p. 25.

68. The November 2019 IEP notes that the Student is now taking pre-algebra at EAS, after having taken algebra for part of the year 2019-20 school year. J5 p. 7. The Student had difficulty with the algebra course so he was moved back to pre-algebra. Tr. at 332 (Mother). He understands the basics of pre-algebra and is performing well in the class. The Student's pre-algebra teacher at EAS provided input for the IEP and noted that when the Student is faced with a problem he does not know how to solve, he shuts down and finds excuses not to work. The teacher noted that the Student "had several medical complaints." J5 p. 8.

69. The Student's English teacher at EAS noted that the Student is an avid participant in class discussions and is sensitive to his classmates. The Student's ability to stay on task and be productive with his time in class is an area of concern. In one instance, the Student drafted only one sentence when given a period of 15 to 20 minutes to work. When he is not coached or monitored, his work production goes down considerably. The teacher breaks down assignments for him. Although the student has somatic complaints in the class approximately once every two weeks, he stays in class and has been able to continue working. The teacher noted that the work the student is producing independently is far greater than he was able to produce last year, and has effectively doubled. He uses a self-check rubric to monitor his work for errors. The teacher also noted that the Student is highly social and tends to learn better in a social setting than he does independently. J5 p. 8.

70. Written input from Dr. Lord was considered for the November 2019 IEP, including the fact that the Student no longer has suicidal urges, and she cautioned that the Student's functioning "may be significantly reduced if he were to return to his prior academic environment." J5 p. 11.

¹² Mr. Gentry holds a Bachelor of Science degree in physical science. He holds master's degrees in teaching (elementary education), and in education (special education). Tr. at 741 (Gentry).

¹³ The testimony from Mr. Gentry was as follows:

A: I knew from the beginning, when I was involved as case manager, that Student was placed at Eastside by the parents' choice, and that there was a desire to continue that. So I knew how it was set up. My understanding was that we needed to develop an IEP for the high school setting.

Q: Which you understood to be Interlake?

A: Right.

No one from the District spoke with Dr. Lord or Dr. Keirsey for purposes of the reevaluation, drafting the November 2019 IEP, or preparing for the IEP meeting. Tr. at 677 (Delport).

71. The November 2019 IEP places the Student in the general education setting for 47.68% of his time. J5 p. 24. That percentage includes lunch and passing periods as general education time. Tr. at 722 (Delport). The IEP provides for SDI in the areas of writing, study skills, social-emotional, and math. It also provides for speech-language pathology services as a supplementary service. J5 p. 24.

72. The November 2019 IEP contains three goals related to social-emotional. They are:

Social-Emotional - Skill: Perspective Taking

By 12/03/2020, when given the opportunity to work with a peer or a small group of peers Student will listen and accept other view points and opinions without emotional distress (ex: putting head down, moving away from group, refusal to participate, etc.) improving perspective taking and ability to work with others from 3/5 opportunities to 5/5 opportunities as measured by monthly teacher collected data.

Social-Emotional – Skill: Regulation

By 12/03/2020, when given an anxiety inducing task or situation (e.g. writing, group work, etc.) Student will label how he is feeling (upset, frustrated, anxious) improving his ability to identify emotions for self-regulation from 0/5 opportunities to 4/5 opportunities as measured by monthly teacher observation and data collection.

Social-Emotional

By 12/03/2020, when given video modeling (videos showing students engaged in team work and other social activities) Student will learn to interpret facial expressions and body language improving ability to understand social cues from 0/5 opportunities to 4/5 opportunities as measured by monthly teacher collected data.

J5 pp. 11-12.

73. The final version of the November 2019 IEP (as opposed to the draft version) further provides:

Student will receive his specially designed instruction through the Olympic Program at Newport High School. The Olympic Program is designed to meet the educational needs of students who have significant deficits in the areas of organizational skills, executive functioning skills, and social competency skills that are often associated with autism spectrum disorder. Students receiving services through the Olympic Program are typically functioning in the low-average to high-average range of intellectual ability and spend as much time in general education settings as the respective IEP teams deem appropriate. Using evidence-based practices, the goal is to provide instruction, opportunities for application, knowledge, training and support to maximize independence and enhance

students' opportunities to achieve their full potential. The Olympic Program has a social worker and an ABA therapist, and support in mental health areas of anxiety and depression is available.

J5 p. 24.

74. An IEP team meeting was held on November 25, 2019. In attendance were:

The Parents

Derek Gentry, Special education teacher, Interlake High School
Joshua Villagomez, General education teacher, Interlake High School
Karen DeJong, Administrator/designee
Moirra Farrell, Special education and general education teacher, EAS
John Delpont, District staff member
Jocelyn Alexander, Administrator, Interlake High School
Gail Oleson, District speech language pathologist
Chris Williams, Parents' attorney

75. Mr. Gentry, Mr. Villagomez, Ms. DeJong, Mr. Delpont and Ms. Alexander had never met or observed the Student. Tr. at 240-43 (Mother); 676, 692-93 (Delpont); 743 (Gentry). The only District team member who had met or observed the Student was Ms. Oleson, who knew him from the communication evaluation she performed as part of the reevaluation. Having an IEP team consist of so many people who had never met or observed the Student was "not a typical process." *Id.* at 762-63 (Gentry).

76. The draft of the November 2019 IEP presented at the meeting showed Interlake as the Student's high school, and had a "no" box checked for placement at EAS. The discussion regarding EAS was very brief, and the Parents felt the District had already decided the Student should attend Interlake. Tr. at 340 (Mother).

77. The services offered by the District in the IEP were based on the reevaluation. The Student's present levels of performance were discussed at the meeting. Input was provided by Ms. Farrell regarding how the Student was doing at EAS. Tr. at 586 (Delpont). Mr. Gentry asked questions about the Student that made Ms. Farrell question how well he had reviewed the data. *Id.* at 159 (Farrell).

