

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

IN THE MATTER OF

OSPI CAUSE NO. 2020-SE-0051  
2020-SE-0052  
2020-SE-0092

OAH DOCKET NO. 03-2020-OSPI-01030  
03-2020-OSPI-01031  
06-2020-OSPI-01080

UNIVERSITY PLACE SCHOOL DISTRICT

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

A due process hearing in this matter was held before Administrative Law Judge (ALJ) Pamela Meotti by video conference on September 28 through October 2, 2020, on November 9, 10 and 13, 2020, and on December 2, 2020. The Parent of the Student whose education is at issue<sup>1</sup> appeared and was represented by Shannon McMinimee and Alex Hagel, attorneys at law. The University Place School District (District), was represented by William Coats and Erin Sullivan-Byorick, attorneys at law. Also present were Holly Galbreath, District Director of Special Programs, and the Student's Grandfather. The following is hereby entered:

**STATEMENT OF THE CASE**

*Procedural History*

The District filed a Due Process Hearing Request with the Office of Superintendent of Public Instruction (OSPI) (Cause No. 2020-SE-0051) on March 16, 2020. The Parent filed a response to the District's complaint on March 18, 2020. The Parent filed a Due Process Hearing Request (Cause No. 2020-SE-0052) on March 18, 2020, and filed a second Due Process Hearing Request (Cause No. 2020-SE-0092) on June 17, 2020. The District filed responses to these complaints on March 24 and June 26, 2020. The parties agreed to consolidate the three matters for hearing on July 20, 2020. The Parent filed an amended complaint in Cause No. 2020-SE-0092, effective August 4, 2020. The District filed a response to the amended complaint on August 14, 2020.

The ALJ issued prehearing orders on April 9, 2020; May 1, 2020; July 20, 2020; August 4, 2020 (Order on District's Motion for Summary Judgment); August 5, 2020; August 26, 2020; and September 17, 2020 (Sixth Prehearing Order--addressing Motion to Dismiss). At the Parent's request, the ALJ set the due date for a written decision in these consolidated cases as thirty (30) days after the close of record. The record closed after receipt of the parties' closing briefs on January 11, 2021. The decision due date in this matter is **February 10, 2021**.

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

## EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J1 through J14.

Parent Exhibits: P1 through P44.

District Exhibits: D1; D2; D9 through D11; D14; D17 through D21; D24; D26; D27; D31; D35; D40 through D42; D44<sup>2</sup> through D55; D57 through D59; D61;<sup>3</sup> D62; D65; D68; D71; D73; D74; D76 through D79; D82; D83; D87; D88; D92; D94 through D96; D98; D99; D101; D103; D104; D106 through D108; and D114 through D119.<sup>4</sup>

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

Holly Galbreath, PhD, District Coordinator of Special Services;  
Kelly McClure, District Director of Special Services;  
The Parent;  
Shelley O'Donnell, Occupational Therapist (OT), Founder, Seattle Therapy-Skills for Life;  
Cin-Shaun Ting, OT, Seattle Therapy-Skills for Life;  
Jo Ristow, OT, Seattle Therapy-Skills for Life;  
Katie Beavers, Teacher, New Horizon School;  
Gayle Fay, PhD;  
The Grandfather;  
Katherine Kelso, District Board Certified Behavior Analyst (BCBA);  
Kristen Brubaker, District OT;  
Marcie Allen, District Speech Language Pathologist (SLP); and  
Marla Veliz, Director, New Horizon School.

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<sup>2</sup> A second version of Exhibit D44 was submitted in place of the original Exhibit D44 by agreement of the parties on October 2, 2020. T1041-42.

<sup>3</sup> The Parent objected to the admission of Exhibit D61 on the ground that it related to interpretation of the settlement agreement. T1053. The District sought to admit the document to demonstrate dates offered for an IEP meeting and the Parent's response. T1054. Both parties subsequently asked questions about D61, but it was not officially admitted into the record. T1058; 1098. Because the Parent had an opportunity to voice her objection and to ask questions about D61, it is admitted and considered for the limited purpose of showing dates offered for an IEP meeting and the Parent's response. T1054.

<sup>4</sup> No exhibits were admitted for the purpose of interpreting or enforcing the settlement agreement, nor were they considered for that purpose.

## ISSUES

The issues were originally set forth in the first prehearing order. After the Parent amended her complaint, she submitted a proposed consolidated statement of the issues on August 18, 2020, which was discussed during a prehearing conference. The issues, as amended, are as follows:

The issues for the due process hearing in Cause No. 2020SE-0051 are as follows:

- A. Whether the District conducted a “new” special education eligibility reevaluation of the Student on March 3, 2020 that triggered the Parent’s right to an independent educational evaluation (IEE) at public expense; and, if not, whether the Parent has a right to a second IEE at public expense under WAC 392-172A-05005?
  
- B. Whether the District’s March 3, 2020 reevaluation of the Student is sufficient, complete and appropriate?

The issues for the due process hearing in Cause Nos. 2020-SE-0052 and 2020-SE-0092 are:

- A. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) since January 8, 2020 by:
  - i. Failing to ensure that the Student had a current annual individualized education program (IEP) for the 2019-2020 school year.
  
  - ii. Failing to ensure that the Student had a current Functional Behavior Assessment (FBA) or Behavior Intervention Plan (BIP) during the 2019-2020 school year or will have a current FBA and BIP for the 2020-2021 school year that appropriately addresses the behaviors that impede his learning.
  
  - iii. Failing to provide the Student with specially designed instruction (SDI) and sufficient related services from a Speech Language Pathologist (SLP).
  
  - iv. Failing to provide the Student with SDI and sufficient related services from an Occupational Therapist.
  
  - v. Failing to provide the Student with related services from a Physical Therapist.
  
  - vi. Failing to comply with the procedures in WAC 392-172A-03005 through 392-172A-03080 in conducting its March 3, 2020 special education eligibility reevaluation of the Student as follows:
    - a. failing to complete its March 3, 2020 special education eligibility reevaluation of the Student within 35 school days of receiving consent from the Parent.

- b. failing to have its March 3, 2020 special education eligibility reevaluation match the scope of the Parent's consent.
  - c. failing to complete a special education eligibility reevaluation that is sufficient to identify the nature and extent of the special education and related services that the Student needs, specifically SDI and related services in communication, occupational therapy, recreational therapy and physical therapy.
  - d. failing to have an individual who could interpret the instructional implications of SLP reports, including the UW Autism SLP Report, the Evergreen Speech and Hearing Services SLP Report, and the observation reports from Seattle Therapy and the summary of the same within the District's reevaluation at the March 3, 2020 IEP meeting.
  - e. failing to have an individual who could interpret the instructional implications of the Mary Bridge Physical Therapy Report at the March 3, 2020 IEP meeting.
- vii. Not holding an IEP meeting for the Student on March 5 or 6, 2020 to implement a new annual IEP for him, even though all individuals who are necessary members of the IEP team under WAC 392-172A-03095 were able to do so on those days.
  - viii. Failing to draft a new annual IEP for the Student within 30 calendar days of completing its reevaluation on March 3, 2020.
  - ix. Failing to include all necessary members of the Student's IEP team at the March 3, 2020, March 30, 2020, June 5, 2020, July 7, 2020, and July 28, 2020 IEP meetings, specifically a counselor and a physical therapist.
  - x. Continuing to proceed with the March 3, 2020, March 30, 2020, June 5, 2020, July 7, 2020, and July 28, 2020 IEP meetings, despite the Parent not excusing the presence of all necessary members of the Student's IEP team, specifically a counselor and a physical therapist.
  - xi. Failing to include individuals who could interpret the instructional implications of evaluation results in the areas of social/emotional and behavior, SLP, OT, and PT at the March 30, 2020, June 5, 2020, July 7, 2020, and July 28, 2020 IEP meetings.
  - xii. Failing to ensure that the Student had a current annual IEP in place to facilitate his receipt of Extended School Year (ESY) services during the summer of 2020.
  - xiii. Failing to offer the Student appropriate ESY services during the summer of 2020, by failing to provide him with the accommodations, modifications, and supplementary aids and

services he needed to access the same, specifically recreational therapy and a dedicated para educator who could support his ability to access ESY through New Horizon School.

- xiv. Predetermining decisions that must be made by the IEP team prior to the March 3, 2020, March 30, 2020, June 5, 2020, July 7, 2020, and July 28, 2020 IEP meetings, as follows:
  - a. predetermining what SDI, related services, and supplementary aids and services the Student would receive from the District.
  - b. predetermining what ESY services would be offered to the Student without consideration of his unique needs.
  - c. predetermining that the Student would be provided either remote dedicated services or would be required to go to a District facility to access dedicated services.
  - d. predetermining that the Student would not receive dedicated services at home while he is receiving remote instruction.
  - e. predetermining that communication services and occupational therapy services would be categorized as social/emotional/behavioral services.
  - f. implementing an IEP on July 20, 2020 that does not reflect the decision making of the IEP team and is contrary to the determinations of the IEP team.
- xv. Proposing an IEP for the Student for the 2020-2021 school year that is not reasonably calculated to provide him FAPE.

B. And, whether the Parent is entitled to her requested remedies:

- i. Declaratory relief finding that the District violated the IDEA and that the Student was denied FAPE by the District's actions;
- ii. An IEE at public expense;
- iii. Compensatory education and supplemental services for the Student to allow him to obtain the educational benefit that he would have received but for the District's violations of the IDEA and denial of FAPE;
- iv. An Order directing the District to timely move forward with an IEP meeting prioritizing the availability of the Parent to have the New Horizon School Staff draft a new annual IEP for the Student;

v. An IEP and educational placement moving forward that is reasonably calculated to enable the Student to receive educational benefits, considering his unique needs;

vi. Or other equitable remedies, as appropriate.