78. The possibility of placing the Student in the Olympic Program (Olympic) at Newport High School (Newport) was raised toward the end of the meeting. Prior to that time, the Parents had never heard of Olympic. *Id.* at 241 (Mother). Ms. Farrell observed there to be "shock" in the room when Mr. Delpont suggested Olympic for the Student. The Parents questioned why they were being presented with a new potential placement at this point in the meeting. *Id.* at 161.

79. The team felt the Student could not handle being in general education for six or seven periods at Interlake, as had initially been discussed; they believed it was "too much" in that it would be overwhelming for the Student, and he needed more support and smaller classes. *Id.* at 748 (Gentry).

80. Ms. Farrell recommended placing the Student at EAS for the 2019-20 school year. Ms. DeJong favored placement in Olympic in part because EAS does not have a psychologist on staff and she did not think EAS could provide the special education services the Student needs. Tr. at 339 (Mother).

81. Mr. Delport's opinion was that the Student would be better served in a "center program" like Olympic because the case managers there have fewer students. Tr. at 587 (Delport). According to Mr. Delport, the Student's "profile in the assessment looks a lot like students at the Olympic Program," but, "not ever having laid eyes on Student, it's difficult to tell." *Id.* at 589. Mr. Delport's recommendation is based on the reevaluation and "the little" he had learned at the June 2019 IEP meeting. *Id.* at 588. Mr. Delport was concerned that the Student would not be able to generalize the social-emotional skills he learned at EAS if he were to remain placed there because he would not be in a general education setting enough of the time. *Id.* at 728.

82. Mr. Gentry believes the November 2019 IEP is appropriate for the Student, based on what he has "read and heard" about the Student. Tr. at 750 (Gentry). There are many students in the District with needs similar to the Student who are successfully supported in District programs. *Id.* Mr. Gentry does not feel there is any reason the Student could not attend Interlake and does not feel he needed to meet or observe the Student in order to make decisions about him. *Id.* at 756, 760 (Gentry). Mr. Gentry does not know whether the Student has a noise sensitivity. *Id.* at 774. Even if the Student were to thrive at EAS, and be suicidal if he moved to Interlake or Newport, Mr. Gentry would still feel that EAS is more restrictive than Interlake or Newport. *Id.* at 771.

83. "Scaffolded exposure" to noise was not discussed at the IEP meeting. Tr. at 798 (Gentry). In order to accommodate his noise sensitivity, the Student's IEP allows for breaks up to five minutes in a designated place, and possibly the use of noise-canceling headphones. *Id.* at 799-800.

84. EAS was rejected by the District members of the IEP team, in part because Mr. Gentry and Ms. DeJong determined it does not provide the Student with the opportunity to work on generalizing skills across different settings, and does not prepare him adequately to meet secondary goals. J5 p. 27; tr. at 802-803 (Gentry). They made this determination based on the size of EAS. Tr. at 805. Neither of them has ever visited EAS. Mr. Gentry does not know the profile of the students who attend EAS. *Id.* at 795.

85. The Parents perceived the District was not open to placing the Student at EAS. The District team members did not ask any questions about EAS. When the Parents advocated for EAS, they felt "blown off." Tr. at 893 (Mother). They felt that EAS was "never on the table," and that they needed to choose between Interlake and Olympic/Newport as placement for their son. *Id.* Mr. Delport described the discussion surrounding placement as "incredibly awkward and tense," and the Student's Father became upset. According to Mr. Delport, the District staff "knew it was coming" because they were recommending a District school and the Parents preferred EAS. *Id.* at 720 (Delport).

86. No transition plan was offered or discussed by the District, and the transition to public school was intended to occur almost immediately. Tr. at 893 (Mother). Transition plans from private school back to public school are typically developed by an IEP team after the placement has been agreed upon. *Id.* at 714 (Delport). A new student can usually visit Olympic ahead of

time and meet the case managers, the social worker, and some of the teachers; and can “walk the schedule.” *Id.* at 594 (Delport).

87. The Parents did not perceive the District was taking the Student’s needs seriously or that the District understood that the transition would be difficult for him. Tr. at 893-4 (Mother). The possibility of the Student taking some classes through Olympic while still attending EAS was not discussed at the meeting. *Id.* at 712 (Delport).

88. At the end of the meeting, the Parents’ attorney, Chris Williams, asked the team something to the effect of, “Does anyone, after hearing what you’ve heard about the Student today, believe that moving the Student now would be a good choice?” After a pause, Mr. Delport said that he did. No one else responded. Tr. at 244-245 (Mother).

89. Mr. Delport has never visited EAS and is basing his recommendation, in part, on the number of students at the school. *Id.* at 677, 712. He believes Olympic could help the Student cope with crowds and noise by allowing him to leave his general education classes early so as to avoid the crowded passing period, and by having an adult walk to class with him, at least for the first few weeks. At lunch, the Students could eat in the Olympic classroom. *Id.* at 593.

90. A PWN issued on November 25, 2019, after the IEP meeting occurred, proposed to change the Student’s placement to Olympic/Newport. The PWN states that the IEP team considered and rejected placement of the Student at EAS. J5 p. 27. The PWN states that the change of placement will be initiated on December 4, 2019. *Id.* at 28. The PWN states that EAS was rejected for the following reasons:

Based on Student’s needs in the areas of social-emotional, study skills, writing, and math, as identified through the recent evaluation and input provided by parents and staff at Eastside Academy [sic], the district IEP team members believe he requires direct instruction by certificated special education personnel in these areas to receive a FAPE. While Eastside Academics offers a smaller school environment, it does not provide specially designed instruction in the areas of social-emotional and study skills to support Student in acquiring the skills he needs in these areas. It also does not provide Student with the opportunity to work on generalizing skills in these areas across different settings or prepare him to meet his post-secondary goals.

Based on the evaluation data, input from IEP team members, Student’s IEP, and the continuum of placement options available in the Bellevue School District, the District IEP team members believe that the Olympic Program at Newport High School would be the least restrictive environment to meet his individual special education needs. In the proposed program, Student will be able to participate in the general education setting for approximately 47% of his time at school and will have access to a greater number of students, which will help facilitate the development of his social skills and prepare him for post-secondary education and employment.

J5 p. 27. The PWN further states, “The Olympic Program will also offer support to address Student’s anxiety.” *Id.* The nature of that support is not described.

91. Olympic supports students who are on the autism spectrum or who have issues with executive functioning and organizational skills. It provides smaller class sizes and additional support from staff. There are usually eight to twelve Students in a class, along with four or five adults (teachers and para educators). Students in the program start their day by checking in with a special education teacher to discuss what may be challenging about the upcoming day. There is a check out at the end of the day with the same person in order to build consistency, trust and connection. At the check out, the student and teacher discuss how the day went and what support the student may need the next day. The program provides a space for small group or individual work during the day. Tr. at 507-09, 554 (Arroyo).

92. Olympic is the most restrictive program in the District. Tr. at 576 (Delpport). It has the ability to be self-contained in that a Student can remain there all day. Most of the students are in ninth and tenth grade. Some students return to their home school after tenth grade, but others choose to stay in the program. *Id.* The Olympic students take “targeted” academic classes that usually contain about five to fifteen students, with an average of ten.¹⁴ Most students take two or three classes outside the program, in general education, but that varies from student to student. A part-time social worker and a part-time board certified behavior analyst are on the Olympic staff. *Id.* at 576-580, 704-05. Olympic provides “a space to go in and decompress and work with people that are familiar with you,” and it helps the students work through anxiety. It provides a place where students can connect with other people and feel that they are “not the only one.” *Id.* at 590.

93. Students in Olympic take at least one social skills class. Tr. at 576 (Delpport). The social skills class incorporates peer mentors (students from general education who come in to work with the Olympic students). The class is usually activity-based and Dungeons & Dragons is one of the activities. *Id.* There can be “a lot of people” in the social skills classes. *Id.* at 578. The class curriculum is fluid in that it addresses the “contextual” issues the students in the class need at the time. *Id.* at 582.

94. After the November 2019 IEP meeting, the Student’s Mother visited Olympic, and Newport in general, two times. She described the first visit, during lunchtime, as “very loud and overwhelming.” Tr. at 247 (Mother). She observed a targeted English class which she did not feel would be appropriate for the Student because it was below his ability level. *Id.* at 247-48. She also observed a social skills class that contained about 15 students. She observed students to be on the floor and one was under a desk. She asked Mr. Delpport, who was leading the tour, whether these students were expected to attend college. He replied that two of them might go to a four year college, and “a couple” may go to community colleges. Regarding the rest, he shrugged, which the Mother took to mean that no post-high school education was planned for those students. *Id.* at 249. About 40% of the Olympic students go on to attend college. *Id.* at 697 (Delpport).

95. The Student’s Mother visited a second time, along with Dr. Lord. Dr. Lord wrote a statement regarding the visit, with which the Mother agrees. Tr. at 250 (Mother); P 19. Dr. Lord

¹⁴ Targeted classes mirror the general education curriculum but are modified in pacing and scope. The goal is to transition the students in the class into their chronological grade class. Targeted classes go through 12th grade if needed. All students in targeted classes have IEPs. Tr. at 578-79, 706 (Delpport).

is neurotypical and has been in a range of school and correctional environments. Tr. at 404 (Lord). She found the size and noise level of the Newport common areas to be overwhelming. In her opinion, the environment poses a risk that the Student would hide, rock, scream, completely withdraw, and/or wear headphones all the time, thereby completely isolating himself. *Id.* at 405.

96. Dr. Lord and the Mother observed two classes during their visit, English-special education¹⁵ and social skills. In the English-special education class, there were six students, one teacher, one para educator, and one peer model. One of the students in the class read comics on his phone for the entire observation period, while another looked at pictures of Pokemon on his laptop. There were no attempts to redirect or engage these students into the classroom activity. P19 pp. 3-4.

97. During the social skills class observation, which was mandated by the District to be quite brief, Dr. Lord noted that it contained approximately 20-30 students, most of whom were engaged with personal devices such as cell phones and laptops. One student was asleep on the floor under a jacket. Others sat with board games in boxes in front of them; it was possible they were preparing to play the games but Dr. Lord and the Mother were not permitted to observe long enough to see what activity may have taken place. P19 p 4.

98. Dr. Lord and the Mother learned during their tour that Olympic includes an option for students to sit in a room remotely with an audio headset and dial in through a computer program called One Note to their general education classes. P19 p.5. The District offered this as a way for the Student to avoid noise and crowds. Tr. at 251 (Mother).

99. A positive aspect of Olympic that Dr. Lord noted is that the Student might be interested and successful in some of the many clubs and extracurricular activities. P19 p. 7.

100. The Student's Mother does not think the Student would do well in Olympic, in part due to the size of the school and the noisy environment. Tr. at 251 (Mother). Dr. Lord does not believe Olympic offers the Student the type of "middle ground" he needs. Most of the students in the program exhibit more significant social and functional impairment than does the Student. P19 p. 3. However, the general education setting at Newport is likely to overload the Student from a sensory perspective, leading to use of devices such as headphones and remote access that will result in his isolation. *Id.*

101. Dr. Keirseay opined that an environment like Olympic/Newport would be very overwhelming for the Student and he would need a great deal of assistance in order to navigate that environment. Tr. at 282 (Keirseay). Transitions can be very difficult for individuals on the autism spectrum. Even small transitions, such as going from one classroom to another, can be stressful or overwhelming without enough time to practice. The Student would need significant support in order to transition to Newport. He would need a designated individual who is on site at all times to turn to for help. Tr. at 283-85 (Keirseay). Dr. Keirseay would be "very worried" about the Student's ability to cope with the transition. In her experience, such a transition can take months or even years. It is not usually recommended, if an autistic student is flourishing and supported, to transition him or her to a different school. *Id.* at 288-29.

¹⁵ This was likely a "targeted English" class.