*Sixth Prehearing Order dated September 17, 2020.*

### **FINDINGS OF FACT**

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

#### ***Background***

1. The Student is [REDACTED] and resides in the University Place School District (District) with the Parent. P1p3.<sup>5</sup>

2. On October 16, 2018, the District conducted an initial special education eligibility evaluation of the Student. P1. The Parent disagreed with the evaluation and requested an independent educational evaluation (IEE). T581-82.<sup>6</sup>

3. The District filed a due process hearing request (Cause No. 2019-SE-0077) to defend its evaluation of the Student. The Parent filed a due process hearing request (Cause No. 2019-SE-0083) challenging the appropriateness of the evaluation and the educational program offered by the District. The District then filed a second due process hearing request to obtain an additional assessment of the Student (Cause No. 2019-SE-0107). J1p1.

4. During the summer of 2019, the Student attended an extended school year (ESY) program offered by New Horizon School (NHS), a private school that serves students who have diagnosed disabilities. T936-939; 1157; 1586; D99p3. In September 2019, the Parent notified the District that the Student would not attend school in the District, but would instead attend NHS. T334; 586-87.

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<sup>5</sup> Citation to the exhibits of record are by the party (“P” for the Parent; “D” for the District; “J” for Joint) and page number. For example, a citation to P20p1 is to the Parent’s Exhibit 20 at page 1.

<sup>6</sup> Citations to the hearing transcript are to T followed by the page number(s) on which the testimony appears. For example, a citation to T661-62 is to pages 661 and 662 of the transcript.

### *Assessments Conducted Before January 7, 2020*

5. The Parent independently arranged for multiple private providers to assess the Student. In January 2019, Patricia Matestic, PhD, a clinical psychologist at the University of Washington Autism Center (UW Autism Center), conducted a comprehensive autism evaluation. J2pp1-16; 30-32. She used multiple assessment tools as listed on J2pp5-10. Dr. Matestic diagnosed the Student with Autism Spectrum Disorder (ASD) and Attention Deficit Hyperactivity Disorder-combined type (ADHD). J2p10.

6. Stacie Tanemura from Mary Bridge Children's Hospital (Mary Bridge) conducted a physical therapy assessment of the Student on January 23, 2019. J2p17-29. Primary impairments included decreased physical endurance for activity, decreased postural endurance for sustained positions, decreased motor planning / coordination for new or multi-step tasks, and slightly decreased strength of the left upper extremities and lower extremities compared to the right. Functional limitations included decreased standing balance on the left lower extremity and reported difficulty keeping up with peers in physical education class. J2p25. Ms. Tanemura recommended clinic based therapy, 2 to 5 times per week, for a total of 8 visits. She also recommended a home program. J2p26. There is no recommendation that the Student receive physical therapy (PT) in a school setting. J2p26.

7. On February 25, March 4, and March 11, 2019, Sara Gratz, a Speech Language Pathologist (SLP) at UW Autism Center, conducted a speech and language assessment. J2p33-42. Assessment tools included: caregiver report and review of records; clinical observations; Social Language Development Test – Elementary; Normative Update (SLDT-E: NU); “Pragmatics Profile” subtest of the Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF 5); Social Skills Improvement System (SSIS) Parent Rating Scale; and select tasks of the Social Thinking Dynamic Assessment Protocol (STDAP). J2p34. Ms. Gratz diagnosed the Student with Social Pragmatic Communication Disorder. J2p41. She recommended weekly sessions of 60 minutes with an SLP to address delays in social communication skills. She also recommended that the Student participate in a social skills group to develop social communication skills. J2p41. Ms. Gratz's report also recommended six goals in social communication. J2p42.

8. In June 2019, Gayle Fay,<sup>7</sup> PhD, a clinical neuropsychologist and director of Northwest Neuropsychology, conducted a neurological assessment of the Student. J2p45-69. Dr. Fay used seventeen assessment tools. An Education and Behavior Consultant in Dr. Fay's office observed the Student at NHS for twenty minutes in a general education setting and 55 minutes in a special education setting. A clinician also interviewed the Student. J2p43; J2p48. Dr. Fay considered the Student to be “one of the most complex kids [she had] seen.” T1125. She recommended dedicated support from a paraprofessional for the Student, noting the interface of his multiple needs, which include medical and neuropsychological, challenges presented by his autism spectrum disorder, high levels of anxiety, and issues with fine and gross motor skills, learning and auditory processing, social

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<sup>7</sup> Dr. Fay completed her PhD in neuropsychology in 1977, and started serving as a neuropsychologist at that time. She has conducted hundreds of evaluations. T1125-26.

and pragmatic communication, receptive and expressive language, and social skills. T1126-27; 1131-32.

9. On July 17, 2019, Evergreen Speech and Hearing Clinic, Inc. (Evergreen) assessed the Student's auditory processing ability. J2pp69-75. Brienne Salzman, Doctor of Audiology, administered four tests. J2pp70-71. Based on the results of these tests, she recommended a speech and language assessment, which was conducted by Maryam Sadrzadeh, SLP. Evergreen's assessment report included recommendations for speech-language intervention as well as modifications and accommodations for the school environment. J2pp73-74.

10. Seattle Therapy-Skills for Life (Seattle Therapy) assessed the Student in occupational therapy (OT) and speech language therapy (SLP). J2p76. Three therapists participated in the OT assessment, which took place in August 2019. J2p76. Shelley O'Donnell,<sup>8</sup> owner of Seattle Therapy, completed the Parent interview. T732. Chase Lane and Cin-Shaun Ting,<sup>9</sup> OTs who work at Seattle Therapy, also participated. T734. The therapists used various standardized assessments to gauge the Student's fine and gross motor skills, sensory processing, handwriting, and functional skills, particularly his level of independence and ability to engage in daily tasks at home and at school. T71-72. The Student's scores on the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2) indicated that his scores in manual dexterity, fine motor integration, balance, and bilateral coordination were "at least one standard deviation in the below-average range" compared to his peers. T773; J2p80. The Student had significant delays in his ability to create and carry out a plan to complete daily activities independently. T776-77. He needed help "following through with even just basic bodily needs, such as . . . removing a coat if he's too hot or going to the bathroom or getting a drink of water, even just feeding himself in a . . . timely way just wasn't happening." T736. Seattle Therapy recommended school-based OT services for 60 minutes per week. J2p84; T738; 777.

11. Kellie Krefft, an SLP employed by Seattle Therapy until 2020, conducted a speech language assessment in November and December 2019. J2pp 86-87; O'Donnell T738-42. She observed the Student in the classroom at NHS and noted that he demonstrated minimal communication skills within the classroom environment and had a difficult time responding to his teachers, even when addressed directly. He also had a difficult time requesting help. Teachers spent significantly more time assisting him than other students. J2p86. Ms. Krefft recommended providing the Student information in multiple modalities; working on difficult skills in isolation to promote independence and confidence; and providing the Student a dedicated aide. J287.

12. In December 2019, Ms. Ting visited NHS and observed the Student in a school setting. She made additional recommendations based on her observations. J2pp88-89; T779.

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<sup>8</sup> Ms. O'Donnell has a master's degree in occupational therapy. She has been an occupational therapist for twenty-five years. T731-32.

<sup>9</sup> Ms. Ting has a master's degree in occupational therapy and has worked as an occupational therapist for four years. She has been employed by Seattle Therapy since October 2017. T769-70.



13. The Student was unilaterally placed by the Parent at NHS from September 2019 through January 6, 2020. T334.

### ***Settlement Agreement***

14. On January 7, 2020, the parties entered into a settlement agreement with respect to Cause Nos. 2019-SE-0077, 2019-SE-0083, and 2019-SE-0107. J1pp1-5.

15. The settlement agreement provided in relevant part:

1. Interim Placement. Pending the Individualized Education Program (IEP) Team meeting identified in Paragraph 4 below, the District will fund the following interim placement for the Student.

- a. The Student's educational placement will be at New Horizon School (NHS) at District expense;
- b. The District will directly fund the Student's receipt of 30 minutes per week of occupational therapy services to be provided by Seattle Therapy at NHS;
- c. The Student will receive 100 minutes per week of behavior/social emotional services, to be provided by the counselor at NHS or by staff at NHS working under the supervision of the counselor, without additional charge to the District . . .

2. District Reevaluation

- a. The District will initiate [a] records review reevaluation of the Student considering all existing reports conducted by private providers to date (all of which have been provided to the District) by no later than January 10, 2020.
- b. No new assessments will be done as part of this reevaluation.
- c. The Parent will provide consent for the same within three business days of being provided a Prior Written Notice of the District's proposed reevaluation that reflects the above and a Consent Form for the same.

3. Functional Behavioral Assessment: The District will have its Board Certified Behavior Analyst (BCBA) conduct a Functional Behavioral Assessment (FBA) of the Student at NHS . . . [no than later than] February 14, 2020, unless agreed upon otherwise in writing by the Parties.

4. Post-District Reevaluation IEP Meeting: By no later than March 6, 2020, unless agreed upon otherwise in writing by the Parties, the District will hold an annual IEP meeting for the Student at NHS . . .

- a. To be scheduled at a mutually agreeable date and time where Parent can have counsel and the Student's grandfather with her;
- b. For the purposes of:
  - i. Reviewing the IEEs completed by [Gayle Fay, PhD] (neuropsychological), UW Autism Center (SLP), Seattle Therapy (OT), and Evergreen Hearing and Speech Center (Central Auditory Processing and Speech Language) that have previously been provided to the District<sup>10</sup> as well as the FBA:
  - ii. Reviewing the District Reevaluation and making determinations with respect to special education eligibility category and areas of need for services;
  - iii. Drafting a new annual IEP for the Student, to include a discussion of if the Student needs Extended School Year (ESY) services . . . and, if so, what those should be; and
  - iv. A Behavior Intervention Plan (BIP) for the Student focused on anxiety and demand avoidance.
  - v. The IEP team will consider providing a behavior intervention plan based on the findings of the functional behavior assessment. . . .

6. Reimbursement for Compensatory Education and Attorney's Fees:

- a. The District will issue a payment to Cedar Law PLLC in trust for [the Parent] in the amount of \$40,301.50 for the reimbursement of:
  - i. The costs of the Parent's provision of compensatory education and related services to the Student:
  - ii. The costs of assessments obtained by the Parent related to the Student's educational needs:

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<sup>10</sup> The settlement agreement refers to these documents interchangeably as reports, assessments and IEEs. This order refers to the reports prepared by private providers as reports, and to the tests and measurement tools used by the private providers as assessments.

- iii. [NHS] tuition and the costs of transportation from the start of the school year that were paid and/or incurred by Parent; and
- iv. Attorney's fees and costs associated with defending the Parent in the District's two due process hearing requests and representing the Parent in her due process hearing request."

J1pp1-4.

16. On January 6, 2020, the District entered into a service contract with NHS to serve the Student for the period from January 6, 2020 through "the last day of the extended school year of July of 2020." D1p1. It further provided that the District would pay NHS a total of \$17,760. D1p2; T1536.

17. The Parent has "never argued that [NHS] is inappropriate or that [NHS] has failed to provide the student FAPE." T25.

18. The Student did not have a current IEP in January 2020. T351. On January 7, 2020, Holly Galbreath,<sup>11</sup> PhD, District Special Education Coordinator, introduced herself to the Parent in an email that stated, "One of my roles is to help coordinate services for our UP students who are placed out-of-district. I will be working with you and [NHS] to assure that we complete [the Student's] special education reevaluation and FBA as well as assure that we collaboratively develop an IEP for him per our mediation agreement." P37p1. In communicating with NHS, Dr. Galbreath stated: "I have heard great things about how [the Student] is adjusting to [NHS.] The District has agreed to place him there and we don't intend to change that. Our job now is to help design an IEP that will meet his needs there." P34p1.

19. Each month, the District submits to OSPI a P-223H form that identifies "all students who have compliant paperwork, [evaluations] and IEPs that [the District] count[s] each month to receive funding . . . ." T1540. The District also submits a P-223 form that lists all general education students. T1540-1541. During the fall of 2019, the Student was not listed on either form, and the District did not seek funding for him from the state because "he was withdrawn from the District and attending [NHS]." T1557-58. In January 2020, the District started listing the Student on the P-223 form for general education students because "we have to have the Student attending in our District in order to pay for them to receive services outside the District." T1550-51; 1555. The Student could not be listed on the P-223H form until he had a compliant IEP; once an IEP was in place, the District listed the Student on the P-223H form. T1550.

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<sup>11</sup> Holly Galbreath has a PhD and a certificate of educational administration. D116. She was first hired by the District as a Special Education Coordinator in July 2019. Since 2000, Dr. Galbreath has held a Washington School Psychologist Certification; she served as a school psychologist in another school district between 2001 and 2004, and between 2007 and 2013. D116.

20. The District's typical practice when it may be unable to meet a student's needs is to conduct an evaluation or reevaluation to determine the precise nature of the student's needs and to develop an IEP for the student, which could be carried out by an out-of-district placement. In this case, there was no IEP meeting prior to January 6, 2020, to consider the Student's placement at NHS. During the hearing, Dr. Galbreath and Kelly McClure, District Executive Director of Special Services, testified that the District considered the Student to have been unilaterally placed at NHS, and that the District evaluated the Student and developed an IEP because it was required by the settlement agreement. T345-46. The District did not develop a services plan for the Student. T570.

21. The Parent's understanding was that the Student's placement at NHS was an interim placement. The District never told the Parent that it considered the Student to be unilaterally placed following the settlement agreement. T591. Ms. Veliz considered the Student to have been placed at NHS by the District based on communications with Dr. Galbreath. T1562-63.

22. The District entered into a contract with Seattle Therapy to provide OT services for the Student between March 1 and August 31, 2020. The contract also provided for Ms. Ting and Ms. Krefft to attend IEP meetings, but it does not state which meetings or how many. D2p1; O'Donnell T743; 745. NHS does not provide SLP or OT services to students. T1588.

### ***Reevaluation and FBA***

23. After the parties entered into the settlement agreement, the District sent the Parent a consent form for the reevaluation. P3p1. The Parent did not sign it because she did not feel it accurately stated what the parties had agreed to in the settlement agreement. T592; 615. The District sent a revised consent form. On January 8, 2020, the Parent signed that form consenting to a "records review reevaluation of the Student considering all existing reports conducted by private providers . . ." The form referred to the reports contained in Exhibit J2. The Parent also gave consent for the District to conduct an FBA of the Student at NHS. J3pp1-2; T592-93.

24. Thirty-five school days after January 8, 2020 is March 3, 2020. D119p2.

25. On January 10, 2020, Katherine Kelso,<sup>12</sup> a District Board Certified Behavior Analyst (BCBA), contacted the Parent to discuss her plan for conducting an FBA of the Student. D9p1. On January 21, 27, and 28, 2020, Ms. Kelso observed the Student at NHS for a total of approximately twenty-one hours. She then prepared a draft FBA. J6p2; T1252. Ms. Kelso recommended that the Student's IEP team consider a behavior intervention plan (BIP). J6p5.

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<sup>12</sup> Ms. Kelso has a master's degree in educational psychology, educational learning and development. She has been a Board Certified Behavior Analyst (BCBA) since 2013. Ms. Kelso has worked with children and adults who have a variety of disabilities and/or diagnoses. She has worked with students who have ASD, most frequently with students who are low functioning. T1209; 1265.

26. The District proposed a meeting to discuss the reevaluation and FBA on February 10 or 11, 2020, and an IEP meeting on February 25, 2020. D11p1. NHS staff were available on February 4, 2020, but that did not give Ms. Kelso sufficient time to complete the FBA. NHS staff were also available on February 19, 2020, but the Parent was not available that date because she was out of state for two weeks and would not return until March 2, 2020. T887. Dr. Galbreath noted that if the reevaluation meeting did not occur until the week of March 2, 2020, it would be necessary to hold the IEP meeting that week as well to comply with the March 6, 2020 deadline set by the settlement agreement. D14p1.

27. On February 28, 2020, the District issued a written invitation to a reevaluation meeting and IEP meeting on March 3, 2020. J4. The District also sent a draft reevaluation report (Exhibit J5) and draft IEP (Exhibit D24) to the Parent and her attorney for review prior to the meeting. P5p3; T608.

28. On February 28, 2020, the Parent's counsel provided feedback concerning the draft reevaluation report and draft IEP. P4; P5; D17; D18; D19. She asked that all private provider reports be summarized in the reevaluation report, noting that the Seattle Therapy SLP report was not referenced in the "communication" section. D18p1. The Seattle Therapy SLP report was, however, discussed in the "other" section of the reevaluation report. J5p19. With respect to the IEP, the Parent opined that the Student required ESY and both SDI and related services from an SLP, in the form of one-on-one services from an SLP and a social communication group led by an SLP. D17pp1-2.

29. On March 2, 2020, the Parent's counsel sent additional feedback in an email emphasizing her belief that the District did not seem to understand that the purpose of the reevaluation was to review all existing reports by private providers as of January 3, 2020, and not to review the District's prior evaluation from 2018. The email also opined that the reevaluation (Exhibit J5) was "deeply flawed," and set out four single-spaced pages explaining how to "fix" it. P7pp1-5; D20.

30. The draft reevaluation report recommended that the Student receive SDI in social/emotional/behavioral, math, and written language. It recommended related services in OT, SLP, and Counseling. J5p6. During the hearing, the Parent explained that she believed that the Student also required services from a PT, in-person support from a para educator, communication goals, SLP services for 60 minutes per week, and a social communication group led by an SLP. T980-87.

31. In preparation for the March 3, 2020 meeting, Dr. Galbreath met with District staff who were part of the Student's IEP team to discuss the private provider reports and assessments. T348. The District felt that the information in these documents was clear, and that Dr. Galbreath, Deanna

Sanders,<sup>13</sup> District School Psychologist; Marcie Allen,<sup>14</sup> District SLP; and Kristen Brubaker,<sup>15</sup> District OT; had the expertise to interpret the reports and assessments. T135-37; 141. Ms. Brubaker reviewed the OT reports from Seattle Therapy (J2 pp 76-85 and 88-90) and Dr. Fay's report, which contained comments about the Student's fine motor skills. T1343; 1361-62; 1364; 1406. Ms. Allen reviewed the UW Autism Center SLP report, Dr. Fay's report, the Evergreen SLP and auditory processing reports, and the Seattle Therapy SLP report. T1421-22; 1440; 1451.

32. When Ms. Brubaker drafted the OT sections of the draft reevaluation report, she did not duplicate information that pertained to more than one area because "it would have been copying and pasting the same information into multiple places in the same report." T1371-73. In drafting the communication section of the reevaluation report, Ms. Allen first discussed the earliest information from the 2018 initial evaluation, then discussed recent information from the private provider reports. T1445. The reevaluation report included information "that the team was agreeing on to provide services." T1446. Because there was a lot of evaluative data, some of which was duplicative, Ms. Allen summarized the information and included what she felt was pertinent to the concerns of the Parent. T1447. The communication section of the reevaluation report included a summary of the UW Autism Center and Evergreen reports, and referred to the Student's Social Pragmatic Communication Disorder. It did not refer to the SSIS or the STDAP assessments. J5p13.

33. The District did not invite a physical therapist (PT) or counselor to the March 3, 2020 meeting. T105-06,143. The District did not invite Dr. Fay because her report was thorough and well-documented, and provided sufficient information to complete the reevaluation and create an IEP for the Student. T158-59.

### ***March 3, 2020 Meeting***

34. On March 3, 2020, the District held a meeting (March 3 meeting) to consider the reevaluation and to develop an IEP for the Student. J4p1; J5p1. The Parent and the Grandparent attended, along with staff from the District and NHS. District staff included Dr. Galbreath; Bea Skelly, District special education teacher; Dr. Sanders;<sup>16</sup> Ms. Allen; Ms. Brubaker; and Ms. Kelso. NHS staff included Marla

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<sup>13</sup> Dr. Sanders is employed by the District as a school psychologist. She did not testify at the due process hearing and the record does not contain details about her credentials. T123.