102. No one from the District ever reached out to Dr. Keirsey for input regarding the Student. Tr. at 290 (Keirsey). Dr. Keirsey recommends the Student remain at EAS. Tr. at 310 (Keirsey). In the declaration she provided for the due process hearing, she opined as follows:

I have serious concerns that Student's ability to function academically would be compromised should a change in placement occur. His autism spectrum disorder impacts his ability to undergo transition, understand social relationships to the degree that his same age peers would, and to have a significant difficulty managing anxiety symptoms and behaviors. Environmental factors such as noise, crowd level, and other sensory inputs can additionally cause overstimulation and spur emotional and behavioral responses. ... Disruption of a support system already providing benefits and academic growth can be extremely detrimental to any student, let alone one with an autism spectrum disorder.

Based on what I have reviewed, Student is doing well at Eastside Academics. Any change to that daily routine and structure poses a risk of exacerbating his anxiety symptoms and could result in a retardation of progress or a retreat to previous maladaptive behaviors. ... Undertaking a large-scale transition for a child with an autism spectrum disorder who is functioning well in their current environment could result in a serious decline in mental health.

P17 p 3.

EASTSIDE ACADEMICS

103. Mr. Rhodes¹⁶ is the Assistant Director of EAS. He described the mission of EAS as "serving students that might not be successful in large public schools and kind of giving them the chance to find the way they learn best." Tr. at 346 (Rhodes). The Bellevue location of EAS, where the Student attends, has 50 students. The Issaquah location is newer and has ten students. EAS educates students in grades six through twelve. Class sizes are two to six pupils. This allows the students to have friends in class but still develop a strong relationship with the teacher. *Id.* at 346-47.

104. Children with a variety of learning profiles attend EAS. There are "typical learners" who do not want to be in a big high school. There are students with ADD and/or ADHD who find focusing in large environments to be very difficult. In addition, there are students with anxiety and/or autism spectrum disorder who need a less overwhelming environment than a large public school. Tr. at 348 (Rhodes). Approximately one third of the student body falls into each category. Many students are dual-enrolled in that they are attending a public high school for one or two elective classes. Some participate in sports and other activities in the public school. *Id.* at 356. There is a student at EAS who is placed there by the District and is working on social-emotional goals. EAS has had other students placed the by the District in the past. *Id.* at 350.

105. EAS is an OSPI-approved nonpublic agency. Tr. at 349 (Rhodes). It follows Washington State's Common Core curriculum standards. Tr. at 191 (Farrell). It has a special education

¹⁶ Mr. Rhodes holds a bachelor's degree in applied learning development and a master's degree in journalism. He is certificated to teach English, language arts and reading. Tr. at 345 (Rhodes).

department and special education policies. Ms. Farrell is the special education teacher on staff, and EAS is able to implement IEPs. *Id.* at 122-27 (Farrell). Social support is embedded into each class at EAS, and social-emotional learning is taught in the context of daily interactions, such as how to participate in a small group discussion. *Id.* at 180. A social skills class has been offered in the past and was taught by Mr. Rhodes. *Id.* at 351 (Rhodes). That class could be provided again if called for, and the Student could be taught to interpret facial expression, body language and social cues. *Id.* at 351, 369-70. He is already receiving instruction in understanding social cues and body language. *Id.* at 125, 179-80 (Farrell).

106. Study skills are emphasized at EAS; the study hall classes focuses on executive function and incorporates planners, graphic organizers, and rubrics. Tr. at 352-54 (Rhodes).

107. EAS is capable of designing and implementing SDI and EAS would be capable of implementing Student's IEP. Tr. at 166-168, 203-212. No progress monitoring data was collected regarding the Student during the 2018-19 school year because that was not called for by the Agreement. *Id.* at 532 (Arroyo). EAS would be able to conduct progress monitoring and data collection for the Student's IEP goals if called upon to do so. *Id.* at 355 (Rhodes). EAS has collected data regarding IEP goals similar to the Student's for other students. *Id.* at 165 (Farrell), 367 (Rhodes). For those students, the District sent case managers to EAS for monthly meetings in order to exchange data. *Id.* at 350.

108. If the Student needed speech-language pathology services, there is time on Fridays to accommodate professionals who come to EAS to work with Students. Tr. at 371 (Rhodes).

109. College preparation is a focus of EAS. Ninety percent of the students go on to attend a two- or four-year college. Tr. at 358 (Rhodes). The Student will be able to fulfill his math graduation requirement at EAS despite being in pre-algebra as a freshman this school year.¹⁷ *Id.* at 381.

110. When the Student started at EAS, he would pull his hair, cry, and rub his head when anxious. He had headaches, stomachaches, and complaints about allergies. This appeared to Mr. Rhodes to be an avoidance tactic, and he developed a plan to deal with it in collaboration with the Student's Parents. Tr. at 359-60 (Rhodes). The anxiety incidents gradually diminished. The Student has only come to the office with a somatic complaint once during the 2019-20 school year. *Id.* at 360.

111. The Student participates in a walking class at EAS as physical education. The class goes into the community, to places such as grocery stores and fast food restaurants for lunch. Tr. at 363 (Rhodes). The age group of the walking class is varied. *Id.* at 364. The Student also participates in a Dungeons and Dragons (D&D) club at EAS, and he has joined the party planning committee. *Id.* at 365. He now rides the public bus home from school. *Id.* at 201 (Farrell).

112. EAS staff has noted that writing by hand causes the Student to lose creativity and depth in his written work. He is much more successful when using a laptop. His written output has

¹⁷ Additionally, were the Student to return to the District, the District requires six semesters of math in order for a student to graduate. J5 p. 17. The Student would be able to fulfill this requirement.

improved since he has been at EAS. Tr. at 361 (Rhodes). The Student is now capable of completing written assignment on his own on his laptop. *Id.* at 141-42 (Farrell).