<sup>14</sup> Ms. Allen has a master's degree in speech language pathology. She is licensed as an SLP in Washington State and holds her Certificate of Clinical Competence, which is a national certification through the American Speech Language Hearing Association. Ms. Allen has been employed by the District as an SLP for seven years. T1419.

<sup>15</sup> Ms. Brubaker has a master's degree in occupational therapy and is licensed in the state of Washington as an occupational therapist. She is certified by the National Board of Occupational Therapy and has taught courses in occupational therapy at the university level. T1337-39. Ms. Brubaker has been employed by the District for four years. T1337.

<sup>16</sup> The Parent was unsettled by Dr. Sanders's presence at the March 3 meeting because Dr. Sanders had previously filed a report with Child Protective Services alleging that the Parent had Munchausen syndrome by

Veliz,<sup>17</sup> NHS Director; Jeff Carter, NHS teacher; and Teresa Hellum, NHS special education teacher. J5p7; D27p4. Additionally, the Parent paid for Ms. Ting and Dr. Fay to attend. T854; 856. Dr. Fay participated in the meeting by telephone but was not present for the entire meeting. T354.

### ***Consideration of the Assessments and Private Provider Reports<sup>18</sup>***

35. During the March 3 meeting, the team reviewed the private provider reports and assessments. T601-602; 895-96; 1122, 1141, 1468. The team spent “a good portion of the time” going through the information from the assessments and going over “all of the issues.” T1122, 1141. This included reviewing data in the areas of adaptive, behavior, and cognitive, which focused on Dr. Fay’s assessment and the UW Autism Center assessment. T1123. This also included reviewing data in the areas of executive functioning, memory, learning, fine and gross motor, family medical history, social/emotional, social skills, sensory issues, auditory processing, and speech. T1122-24; 1141; 800. The team discussed the Evergreen assessment, which indicated that, “while [the Student] didn’t meet diagnostic criteria for an auditory processing deficit functionally, that was a very significant issue.” T1124. Ms. Ting also discussed her OT assessment and felt that it provided sufficient information to develop goals for the Student and for the team to make a recommendation as to what services the Student required. T782; 800-02; 601-602. The team “was really focused on lining out all of the issues that [the Student] brought to the table and [that needed] to be considered in-depth in establishing a comprehensive and effective program for him. And it was also from a global level established that NHS was doing a really good job with him, but he needed, obviously, [dedicated] support and . . . he also needed intensive and specialized support from other providers, such as occupational, physical therapy, and communication disorder specialists.” T1125.

36. The Parent felt that the reevaluation was largely the same as the 2018 evaluation. T596. It seemed to her that District staff were “completely unaware” of the assessments she had obtained from private providers. T596. She believed Ms. Brubaker did not know what she was supposed to do with the OT assessment and could not interpret the educational implications of it. It was her impression that Ms. Allen was not familiar with the SLDT-E: NU assessment or with Ms. Gratz’s UW Autism SLP report, and did not understand how to interpret the educational implications. T596; 626-27.

37. During the hearing, Ms. Allen testified that the Parent’s counsel did not permit her to speak about the SLP assessments at the March 3 meeting. Ms. Allen explained that at the beginning of the

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proxy. Neither CPS nor law enforcement made any findings against the Parent in response to the report. T585. Dr. Sanders remained on the Student’s evaluation team because she was most knowledgeable about the assessments concerning the Student and served the school the Student would attend if he attended in the District. T130-31.

<sup>17</sup> Ms. Veliz has been the CEO of NHS for twenty-six years. NHS is a small private special education school that is an approved nonpublic agency. T1560-61.

<sup>18</sup> To the extent that the Parent claims that the District failed to comply with the terms of the settlement agreement in reviewing the private provider reports, such claims are outside the scope of the ALJ’s authority. *Seattle School District*, 115 LRP 54792 (SEA WA 2015). As such, they are not addressed further in this decision.

meeting, when she was asked to provide more descriptive information about the SLDT-E: NU assessment than was in the reevaluation report, she stated that she had never administered it. T1324. At that point, the Parent's counsel deemed her "not competent to address any more of the report." T1423-24; 1474. The Parent, the Grandfather and Ms. Veliz believed Ms. Allen had stated she could not interpret the SLP assessment. T626; 1568; 1166. Ms. Ting testified that "when provided the opportunity to talk [Ms. Allen] did not. I don't know if she could not, but I just know that she did not." T824. During the due process hearing, Ms. Allen acknowledged that she has not administered the SLDT-E: NU and is not familiar with test protocols, but emphasized she is "most definitely capable of interpreting it." T1424, 1449-50. Based on a comprehensive review of the evidence in the record, I find it more likely than not that Ms. Allen was familiar with the private provider reports and capable of interpreting the educational implications of the SLDT-E: NU and other assessments referenced in the SLP reports. Ms. Allen credibly testified that she reviewed the SLP reports and was prepared to discuss them. The Parent did not introduce any evidence that called into question Ms. Allen's training or qualifications. I also find it more likely than not that Ms. Brubaker was familiar with the private provider OT reports and capable of interpreting them. As with Ms. Allen, the Parent did not introduce any evidence that called into question Ms. Brubaker's training or qualifications.

38. The team discussed the Student's eligibility category and all team members agreed to change the category from autism to multiple disabilities. T605. NHS staff opined that the assessments and reports provided enough information to permit the team to draft an appropriate IEP. T622-24. District staff also felt that they had sufficient information to make recommendations and to develop appropriate goals for the Student. They did not believe any additional data was necessary. T1343-44; 1424; 1469. Team members disagreed, however, about the areas of service in which the Student required SDI, related services, and supplementary aids and services. T605-07.

39. During the due process hearing, the Parent clarified that she believes that the District has sufficient evaluative data and that she does not think additional data is necessary to prepare an appropriate IEP for the Student. T999; 1005-07. The Parent's concern is that she does not believe the District considered the reports from outside providers or that they appropriately incorporated that information into the reevaluation report. T998; 1006-07; 1111.

40. Ms. Kelso twice asked to discuss the FBA and BIP at the March 3 meeting, and hoped to discuss them when Dr. Fay was present to provide input. However, time ran out before the team had time to discuss the FBA (Exhibit J6), BIP (Exhibit D21), and IEP (Exhibit D24). T350; 883; 1261-62; 1323-24.

### ***Completion of the Reevaluation***

41. At the end of the March 3 meeting, Dr. Galbreath asked team members to "consider continuing the meeting so that we could have a full discussion of the concerns about the evaluation." T154. The team agreed to meet again. T461; 609. The Parent, the Grandparent, and Ms. Veliz considered the reevaluation meeting complete because Dr. Galbreath distributed a signature page, and five team members checked a box indicating disagreement with the reevaluation. T142-143; 607; 1167; 1570;



J5p7; D23p1. In Dr. Galbreath's view, she distributed the signature page only to reflect attendance.<sup>19</sup> T154.

42. The Parent and NHS staff were available to meet on March 5 and 6, 2020, but the District's counsel and special education teacher were not available. P9p3. Ms. Ting was not available on those dates either. T782. The Parent did not consent to extending the deadline for completing the reevaluation and did not agree to an extension to meet past March 6, 2020, the deadline in the settlement agreement for holding the IEP meeting. T155; 461; 609; 617.

43. On March 4, 2020, the Parent requested a comprehensive IEE at public expense. J7p1. The District filed a due process hearing request, Cause No. 2020-SE-0051, contesting the Parent's request for an IEE at public expense on March 16, 2020.

44. On March 4, 2020, Ms. Veliz informed Dr. Galbreath via email that she and the NHS teachers believed the Student required SDI in reading comprehension, adaptive, communication, and OT, along with areas previously identified in the draft reevaluation report. NHS staff had not received the draft reevaluation report in advance of the March 3 meeting. P34p3.

45. On March 9, 2020, the Parent requested the District provide a prior written notice (PWN) memorializing that the IEP team, except for the District staff, believed the private provider reports contained sufficient evaluative data to support that the Student needed 1) SDI in: Adaptive, Behavior, Communication, Fine Motor, Executive Functioning/Study Skills, Math, Reading, Written Language, and Social Emotional; 2) related services in counseling/psychological, gross motor, and sensory processing; and 3) the supplemental aids and services of access to assistive technology and a dedicated para educator. P11pp8-9.

46. On March 11, 2020,<sup>20</sup> the District issued a PWN stating that the District had held a reevaluation meeting on March 3, 2020, and "[a]fter having fully considered the information presented as well as team and parent input," the District proposed action that included: 1) changing the Student's eligibility category from Autism to Multiple Disabilities; 2) recommending SDI in the areas of social/emotional/behavioral skills, math, written language, and adaptive; 3) recommending related services in the areas of OT, SLP, counseling, and transportation; and 4) adding the accommodation of para educator support. The District also proposed adding multiple diagnoses to the Student's medical/physical history, to include additional information from Seattle Therapy concerning the Student's adaptive skills, and to append the private provider reports to the reevaluation report. D27pp1-2. The District did not agree to provide SDI in SLP and OT, in addition to related services. T109. The PWN indicated that the assessments did not provide sufficient data to support the need for PT. D27p3.

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<sup>19</sup> Although Dr. Galbreath and Ms. Ting were present, they did not sign the signature page. T133. Additionally, Dr. Fay participated by telephone, and the District did not add her signature electronically. T152. Ms. Ting attended the meeting for approximately one hour. T782;799.

<sup>20</sup> The team did not reconvene between March 3, 2020 and the issuance of the PWN on March 11, 2020.

47. On March 13, 2020, Dr. Galbreath sent the IEP team an updated reevaluation report (Exhibit D42), which had been amended to reflect the input of individuals who attended the March 3 meeting. D35pp1-2; T360; 363-64; 898. This updated report included significantly more evaluative data. In the Adaptive area of the evaluation, the updated draft included more information from the Seattle Therapy assessment. D42p8. The updated draft also included more information from the Seattle Therapy OT assessment, observational data from Ms. Ting's visit to NHS, information and observations from NHS staff, and data from the Mary Bridge PT report. D42pp13-22. The draft was also updated to reflect that the team was recommending SDI in adaptive, in addition to Social/Emotional/Behavioral, Math and Written Language. D42p4.

48. The Parent responded to Dr. Galbreath that the District had already finalized its reevaluation at the March 3 meeting, P12p1; P13pp1-2; D35. The District then proposed an IEP meeting on March 26, 2020. D35p2.

49. Based on consideration of the evidence in the record, I find that the District did not complete the reevaluation of the Student on March 3, 2020. Evidence that the team agreed to meet after the March 3 meeting to discuss the reevaluation, coupled with evidence that the District updated the reevaluation report after the March 3 meeting to reflect input from team members, including additional input from NHS provided after the meeting, establishes that the reevaluation was not completed on March 3, 2020. I further find that the reevaluation was completed upon issuance of the District's March 11, 2020 PWN, which proposed action concerning the Student's eligibility category, SDI, and related services, and specifically stated that the District's proposed action was based on a full consideration of the information presented at the March 3 meeting along with team and Parent input. Accordingly, it is reasonable to conclude that the reevaluation was completed at that time.

### ***March 30, 2020 IEP Meeting***

50. The Student's IEP team agreed to meet on March 30, 2020 (March 30 meeting).<sup>21</sup> D43. In a proposed revised agenda for the meeting, the Parent opined that it was not necessary to review the FBA and BIP. The Parent also opined that it was too late for the District to include a District PT because one had not been present for the March 3 meeting. The Parent thought it was "a waste of [District] resources" to invite Ms. Allen since Ms. Krefft would be present; she also thought it was unnecessary for Ms. Brubaker to attend since Ms. Ting would be present. D44p2. In the Parent's view, the March 30 meeting was exclusively about the IEP and not the reevaluation. D44p2-3; D46pp1-2; T155.

51. The March 30 meeting was held by videoconference to prevent the spread of COVID-19. J8p1. D41p1. The District invited a PT, but did not invite a counselor. T174. The record does not contain a signature page from the March 30 meeting.

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<sup>21</sup> On March 27, 2020, the District sent the Parent a meeting invitation, draft agenda, draft IEP, and procedural safeguards. D44 (references to Exhibit D44 are to the substitute Exhibit D44 submitted during the hearing).

52. The Parent was concerned that a box was checked on the draft IEP indicating that the Student was parentally-placed at NHS. T175.

53. The team did not agree to an IEP for the Student at the March 30 meeting, and was “only able to get through [the] very beginning of it.” T370-71. Although the meeting agenda listed “Consideration of ESY,” the team did not discuss ESY. D45; T1666; 371. Team members agreed to meet again on April 14, 2020. T380.

54. Following the March 30 meeting, the Parent provided feedback to the District by email. T665; D47. Her email listed approximately 11 pages of expected changes to the draft IEP. D47pp1-11. Most of the feedback detailed extensive information from the private provider reports that the Parent believed should be included in the IEP. D47pp2-7. It also listed goals that the Parent believed appropriate. D47pp3, 5-6, 8-9 T672-74. The Parent was “frustrated that the Student’s social communication disorder still was not accurately captured. There were no communication goals. [The Grandfather] was, again, left off the invitation for the IEP. And the goals that were listed for social-emotional were far beyond the [Student’s reach].” T667. The Parent further explained her frustration: “[y]ou put your child through all these evaluations to get this data that’s being requested, and then to not have the data that you worked so hard to obtain be listed and drive the goals is . . . upsetting. So yes, I was very vocal about . . . the need to have that evaluation information included.” T669. The Parent wanted to see more information in the IEP about the Student’s low adaptive skills, more information from Dr. Fay’s evaluation, and more information from Ms. Kelso’s FBA about the Student’s demand avoidance, anxiety, and sensory processing deficits. T669-71. The Parent also opined the Student was not in a private placement by his Parent. “NHS has been his District placement since January [2020].” D47p11; T666.

#### ***Events Leading up to the Next IEP Meeting***

55. On March 31, 2020, Ms. Allen asked NHS staff for information about the Student’s present levels of performance for goals pertaining to conversation in order to correct the proposed IEP. D49p3. The Parent pointed Ms. Allen to the private provider reports and noted that if the District wanted more communication information, it would need to send a release “to facilitate the exchange of information for [Seattle Therapy].” D49p2. Ms. Allen explained that she was “asking for an update from [the Student’s] teachers as they mentioned that [SLP] skills have improved. Their data is what [was needed] as it [was] most current and address[ed] present level[s] in the classroom.” D49p1-2.

56. The Parent believed that if staff at NHS were being asked to write goals and rubrics, they should be permitted to draft the IEP. D48p1.

57. On April 6, 2020, Dr. Galbreath emailed NHS staff because she had not yet received information about the Student’s present levels of performance. The email included some proposed goals in the hopes of making the process easier. D51pp2-4.

58. On April 8, 2020, the Parent cancelled the April 14, 2020 IEP meeting. The Parent did not provide a reason at that time, but testified at the hearing that she was waiting for the District to provide records she had requested. P16p2; T380; T1099.

59. On April 17, 2020, Dr. Galbreath informed the Parent that the District was assembling records in response to her request for records of March 17, 2020, and anticipated providing records between April 20 and 24, 2020. The response was delayed due to difficulties in finding support staff who could safely go to the office to process the request. The Parent responded: "We cannot hold an IEP team meeting until we get educational records . . . ." D53p1.

60. On April 21, 2020, Dr. Galbreath proposed five dates between April 23, 2020, and May 1, 2020, for an IEP meeting. Two dates, which fell on Thursdays, were followed by an asterisk and the notation, "\*I don't know if Thursdays are still not good for you but we're available if you are." D54p2. The Parent stated she was still waiting for the District to respond to her request to have NHS staff draft the Student's IEP, and would respond to the District's scheduling question after the District responded to her question. D54p1. The Parent did not provide her availability for an IEP meeting.

61. On April 28, 2020, Dr. Galbreath proposed four dates in May for the IEP meeting. D57p1. The Parent was not willing to schedule a meeting until the District responded to her request for NHS staff to draft the IEP and until she received the records she had requested. D58p1. The Parent did not provide her availability for an IEP meeting.

62. On May 6, 2020, Dr. Galbreath asked the Parent to provide her availability to meet on five dates in May. The Parent's counsel responded "You know why you have never heard back on a date for the IEP team meeting for [the Student.] You have never explained why the [District] is expecting [NHS] staff and Seattle Therapy staff to provide the information for this IEP but not actually write it." D61pp1-2. The Parent did not provide her availability.

63. In a PWN on May 18, 2020, the District proposed to draft an IEP for the Student and rejected the Parent's request to have NHS draft the IEP.<sup>22</sup> P16p1.

64. On May 18, 2020, Dr. Galbreath asked for the Parent's availability on five dates in late May and early June. The Parent responded that the District had not proposed any viable options because two dates were on Thursdays, even though the Parent had stated she could not meet on Thursdays, and the attorneys for both sides had conflicts on the other days. D62pp1-2. The Parent did not provide any dates when she was available.

65. On May 20, 2020, the Parent informed the District she could meet on June 29 and 30, 2020, and certain times the first week of June. P19p1. On June 2, 2020, an IEP meeting was scheduled for June 5, 2020. D71p1.

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<sup>22</sup> The Parent did not consider this to be a PWN because the action initiation date of May 18, 2020 was the same date that the PWN was actually sent to the Parent. P17p1. The Parent indicated that her due process hearing request would be amended to reflect this issue but no such amended complaint was filed.

66. On June 4, 2020, the Parent's counsel notified Dr. Galbreath that the Student's counselor had not been invited to the meeting, and that Ms. Ting and Ms. Krefft were not available. P20p1. The District asked the Parent to excuse the presence of a counselor but she did not do so. T177. The Parent believed it was important for a counselor to attend because the Student had not been able to engage in conversation during his therapy sessions due to his communication disorder, and the counselor would be able to explain her observations to the team. T631. Dr. Galbreath requested contact information for the Student's counselor on June 4, 2020, but the Parent did not provide contact information at any point. T879. Dr. Galbreath contacted Seattle Therapy on June 4, 2020, but Ms. Ting and Ms. Krefft were unable to attend. J10p2; T185-86.

### *June 5, 2020 IEP Meeting*

67. The Student's IEP team met by videoconference on June 5, 2020 (June 5 meeting). J9p1. In attendance were the Parent; the Grandfather; counsel for both parties; Dr. Galbreath; Ms. McClure; Ms. Skelley; Mr. Carter; Ms. Allen; Ms. Kelso; Ms. Brubaker; Lisa Norlander, NHS teacher; Mr. Robnett, NHS teacher; Presley Nuefeld, NHS teacher; Ms. Veliz; Shaina Hillman, NHS teacher; Timm Hines, NHS teacher; and Emily Burman, District PT. J10p2.

68. During the June 5 meeting, team members argued about what topic should be addressed first. The District wanted to update the Student's present levels of performance and review recommended goals. The Parent wanted to focus on ESY because the school year was ending soon. T180; 187-88; 689; J10p2. The last day of school at NHS was on or about June 12, 2020. T1572.

69. Although NHS's contract with the District provided for ESY, the Student did not have an ESY plan in place. T188. The Parent wanted the District to implement an IEP and subsequently amend it so that an IEP would be in place for purposes of developing an ESY plan. T690. Dr. Galbreath stated during the meeting that because the IEP had not been completed, it was not possible to amend it or reach the discussion of an ESY program for the Student. T394; J10p1; Declaration of Dr. Galbreath (November 18, 2020) ¶3.<sup>23</sup> Ms. Veliz believed it was the District's view that the Student could not attend ESY because he did not have a finalized IEP in place. T1573; 1619; T1621-22.