113. For students who do not have an IEP, Ms. Farrell reviews their assessments and diagnostic material and develops a work plan. She also works with students at EAS who are placed on contract with school districts, and collaborates to meet their IEP goals and track data. *Id.* at 123-24. She has developed a work plan for the Student.¹⁸ One of his goals is to write independently, without use of a scribe, using Google Docs and a laptop. *Id.* at 176.

114. The Student's IEP goals could be worked on at EAS. His social-emotional goal regarding "perspective taking while working with others" is already addressed with Ms. Farrell in that students in her class give feedback to each other on their work, and learn how to give and accept criticism. Tr. at 203 (Farrell). The same is true for the goals related to self-regulation and improving focus. *Id.* at 204-05, 209-13.

115. The Student describes his experience at EAS very positively. He feels supported in class and is able to come up with ideas for writing assignments. He describes the environment as "really quiet and less stressful." Tr. at 59 (Student). He is able to write paragraphs for his writing assignments, and feels that he has "people encouraging [him] and a nonstressful environment." *Id.* at 64. He does his homework independently. *Id.* at 321 (Mother).

116. A smaller environment such as EAS has less potential for sensory overstimulation. Lack of a psychologist or counselor on site is a concern, but if the Student has other adults he can approach for help (such as his teachers or the principal) and in whom he is confident, they can help him re-engage in the academic setting. Tr. at 287 (Keirse). Ms. Arroyo, from the District, believes EAS can meet the Student's social-emotional needs. *Id.* at 531-32 (Arroyo).

117. Ms. Rose¹⁹ is a science and math teacher at EAS. The Student is in her biology and astronomy classes this school year. Tr. at 447 (Rose). Ms. Rose developed the D&D club at EAS in order to provide a fun place for students to practice social skills. Tr. at 452 (Rose). The club consists of three groups that meet for two hours each week, and there is a week-long camp during the February break. There are four to six students in each group. *Id.* at 453. D&D is a collaborative game in which players have to cooperate in order to succeed. The groups must overcome obstacles and resolve conflicts when players want to do different things. Players need to learn to interpret facial expressions and body language to effectively engage in the group. *Id.* at 456. The game also teaches players to cope with failure, because there is a random element to the game, and their character may unexpectedly die. *Id.* at 457.

118. An interest group in which he spends time with other children is beneficial to the Student. Tr. at 300 (Keirse). D&D provides an opportunity for the Student to practice social skills in a setting where he is not "put on the spot" because his character engages in the interaction, not him. Such an activity generates closeness and peer relationships. *Id.* at 307-08.

¹⁸ The work plan was offered into evidence by the Parents, but it was not admitted because it was not provided to the District in compliance with the IDEA's five-day rule pertaining to documents to be used at a due process hearing. See WAC 392-172A-05100(c).

¹⁹ Ms. Rose holds a Bachelor of Science degree in aeronautical science and engineering. Tr. at 443 (Rose).

119. Dr. Lord is familiar with EAS because she has another patient who attends the school. Tr. at 395 (Lord). She thinks it is a good fit for the Student's needs. *Id.* The Student became much more engaged in and enthusiastic about school once he moved to EAS. Dr. Lord had not seen him that excited about school since she had been treating him. *Id.* at 398. Dr. Lord is not concerned that there is no psychologist, counselor or social worker on site at EAS, and she was able to work collaboratively with Mr. Rhodes when the Student moved to EAS to design interventions when he felt overwhelmed or needed tailored support. *Id.* at 408.

120. Dr. Lord visited EAS for the same amount of time she was permitted to visit Olympic. She observed the school to be quiet. Classes consisted of one to six students. She noted that the classmates of the Student appeared to be higher functioning than the Student. She did not observe any of the EAS students to be nonverbal or to have significant functional impairment. P19 pp. 5-7.

121. Ms. Farrell disputes the November 2019 IEP's assertion that EAS does not provide SDI in social-emotional and study skills. In her opinion, EAS can provide more beneficial instruction in those skills than can a public school. Tr. at 164 (Farrell).

122. The Parents have incurred and paid \$16,875 in tuition expenses to EAS for the 2019-20 academic year. They seek reimbursement of that expense as relief in this action. Tr. at 252 (Mother); P16.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings 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 pursuant to these statutes, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *See Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Since the Parents are the party seeking relief in this case, they have the burden of proof. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof to resolve a dispute in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981); *Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). Therefore, the Parents' burden of proof in this matter is preponderance of the evidence.

The IDEA and FAPE

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

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

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

4. A "free appropriate public education" consists of both the procedural and substantive requirements of the IDEA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

[A] "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" [FAPE] as defined by the Act.

Id. at 188-189. In order for a school district to provide a FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Id.* at 458 U.S. at 200-201.

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

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

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

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

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

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

7. Thus, not every procedural violation of the IDEA is sufficient to support a finding that the child in question was denied FAPE. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003)(quoting *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 887, 892 (9th Cir. 2001)). "A procedural violation denies a free appropriate public education if it results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010)(citations omitted).

8. 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).

Whether the District predetermined that EAS would not be considered or recommended as a placement option during the June 2019 and November 2019 IEP meetings

9. The Parents contend the District committed procedural violations of the IDEA by predetermining that EAS would not be considered or recommended as a placement option during the June 2019 and November 2019 IEP meetings. "[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 (9th Cir. 2002). Predetermination of a student's placement is a procedural violation that can deprive a student of FAPE. According to the Ninth Circuit, a school district violates IDEA procedures "if it independently develops an IEP, without *meaningful* parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d at 1131 (emphasis added). A school district may not enter an IEP meeting with a "take it or leave it" position, and if it does so, then even the parents' decision not to cooperate thereafter may not excuse the district's error." *Id.*

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

11. In the present case, at the June 2019 IEP meeting, no substantive discussion regarding the possibility of placing the Student at EAS occurred due to the District's "take it or leave it" approach. The District offered placement at Interlake and was unwilling to discuss or consider other alternatives. The District refused to consider interim placement of the Student at EAS when the Parents inquired about that possibility, and offered no reason for the refusal. Public/private separate day school is not marked in the IEP as having been considered for the 2019-20 school year. Dr. Lord's input and other material provided by the Parents for the June meeting were given little consideration by the District with respect to the Student's placement. Notably, one District IEP team member saw fit to distribute the materials to other District personnel as "reading entertainment." Moreover, the District staff member who drafted the June 2019 IEP did not think the Student should have been placed at EAS in the first place. He was very resistant to reconsidering the impressions he had formed regarding the Student's needs, and had made up his mind prior to the meeting that EAS was not an appropriate placement for the Student.

12. At times in the due process hearing, the District pointed to the Agreement as the reason it decided to place the Student at Interlake without further inquiry. This does not reflect an accurate interpretation of the wording of the Agreement. The Agreement provides that, if the Student returns to the District, the most recent placement offer will be implemented *unless otherwise directed by the Student's IEP team* (emphasis added.) Clearly, the Student's IEP team has the ability to override the most recent placement offer; any other reading of the Agreement would render the clause "unless otherwise directed by the Student's IEP team" to be superfluous and meaningless. Therefore, to the extent the District argues that the Agreement prevented the IEP team from considering EAS as a potential placement, that argument is not persuasive.

13. It is concluded that the District predetermined, prior to the June 2019 IEP meeting, that EAS would not be considered or recommended as a placement for the Student. This is a serious procedural violation of the IDEA. This predetermination by the District significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child, and therefore constitutes a denial of FAPE.

14. The Parents also contend the District predetermined EAS would not be considered or recommended as a placement for the Student in relation to the November 2019 IEP meeting. The evidence does not support this assertion. The District staff member who developed the IEP, Mr. Gentry, understood that he was to develop an IEP placing the Student at Interlake. The draft IEP, and the PWN issued afterward, both indicate that EAS was not considered as a placement. However, the District did not exhibit the same unwillingness to reconsider its placement recommendation as it did at the June 2019 IEP meeting. Rather, placement was substantively discussed by the team at the meeting, and the team ultimately determined that Interlake would not meet the Student's needs. The District changed its placement recommendation to Olympic after getting input from the Parents.

15. The fact that the District may have come to the meeting with pre-formed opinions regarding placement is not dispositive of the issue, so long as they were willing to listen to the Parents and the Parents had the opportunity to make objections and suggestions regarding the IEP. *L.C. on behalf of A.S. v. Issaquah Sch. Dist.*, 2019 WL 2023567 at *21.

16. It is concluded that the District did not predetermine that EAS would not be considered or recommended as a placement for the Student prior to the November 2019 IEP meeting. As such, no procedural violation or denial of FAPE occurred due to predetermination at the November 2019 IEP meeting.

Whether the District violated the IDEA and denied the Student FAPE from January 9, 2019, to December 31, 2019, by failing to consider during the June and November IEP team meetings the impacts of the proposed transition of the Student from EAS to a traditional high school setting

17. The Parents contend that the District denied the Student FAPE by failing to consider the impacts of his proposed transition from EAS to a District high school. The District correctly argues that the IDEA does not *require* a transition plan in an IEP when a student transitions from a private school to a public school. However, this is not the same inquiry as whether the impacts of the proposed transition from a small private school to a very large public school should be *considered* by the IEP team.

18. The evidence is overwhelming that the Student suffers from anxiety. His ability to adjust to change is limited, and transitions are very difficult for him. The mere thought of changing schools causes the Student to experience traumatic intrusive memories. The June 2019 IEP itself notes that the Student is able to cope with anxiety-inducing situations only 0-25% of the time. At the June 2019 IEP meeting, the District did not agree to allow the Student to “ease back into the District” and did not agree to develop a transition plan. However, this does not mean the District was unwilling to consider the impacts of the transition on the Student. It was not given the opportunity to do so because the meeting was cut short by the Parents. There is no evidence that, had the meeting continued, the District would have been unwilling to consider the impacts of the transition on the Student. The evidence points to the contrary in that the District agreed to reevaluate the Student after concerns were raised by the Parents. The fact that the District was unwilling to consider EAS as a placement does not lead to a conclusion that the District was unwilling to consider the impacts of the transition to Interlake. Therefore, it is concluded that the District did not fail to offer the Student FAPE by failing to consider the impacts of the transition from EAS to public school at the June 2019 IEP meeting.

19. The November 2019 IEP meeting presents a different scenario. At that point, the District had considerably more recent information about the Student. It also had ample time at the IEP meeting to demonstrate willingness to consider the impacts of the proposed transition on the Student. The District knew that noise and crowds were triggers for the student to panic. Dr. Lord had opined that the Student’s functioning might be significantly reduced if he were to return to a large public school. The transition to the District school was to occur almost immediately according to the terms of the IEP, but no transition plan was offered or even discussed by the District. The Parents’ expert, Dr. Keirse, opined persuasively at the due process hearing that the Student’s ability to cope with such a transition would be very concerning, and a successful transition could take months or even years. No one from the District spoke with Dr. Keirse, or Dr. Lord, for purposes of the reevaluation or development of the November 2019 IEP. Clearly, most members of the IEP team were individually troubled by the thought of moving the Student to Olympic/Newport in the manner contemplated by the IEP. When asked at the end of the meeting, “Does anyone, after hearing what you’ve heard about the Student today, believe that moving the Student now would be a good choice?”, no one but Mr. Delpert responded that they did. The other team members did not answer.

20. As set forth above, FAPE consists of SDI supported by such services as are necessary to permit the child to benefit from the instruction. An IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Moreover, an IEP team is charged with developing a "comprehensive plan" that is "tailored to the unique needs of a particular child." The essential function of an IEP is to set out a plan for pursuing academic and functional advancement. In the present case, the November 2019 IEP's plan for the Student's functional advancement was inadequate. Given the Student's anxiety, autism, noise sensitivity, and negative experience at Highland, as well as the input from the Parents and Dr. Lord, the IEP team should have recognized that the Student would be unable to benefit from his instruction, and be unable to make appropriate progress, for potentially a very long period of time were he to be "thrown in" to the environment at Olympic/ Newport. Even if a formal transition plan was not necessary (though the evidence strongly points to the fact that it was), the immense impact of the transition on the Student should, at the very least, have been *considered* by the IEP team. The District's unwillingness to do so constituted a failure to offer the Student FAPE.