70. During the meeting, the Parent expressed concern that the District was minimizing the Student's communication needs. T690. She wanted the IEP to reflect that the Student has been diagnosed with a social pragmatic communication disorder and did not want the IEP to use terms such as "challenges or struggles." D73p2. The team decided to add the Student's diagnosis to the IEP. J10p1.

71. At some point during the June 5, 2020 meeting, team members became concerned that they did not all have the same version of the draft IEP. T692. The meeting lasted only one hour because

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<sup>23</sup> Dr. Galbreath's November 18, 2020 declaration was subject to cross-examination on Hearing Day 9 (December 2, 2020). The District's closing brief also refers to Dr. Galbreath's declaration submitted in support of the District's Motion for Summary Judgment. No findings of fact are based on that declaration.

the Parent and her counsel were disconnected from the video conference. J10p2. The IEP was not complete at that point. J10.

72. On June 12, 2020, the District issued a PWN proposing to initiate changes to the Student's draft IEP. J10p1. The PWN does not indicate that ESY services would be provided. J10.

### ***Scheduling and Preparing for the Next IEP Meeting***

73. The Parent believed that the problem in scheduling IEP meetings was because the District invited people who did not need to attend. T648. The Parent did not think it was necessary for Ms. Brubaker, Ms. Skelley, and Ms. Allen to attend IEP meetings. T1115. She also did not believe more than one administrator should attend. T1116. In the Parent's view, the only people who needed to be at the meeting were the Parent, the Grandparent, Ms. Veliz, the Student's NHS teachers, the Student's counselor, Ms. Ting, Ms. Krefft, and a District administrator. The Parent asked to schedule the meeting based on the availability of these individuals. D74p1.

74. The IEP team agreed to meet on July 7, 2020 (July 7 meeting). D77. On June 16, 2020, Dr. Galbreath asked the Parent whether the Student's counselor would be available to attend on that date. D79p2. The Parent responded that the Student's counselor no longer worked for NHS and she did not know if the counselor's successor would be available during the summer. D79pp1-2. There is no evidence in the record that the Parent subsequently indicated that a counselor would be available.

75. The day before the July 7 meeting, the Parent's counsel reminded Dr. Galbreath and Ms. McClure of her position that the actual members of the Student's IEP team were the Parent, the Grandparent, NHS staff, Ms. Ting, Ms. Krefft, counsel and a District administrator, noting that "everyone else from the [District] is not necessary. One can only assume that the [District] wants to 'stack the deck' by putting irrelevant people on the team who serve no purpose." D88p1.

### ***July 7, 2020 IEP***

76. The IEP team met again on July 7, 2020. J12p1. In attendance were the Parent, the Grandfather, Ms. Kelso, Dr. Galbreath, Ms. Hillman, Ms. Brubaker, Ms. Ting, Ms. Skelley, Ms. Allen, Ms. Krefft, Ms. Veliz, Mr. Carter, Ms. Nordlander, and Katie Beavers, NHS special education teacher. Amy Royster, District Assistant Director of Special Services, also attended and took notes. The District did not invite a PT. J12p8. The Student's counselor did not attend because she no longer worked at NHS. T190. The Parent did not agree to invite a District counselor or to excuse a counselor. T190-92; J12p30.

77. The team discussed the Student's present levels of performance and goals. D92. Although team members had collaborated to create appropriate goals for the Student, the draft IEP was not complete and required work to ensure that all of the relevant information about the Student was included. T784-85; 948.

78. The team also considered providing SLP and OT services as SDI, rather than as related services. Team members disagreed about how the Student would receive OT and SLP services and who would provide them. T926-28; 947.

79. Ms. Royster's meeting notes (Exhibit D92), which the Parent considered largely accurate,<sup>24</sup> indicated that the Student would receive 60 minutes per week of SLP services, and that the SLP minutes could be split into two thirty minute sessions "if a social group can be one of the groups."<sup>25</sup> D92p5; T697.

80. The District attempted to discuss the Student's FBA and BIP but the Parent did not wish to do so until the Student returned to in-person learning. J12p31.

81. At the July 7 meeting, the Parent's counsel briefly discussed the Student's least restrictive environment (LRE). T404-05; D92p5. The team also briefly discussed an ESY plan for the Student. J13p1; T206; D92p5. The Student had emerging skills in all academic areas that would not be maintained without ESY. J13p6.

82. The Parent considered the July 7 meeting to be very productive, not only because the team completed the IEP, but because staff from NHS and Seattle Therapy provided input and corrections. T700, 706.

83. The Parent provided feedback to Dr. Galbreath after the July 7 meeting and again after reviewing the updated draft IEP. D94; D98. Much of the Parent's feedback was that the IEP should include additional data from the private provider reports and the FBA, and where that data should appear in the IEP. D94pp1- 3. The Parent disagreed that information "from OTs and SLPs belong in a Social/Emotional/Behavioral section." D98p2. She also believed "social communication / pragmatic communication goals **must** be served and measured by an SLP." D94p3. (emphasis in original). The Parent also argued that the District should have invited counselors to all of the Student's previous IEP meetings, arguing that they were not invited and had not been excused by the Parent. D94p2. The Parent noted that the team "will consider the need for a behavior intervention plan when [the Student] is no longer receiving remote services." D98p2.

84. On July 8, 2020, Dr. Galbreath asked Ms. Veliz for the dates and hours of ESY at NHS. P26p17. ESY was in session at NHS from July 6, 2020 through July 31, 2020. P26p16.

85. In a PWN dated July 9, 2020, the District proposed to initiate ESY services, with an action date of July 17, 2020. The District proposed that Seattle Therapy would provide the ESY related services of OT and SLP to the Student. T207; J13pp6-7.

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<sup>24</sup> The Parent contested the accuracy of the notes in section VIII of Exhibit D92. T697.

<sup>25</sup> There is no testimony in the record as to the precise meaning of this phrase.

86. On July 9, 2020, Dr. Galbreath sent an email to the Parent that stated: “One of the things I’ve been thinking about is how to provide [the Student’s] para educator support during ESY given that it will be on a distance learning platform.” D103p2. Dr. Galbreath described two options: having the Student come to a building in the District with personal protective equipment to meet a para educator who would sit beside him while he was logged on to his remote instruction with NHS, or having a para educator attend “virtually” with the class. P26pp13-14; D103p2; T870. Dr. Galbreath stated “whatever model we decide upon, we need to make sure we have a meet and greet session or two so [the Student] can get to know the person and build some rapport. If you or [Ms. Veliz] have other ideas about how you could see this working, please let us know. We want to be creative and flexible to meet [the Student’s] needs.” P26p14.

87. On July 10, 2020, the Parent contacted the owner of Arnold’s Walking Horses about hippotherapy, or horse therapy, and the Student started participating in this program on July 11, 2020. The Parent chose the program because it was outdoors, close to home, and affordable. T1069-1070; 1173. Additionally, she felt that “being out of the house and seeing other kids face to face” served the goals of “recognizing feelings and facial expressions and that sort of thing.” T861. The Parent also chose the program because the Student’s PT,<sup>26</sup> Ms. Tanemura, recommended hippotherapy. T1070-71.

88. On July 15, 2020, the District issued a PWN proposing to initiate the IEP and ESY plan, with an effective date of July 20, 2020 (July 20 IEP). J12pp30-31. Dr. Galbreath provided team members with a copy of the July 20 IEP (J12), which incorporated the feedback and corrections from the Parent and team members. P28p2; D101. T703. The changes, which are listed in Exhibit D101 page 1, included rewording the IEP to reflect that the SLP would collect data on social communication / pragmatic communication goals. D101p1; J12pp14-15.

89. The Parent was disappointed when she received the July 20 IEP because “it was so drastically different from what was discussed” at the July 7 meeting. T701, 709. The Parent considered Dr. Galbreath to be lacking in attention to detail.<sup>27</sup> T646. It was frustrating to her to “spend all this time discussing changes and gathering all these different individuals’ input, and then the documents would come out and none of those changes would be reflected.” T646. Ms. Ting and Ms. Veliz also found it frustrating to work with Dr. Galbreath for these reasons. T1564-65; 784.

90. A comparison of the draft IEP from March 2020 (D24) with the July 20 IEP (J12) demonstrates multiple changes were made. These included but were not limited to:

- a. The July 20 IEP specifically stated that the Student had been diagnosed with Social Pragmatic Communication Disorder. J12p10.

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<sup>26</sup> The Student participated in 8 PT sessions, as recommended in Ms. Tanemura’s report, and has not had additional PT. T1071.

<sup>27</sup> For example, at some point between July 7 and July 15, 2020, Dr. Galbreath apparently sent the wrong version of the IEP to team members. T702.



- b. The goals were changed based on input from the Parent and staff from NHS and Seattle Therapy. T1078-79. The number of goals in Social/Emotional/Behavioral increased from three to seven. Compare D24pp7-8 with J12pp13-15. Goals were added in the area of adaptive. J12pp15-17; T1077.
- c. A significant number of modifications and supports were added based on input from the Parent and NHS and Seattle Therapy staff. Compare D24p10 with J12p27; T1079.
- d. SDI and related services increased significantly. The March IEP proposed SDI in math and written language for 50 minutes per day, five times weekly. D24p14. The July 20 IEP provided this SDI, plus 127 minutes per day, five times per week of SDI in adaptive and social/emotional/behavioral. J12p27. It also provided 60 minutes per week, one time weekly, of OT and PT, to be provided by an OT and SLP, respectively, and 30 minutes, two times weekly of counseling. J12p27; T197-98.
- e. The July 20 IEP provided consultation with an OT and SLP, and dedicated support from a para educator for 390 minutes, 5 times per week. Compare J12p27 with D24p14.

91. The Parent agreed the July 20 IEP was much improved from the IEP proposed in March, but she felt that it “still [was] not appropriate.” T1084. She still had concerns about the Student’s communication goals and their placement in the social / emotional / behavioral section of the IEP. T1117. Additionally, the District rejected the Parent’s request to provide SDI, as opposed to related services, in OT and SLP. T201; J12p30. During the hearing, Ms. Ting opined that a community safety goal and task completion goal were also missing from the Student’s July 20 IEP. T823.

92. In the section of the July 20 IEP concerning placement options, the box for “Public/private separate day school” was marked “Considered” and “Selected.” J12p28. Additionally, the PWN stated: “The team determined the least restrictive environment for his services (New Horizon School).” J12p31. During the hearing, however, Dr. Galbreath testified that the team “had not gotten to the discussion of this.” T198. I find that, even if the team did not discuss this, the fact that the District issued a PWN indicates the District had determined the Student’s LRE.

93. During the hearing, Dr. Galbreath suggested that the July 20 IEP was not complete because there was still substantial disagreement. T165. Based on the District’s PWN proposing to initiate the IEP on July 20, 2020, coupled with the fact that the District subsequently amended the IEP, rather than proposing another draft, I find that the July 20 IEP was completed at the July 7, 2020 IEP meeting and implemented on July 20, 2020.

### ***ESY Services***

94. On July 20, 2020, approximately 1 week of the NHS ESY program remained. T203. Dr. Galbreath again asked the Parent whether the Student would go to a District building to be assisted

by a para educator while he was logged on to his instruction with NHS, or whether a para educator would assist the Student remotely. D104p1.

95. On July 21, 2020, Dr. Galbreath asked Ms. Veliz what platform NHS used for virtual instruction and whether the Student's para educator could have access to become familiar with it. D106p2-3. The Parent's counsel responded that this should have been discussed at or before the July 7, 2020 IEP meeting, and that "clearly, the [District] was never going to be able to offer [the Student] ESY services beyond OT and PT services [that] week, as it ha[d] not even started the process of obtaining a para educator." D106p1. The District had several para educators who were prepared to work with the Student either remotely or in person. T1672; D105pp1, 4.

96. During the hearing, the Parent acknowledged that she was aware that she did not need an IEP in place in order to enroll the Student in the ESY program at NHS. T1067. She decided not to enroll him in the NHS ESY program, however, because he was "struggling with all the computer time," and "really needed some . . . connection and activity." T1067.

#### ***Updated Report from UW Autism Center***

97. On July 21, 2020, the Parent provided the District with an updated speech and language report by Ms. Gratz from the UW Autism Center (J11). J14p1; pp4-11. Ms. Gratz recommended that the Student continue individual sessions with an SLP and participate in a social skills group. J11p7. The Parent informed the District that she did not believe the District was proposing sufficient communication services for the Student to make educational progress. She believed that the Student required: "weekly one hour sessions of SLP services as well as participation in a social communication group, with both being provided during . . . school. The direct time with the SLP should be SDI and participation in a social communication skills group led by an SLP should be related services." J14p1. Ms. Allen does not disagree with either of Ms. Gratz's reports. (J2p32 and J11). T1464.

#### ***July 28, 2020 IEP Meeting***

98. The Student's IEP team met again on July 28, 2020 (July 28 meeting). P27p1. In attendance were the Parent, Ms. Brubaker, Ms. Allen, Ms. Skelley, Dr. Galbreath, Ms. McClure, Ms. Veliz, Mr. Robnett, Ms. Norlander, Ms. Ting, Ms. Beavers, and Jo Ristow,<sup>28</sup> Seattle Therapy SLP. Counsel for both parties also attended. P27p2; T798, 834, 1352.

99. The Parent's counsel spoke for the majority of the meeting. D108; T709. She discussed the Parent's concerns about the IEP as reflected in Exhibit P25. T709. The Parent was furious that the Student's social communication disorder was not referenced appropriately. She felt that the

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<sup>28</sup>Ms. Ristow has a master's degree in speech language pathology. She has a clinical competency certification and is licensed to practice in Washington state. Ms. Ristow has been an SLP for seven years. T829-30. Seattle Therapy hired Ms. Ristow to fill the clinical leadership and SLP position previously held by Ms. Krefft. T745. Ms. Ristow agreed with goals Ms. Krefft had suggested for the Student. T831-32. She also agreed with the recommendations in the assessment by Ms. Gratz of the UW Autism Clinic. T831.

document: “contained multiple errors. It made false statements, there was redundancy throughout, things were put in the wrong places.” T710. The Parent was still concerned that the Student’s communication goals were listed under social/emotional/ behavioral, which she believed was inappropriate because the Student’s communication issues are not behavioral. T1117-18.

100. The team also reviewed recommendations that had been made by Seattle Therapy and NHS and worked to align those with the IEP. T834; 798-99. Additionally, the team discussed the belief held by the Parent, the Grandparent, NHS, and Seattle Therapy that the Student required both SDI and related services in communication, along with participation in a social skills group, and in-person support from a para educator at home during remote learning. T707, 835. Ms. Ting was unable to discuss her recommendations during the meeting due to lack of time. T798-99. The Parent’s counsel submitted comments from Ms. Ting, Ms. Ristow, and NHS in writing because the Parent felt that input from those who served the Student was being minimized. With respect to OT, Ms. Ting’s comments indicated that she believed the Student required related services. T707, 799; D110p4; P26p7. During the hearing, when asked which of her recommendations focused on providing SDI, Ms. Ting said, “I did not point to any of these recommendations being SDI.” T816. Ms. Brubaker clarified that the Student’s OT therapy would be similar, regardless of whether the therapy was classified as SDI or related services. T1401-02.

101. In Ms. Ristow’s opinion, the Student needs to work directly with a speech therapist to build social skills that would then be generalized to a social skills group. T836; 1024-25. Participation in a social skills group is an important component to the Student’s overall success in accessing his education. T1026.

102. Ms. Ristow believed that the Student required SDI in communication, in addition to related services, based on her view that SDI is delivered by an SLP, rather than by a special education teacher, with measurable goals delineated in the IEP. T1029-31. Ms. Allen typically drafts goals for students when she is providing them with SDI and when she is providing them with related services. T1454. The Student’s communication goals were “written specifically to be measured by the SLP . . .” T1427. Ms. Allen explained that in providing a related service, the SLP and special education teacher work together to blend their areas of expertise. They “talk about strategies together and common language in how we will teach the student. But we’re both addressing them, so there’s more opportunities for the student to learn and practice these skills.” T1427.

103. During the July 28 meeting, the team also discussed how the Student would receive para educator support. T1517. The Parent and the Grandfather raised concerns about the Student going to a school building for para educator support. T1519. The District attempted to provide support remotely, but could not do so because security requirements of the NHS platform would not let District para educators participate. T1507; 1526. It is not clear from the record when this occurred. The District has also offered in person support at a District junior high school, but the Parent has not accepted this offer. T1508.

104. Ms. Veliz recalled a District representative stating at an IEP meeting that the District does not provide in-home services, but it is unclear at what meeting this conversation occurred. T1575; 1579-81; 1626. The District makes case-by-case decisions about providing in-residence service. A student must have such significant impairments or health concerns that they cannot attend school. At present, the District does not have any staff providing services in-home “due to our inability to guarantee the sanitation and personal protective equipment requirements that [the Washington State Department of Labor and Industries] requires of our employees.” T1508.

***October 7, 2020 IEP Meeting***

105. The Student’s IEP team met again on October 7, 2020, while this hearing was underway (October 7 meeting). A counselor from NHS attended. P40p1. Ms. Veliz stated in a letter to the District that she found the meeting frustrating because she felt that NHS teachers were not given an opportunity to participate. Ms. McClure or Dr. Galbreath interrupted them and did not call on them when they raised their hands. T1582; 1617. At one point, all NHS staff lost audio except for Ms. Veliz. T1583-84. The letter also expressed that Ms. Veliz and NHS teachers felt it had been difficult for them to provide input and have a voice at IEP meetings. P41p1. She therefore provided their input in writing. P41pp1-2. In general, Ms. Veliz felt that there were numerous individuals who did not serve the Student at the IEP meetings, making it difficult for NHS staff to assert themselves and to be fully heard. T1585. Additionally, a considerable amount of time at IEP meetings was taken up by disagreements between the attorneys for both sides. T1617.

***October 16, 2020 IEP Meeting***

106. The Student’s IEP team met on October 16, 2020 (October 16 meeting). P42p1. A counselor from NHS and a District PT attended. P42p4. The team agreed to move the Student’s communication goals from the category of social / emotional / behavioral to a section entitled Pragmatic (Social) Communication Skills. Compare P42pp19-20 with J12pp13-14; T1429-1431; 1459. This change makes no difference with respect to what services the Student receives. T1431. The team also determined that the Student could benefit from a social skills group led by an SLP, and agreed to increase his SLP minutes by 30 minutes per week, for a total of 90 minutes per week. P42p31; T1431. By the conclusion of the October 16 meeting, team members had reached a consensus as to the Student’s present levels of performance and goals. T1505. With respect to the Student’s placement, although District staff thought the District could provide the Student with an appropriate education in his LRE at a District school, they “deferred to the Parent’s request to keep him at NHS.” T1506.

107. During the October 16 meeting, the team resolved the major issues concerning the Student’s IEP. T1505. As of the date of the hearing, the team still has not had a thorough discussion of issues related to the provision of a para educator because “meetings were predominated by discussion of many other issues regarding the IEP.” T1520; 1524. This issue remains an area of disagreement. T1507-08; 1520; 1625.

108. On October 23, 2020, the District issued a PWN proposing to increase the Student's SLP minutes to 90 per week and identifying NHS as his placement. The date for this proposed action was October 29, 2020. P42pp31-32.

109. The team also has not discussed the Student's FBA or BIP. Although Ms. Kelso attended meetings on March 3, June 5, July 7, July 28, October 7, and October 16, 2020, and was prepared to discuss the FBA and BIP each time, she was unable to discuss the FBA and BIP at any of these meetings "because counsel for the Parent had other issues, other concerns that were brought up that prevented us from being able to discuss those things." P1262-64. There is no evidence in the record that the Parent changed her mind, and was ready to discuss the FBA and BIP while the Student was still engaged in remote learning.