21. The cases cited by the District in its briefing do not change this conclusion. In *J.G. by & through Greenberg v. Dep't of Educ.*, 772 F. App'x 567 (9th Cir. 2019), the case most on point, the underlying district court case provides necessary context. J.G.'s IEP was developed over a series of five IEP meetings that included the parents. *J.G. v. Hawaii*, 2018 U.S. Dist. Lexis 132945 at *2 (D. Haw. 2018). The IEP provided that a transition plan would be developed for the student and specified the areas of concern that needed to be addressed, including "new people, new location, potential regression," and other factors. *Id.* at *5. The foresight expressed in that IEP shows an awareness of J.G.'s needs that is lacking in the IEP in the present case. In *J.G.*, a "concerted effort" was made by the school district to develop a transition plan in consultation with the parents. *Id.* at *44. In contrast, in the present case, the Student was expected to move to the public school almost immediately yet the impact of the transition was not even considered by the IEP team.

22. The other Ninth Circuit cases cited by the District similarly do not support the argument that the November 2019 IEP offered the Student FAPE despite the failure of the IEP team to consider the impact of the Student's transition to Olympic. In *B.B. ex rel. J.B. v. Hawaii Dep't of Educ.*, 483 F. Supp. 2d 1042 (D. Haw. 2006), a detailed "transfer plan" was developed for the student. The court noted that, while the IDEA does not mandate the creation of a specific transition plan, in some cases the knowledgeable experts agree that a particular student would benefit from such a plan, and the transition plan is necessary to demonstrate that the district can provide a FAPE. *Id.* at 1057. The present case is just such a situation. Similarly, *James M. ex rel. Sherry M. v. Hawaii*, 803 F. Supp. 2d 1150 (D. Haw. 2011), is distinguishable because that court did not find evidence to demonstrate that the Student required a transition plan (but a plan was developed nonetheless). *Id.* at 1163-64.

Whether the District violated the IDEA and denied the Student FAPE from January 9, 2019, to December 31, 2019, by failing to offer IEPs for the Student on June 14, 2019, and November 25, 2019, that are reasonably calculated to deliver FAPE for the 2019-20 school year

23. The Parents contend the District failed to offer the Student IEPs that are reasonably calculated to provide him with FAPE in June and November of 2019.

24. With respect to the June 2019 IEP, the Ninth Circuit has determined that the question of substantive compliance with the IDEA need not be reached if the reviewing court finds procedural inadequacies that seriously infringe a parent's opportunity to participate in the IEP formulation process. *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d 1202, 1207 (9th Cir. 2008)(internal quotations omitted). It has been concluded above that the District predetermined, prior to the June 2019 IEP meeting, that EAS would not be considered or recommended as a placement for the Student. This is a serious procedural violation of the IDEA that denied the Student FAPE. Nonetheless, the question of the June 2019 IEP's substantive compliance with the IDEA will be addressed here.

25. In developing an IEP, the IEP team must consider, among other things: the concerns of the parents for enhancing the education of their student; the results of the most recent evaluation of the student; and the academic, developmental, and functional needs of the student. WAC 392-172A-03110(1). "Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Andrew F.*, 137 S.Ct. at 999 (emphasis in original, internal citations omitted). However, a reviewing court may fairly expect school district authorities "to be able to offer a cogent and responsive explanation for their decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1002.

26. An IEP must include a statement of the special education and related services to be provided to the student to enable the student to advance appropriately toward attaining annual goals. WAC 392-172A-03090(d). "Related services" means such services as are required to assist a student eligible for special education to benefit from special education, including psychological services and counseling. WAC 392-172A-01155(1).

27. The June 2019 IEP calls for the Student to spend 73.83% of his time in the general education setting at Interlake for the 2019-20 school year. The IEP notes that the Student is able to cope with anxiety-inducing situations only 0-25% of the time. The IEP contains no plan to transition the Student from EAS to Interlake, and calls for the move to take place *immediately*. The IEP's social/emotional "regulation" goal, the only goal to directly address anxiety, provides that the Student will recognize his anxiety and request to take a break. The IEP includes no related counseling or psychological services. Prior to the IEP meeting, the Parents provided input from Dr. Lord that noted that the Student's functioning could be significantly reduced if he were to return to his prior academic environment (i.e. a large public school), and the mere thought of changing schools causes the Student to experience trauma symptomology.

28. At least one District IEP team member, Ms. Arroyo, felt that consideration of a transition plan was called for, and that she needed more information about the Student. However, the District refused to consider interim placement of the Student at EAS pending the reevaluation and offered no reason for this refusal. Notably, after the reevaluation, the November 2019 IEP team determined that Interlake was not an appropriate placement for the Student, and that the Student needed more support than could be provided at Interlake. It is well established that the appropriateness of an IEP must not be judged in hindsight, but rather based on the information that was reasonably available to the parties at the time the IEP was developed. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). However, information indicating the Student would experience difficulty adjusting to Interlake, and needed more support than the IEP provided, was

very available to the parties in June of 2019. The Parents attempted to call the significance of this information to the attention of the District team members, to no avail.

29. For these reasons, it is concluded that the June 2019 IEP did not adequately address the Student's functional needs, was not a comprehensive plan tailored to the unique needs of the Student, and was not reasonably calculated to deliver the Student FAPE for the 2019-20 school year.

30. With respect to the November 2019 IEP, it is concluded above that the District's unwillingness to consider the impacts of the transition from EAS to a large public school constituted a failure to offer the Student FAPE. Nonetheless, the issue of whether the IEP was reasonably calculated to provide the Student with FAPE will be further addressed here.

31. It is clear and undisputed that the Student has a pervasive sensitivity to noise and crowds; the ability to cope with these sensitivities is an overriding functional need on the part of the Student. This was well known by the District by November of 2019 but is not adequately addressed by the November 2019 IEP. There is a risk that the Student will hide, rock, scream, completely withdraw, and/or use headphones constantly to attempt to cope with the environment at Olympic/Newport. The Student's November 2019 reevaluation noted that he should receive scaffolded exposure to crowds and noise. Dr. Lord and Dr. Keirseay disagreed with this approach, both opining that the Student needs to learn coping skills and techniques in order to manage these sensitivities while avoiding isolation and separation from others. Regardless of which approach may be most appropriate, the IEP provides for neither; it does not provide for scaffolded exposure, and does not provide an opportunity to learn coping skills and techniques. It merely provides the Student can take breaks for up to five minutes and possibly use noise-canceling headphones. The social/emotional "regulation" goal, the only goal to directly address anxiety, provides that the Student will label how he is feeling to improve his ability to identify emotions for self-regulation. The IEP includes no counseling or psychological services other than a boilerplate description of the Olympic Program. The PWN issued after the meeting states that Olympic "will offer support to address Student's anxiety," but does not describe the nature of that support, when or how it will be provided, or by whom it will be provided. The Student's anxiety related to noise and crowds is not adequately addressed, and the District did not provide a cogent and/or responsive explanation for the inadequacy. The IEP is, therefore, not a "comprehensive plan" that is tailored to the unique needs of the Student.

32. For this reason, it is concluded that the November 2019 IEP is not reasonably calculated to deliver the Student FAPE for the 2019-20 school year.

Whether EAS is an appropriate placement at which to provide the Student a FAPE

33. Parents who unilaterally enroll a student in a private school are entitled to tuition reimbursement only if: (a) the school district's placement violates the IDEA, and (b) the parents' private school placement is proper under the IDEA. *Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 364 (1993). See also WAC 392-172A-04115; *Burlington v. Dep't of Educ.*, 471 U.S. 359, 369, 105 S.Ct. 1996 (1985).

34. In order for a private placement to be proper, parents must demonstrate that it "provides educational instruction specially designed to meet the unique needs of a handicapped child,

supported by such services as are necessary to permit the child to benefit from instruction.” *C.B. v. Garden Grove Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011), *cert. denied*, 132 S.Ct. 500 (2011). In *C.B. v. Garden Grove*, the student at issue had unique needs in math, among several other areas. The private center in which he was placed provided only language-based services, and no instruction in math. Nonetheless, the Ninth Circuit found the private placement was proper because it met some, though not all, of the student’s educational needs, and provided significant educational benefits. *Id.* at 1159-1160. In contrast, a private placement is not proper when the educational benefits conferred are “meager” and the student at issue makes no progress in essential areas. *M.N. v. State of Hawaii*, 509 F. App’x 640, 641 (9th Cir. 2013).

35. A private placement does not have to be the Student’s least restrictive environment to be appropriate for reimbursement purposes. *C.B. v. Special Sch. Dist. No. 1*, 636 F.3d 981 (8th Cir. 2011).

36. An ALJ may reasonably rely on testimony of witnesses who have a consistent relationship with the student at issue and/or have observed the student’s school performance over those who base their opinion predominately on file reviews. *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d at 1212.

37. The Bellevue location of EAS has 50 students. Approximately one third of the student body is made up of typical learners, i.e. general education students. EAS follows state curriculum standards. It has the capability to provide a social skills class, including instruction on interpreting facial expression, body language and social cues. The study skills class at EAS focuses on executive functioning. There is a special education teacher on staff, and the District currently has a student placed at EAS who is working on social emotional goals. Social support and social-emotional learning are imbedded into each class. The EAS staff has demonstrated the ability to work with the Student and Parents to address the Student’s somatic complaints and avoidance tactics. The Student has made great progress at EAS, as described in the Findings of Fact, above. Notably, the D&D activity that is implemented at Olympic is implemented to a greater degree at EAS and has been very effective for the Student. He is on track to graduate with the necessary prerequisites for college attendance.

38. In light of the legal standards and Findings of Fact articulated above, it is concluded that EAS is an appropriate placement at which to provide the Student FAPE.

Whether any of the Parents’ claims and/or requested relief are barred by the terms of the settlement agreement entered into by the parties on January 9, 2019

39. The District raised the terms of the Agreement to preclude or bar only the June 2019 IEP meeting predetermination claim, discussed above. It is concluded above that the Agreement does not bar that claim. Accordingly, none of the Parents’ claims and/or requested relief are barred by the terms of the Agreement entered into by the parties on January 9, 2019.

Whether the Parents are entitled to their requested remedies or other relief

40. The Parents have incurred and paid \$16,875 in tuition expenses to EAS for the 2019-20 academic year. They seek reimbursement for that payment as relief in this action. It is concluded that this tuition is reasonable. Because the District did not offer the Student FAPE in June and

November of 2019, the Parents are entitled to reimbursement for the tuition paid to EAS for the 2019-20 academic year in the amount of \$16,875.

41. With regard to prospective placement at EAS, IEPs are only one year in length because a student's needs change over time. The evidence does not support a conclusion that the District is incapable of offering the Student FAPE. Consequently, the need for prospective placement of the Student at EAS beyond the 2019-20 school year has not been demonstrated. If the District makes an offer of placement through a new IEP with which the Parents disagree, they have the right to file a new due process hearing request.

42. The Parents are entitled to the remedies and relief set forth above, and as specified in the ORDER below.

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


ORDER

1. The Bellevue School District violated the IDEA and denied the Student FAPE in multiple ways, as set forth above.

2. The District is ordered to reimburse the Parents for private school tuition in the amount of \$16,875.

3. All remedies requested by the Parent have been considered. Any remedies not awarded above are denied.

Signed on the date of mailing.



Jacqueline H. 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 this final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

DECLARATION OF SERVICE

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

Parents



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Dated April 8, 2020 at Seattle, Washington.

lan

Representative
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cc: Administrative Resource Services, OSPI