110. On October 28, 2020, the Parent sent an email to Dr. Galbreath identifying issues she believed still needed to be addressed following the October 7 and October 16, 2020 IEP amendments. T1515-16; P43. She identified that the amended IEPs still referred to a handwriting goal. P43p3. Dr. Galbreath explained during the hearing that this was a clerical error. T1504. The Parent did not believe the amended IEPs matched the PWNs issued after the amendments; she included excerpts from both documents. P43pp2-4. Dr. Galbreath reviewed the documents but was not certain of the Parent's concerns. T1514.

111. During the due process hearing, Dr. Fay discussed whether the July 20 IEP contained anything that was either inconsistent with her recommendations or failed to capture what she had recommended in her report. T1146-49. The October 16 IEP amendment, developed after her testimony, appears to address most of these concerns:

- a. It discusses the Student's significant issues with expressive language. T1146; compare J12p10 with P42p6.
- b. The assistive technology portion sets out specific programs the Student needs for accessibility. T1146-47; compare J12p10 with P42p7.
- c. The Student's communication goals are no longer listed under the category of social / emotional / behavioral. T1147; compare J12pp12-15 with P42pp17-20.
- d. It contains specific adaptive goals, including a safety goal. T1148-49; P42pp13-14.

112. Ms. Veliz believes the Student should be getting PT services because he has developmental motor coordination problems that make it difficult for him to access his physical education program. Accordingly, he has accommodations in place. T1627-28; 1631. Because the record does not contain any evidence that Ms. Veliz has any experience, training or qualifications in the area of PT, I give no weight to her testimony on this issue.

### ***Remote Learning and Progress at NHS***

113. The Student has shown "tremendous growth" at NHS. T1590. He has made "academic gains across all domains." T1591. March 12, 2020, was the last day of in-person learning at NHS. The

Student has engaged in remote instruction since March 13, 2020. He has received his SDI in all of his academic areas even though NHS did not have a finalized IEP. During remote learning, the Student received the same instruction that he had received in the in-person learning environment. T1598. The Student did well with online learning, but had a lot of support at home from his Grandfather. T1603-04. While the Student initially had difficulty using the technology available to him for remote learning, and had difficulty with tasks such as logging in, “he has gotten much better at it.” T1172.

114. Ms. Ting started providing services to the Student remotely on April 28, 2020. The Student participated in 17 remote sessions. T795; 825; 868. Although he made some progress, it was slower than it would have been in person because OT focuses “on doing” and it was difficult to “assess the doing.” The Student’s communication challenges compounded the difficulty of conducting remote sessions. T795, 824-25. On September 2, 2020, Ms. Ting started providing in person services to the Student at the Seattle Therapy clinic. T791-92; 825.

115. The 2020-2021 school year at NHS started on September 8, 2020. D119p1. The Student is attending all of his online classes at NHS and is “doing well with it.” T924. He needs assistance with completing assignments, using different programs, and remembering to do all assigned tasks. T925.

### ***The Parent’s Expenses***

116. The Student has been receiving speech therapy from Ms. Gratz at the UW Autism Clinic since February 2019 for one hour per week after school. T857-58. The Parent would prefer that the Student receive communication services during the school day. The Student also attended a social skills group several times at the UW Autism Clinic after school but was too fatigued to participate after the school day. T858. The record does not contain any evidence concerning the cost for therapy provided by Ms. Gratz.

117. The invoices in P29 through 32 reflect the Parent’s costs incurred and paid since January 7, 2020. T711. During the due process hearing, the Parent received a check from the District reimbursing her for Dr. Fay’s attendance at the March 3 meeting (P29); she is no longer seeking reimbursement for this expense. T854.

118. The Parent submitted invoices from Seattle Therapy for SLP services that she has paid. T1021; 1023. The Parent also paid Seattle Therapy for the Student’s OT services during March and early April 2020 because there were “some problems with the contracts” with the District, and she wanted to ensure that the Student received the services. T855-56; 869. The Parent also paid Seattle Therapy to have Ms. Krefft provide speech therapy to the Student during March 2020 through April 15, 2020. P30pp1-3.

119. The Parent also agreed to pay Seattle Therapy for Ms. Ristow to provide speech therapy in September 2020, but had not yet made the payment of \$414.00 at the time of the hearing. P30p4; T748; T868-69. The Student does well working with Ms. Ristow. T857.

120. During the hearing, the Parent submitted a mileage log. She travelled a total of 222 miles to and from Seattle Therapy during September 2020. The mileage log does not contain any actual or estimated costs. P32p1.

## CONCLUSIONS OF LAW

### *Jurisdiction and Burden of Proof*

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Because the District is seeking relief in Cause No. 2020 SE-0051 concerning the appropriateness of its reevaluation and the Parent's request for an independent educational evaluation (IEE), the District bears the burden of proof with respect to those issues. Because the Parent is seeking relief in Cause Nos. 2020-SE-0052 and 2020-SE-0092, she bears the burden of proof with respect to those issues. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof to resolve a dispute in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981); *Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 4, 256 P.3d 339 (2011). Therefore, the burden of proof for both parties in this matter is preponderance of the evidence.

### *The IDEA and FAPE*

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

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

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these

requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

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

5. The first inquiry is whether a District has complied with the procedures established by the IDEA. *Id.* at 206-07. Procedural safeguards are essential under the IDEA, particularly those that protect the parents' right to be involved in the development of their child's educational plan. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

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

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

6. The next question is whether the District has violated the substantive requirements of the IDEA. The Supreme Court recently clarified the substantive portion of the *Rowley* test as quoted above. "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 197 L.Ed.2d 335 (2017). Additionally, the Student's "educational program must be appropriately ambitious in light of his circumstances . . . ." *Id.*, 1000.

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

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

*M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 138 S. Ct. 556 (2017) (citations omitted; internal quotation marks omitted). The determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is "a snapshot, not a retrospective." *Id.*



### *Motion in Limine*

8. On September 24, 2020, the District filed a Motion in Limine (motion) seeking to exclude evidence or testimony related to the interpretation or enforcement of the settlement agreement; special education and related services provided at NHS; and the provision of FAPE to the Student at NHS.

9. The District's motion was GRANTED as to the exclusion of evidence or testimony related to the interpretation or enforcement of the settlement agreement. The parties agreed that the enforcement and interpretation of the settlement agreement was not properly before the ALJ.

10. The District's motion was DENIED as to the exclusion of evidence concerning special education and related services provided at NHS and the provision of FAPE at NHS. The Parent clarified that she is not claiming that SDI and related services provided by NHS are inappropriate; rather, she is challenging the SDI and related services provided in the Student's IEP. However, because the District is challenging whether the Student was parentally placed at NHS, evidence concerning the provision of special education and services at NHS could be relevant.

### *Jurisdiction*

11. The District claims that the Student was unilaterally placed at NHS, and therefore did not have a right to receive "some or all of the special education and related services that the child would receive if enrolled in a public school." 34 CFR §300.137. The District contends that the ALJ lacks subject matter jurisdiction to hear the Parent's due process hearing request because 1) students who are parentally-placed in private schools are entitled to receive services according to a services plan, not an IEP; and 2) due process procedures are not available for disputes concerning a services plan. See WAC 392-172A-05050(1).

12. Issues concerning subject matter jurisdiction may be raised at any time. Ideally, such issues are resolved early, to avoid holding an unnecessary hearing. The District did not raise this jurisdictional issue until it filed its prehearing brief, even though it had filed a motion to dismiss in September 2020 and a motion for summary judgment in August 2020. Because the District's jurisdictional claim depended on a factual determination that the Student was parentally-placed at NHS, it was not possible to rule on the jurisdictional issue based on the prehearing brief without an evidentiary hearing.

13. It is undisputed that the Parent unilaterally placed the Student at NHS during the fall of 2019 through January 6, 2020. It is also undisputed that after the parties entered into the settlement agreement, the District agreed to fund an interim placement for the Student, and that "The Student's educational placement will be at [NHS] at District expense . . . ." At issue is whether the placement at NHS pursuant to the settlement agreement constituted placement by the District or placement by the Parent. Both parties and the ALJ agree that the interpretation and enforcement of the settlement agreement is outside the scope of this ALJ's authority.

14. When a school district places a student in a private school, the student has “all the rights of a child with a disability who is served by a public agency,” including the right to special education and related services provided through an IEP. 34 CFR § 300.146. When a student is parentally-placed at a private school, however, the student does not have a right to receive some or all of the special education and related services that the student would receive if enrolled in public school. 34 CFR § 300.137. Under 34 CFR § 300.132, “a services plan must be developed and implemented for each private school child with a disability who has been designated by the LEA in which the private school is located to receive special education and related services . . . .”

15. The District argues that its agreement to pay for the Student’s tuition at NHS on an interim basis did not convert NHS into a District placement, noting that it never affirmatively placed the Student at NHS. See *K.D. v. Dep’t of Educ.*, 665 F.3d 1110 (9th Cir. 2011). However, the District’s actions following the settlement agreement contradict its assertion that the Student was parentally-placed at NHS. First, there is no evidence in the record that the District ever created a services plan for the Student. Accordingly, there is no merit to the District’s claim that the ALJ lacks jurisdiction because disputes concerning services provided pursuant to a services plan must be heard through the state complaint process. Second, Dr. Galbreath communicated to NHS that the District had agreed to place the Student at NHS and did not intend to change that decision, which is inconsistent with the notion that he was parentally-placed. Ultimately, the District placed the Student at NHS. In *K.D.*, in contrast, the district ultimately placed the student in a district setting, and when the parent re-enrolled the student in the private school, the district specifically warned her that it considered the placement to be unilateral. *Id.*, at 1115. Third, the District held multiple IEP meetings for the Student, and never raised the idea that it had no obligation to do so under the IDEA until days before the due process hearing. If the District believed from the outset that it had no obligation to provide the Student an IEP, it would have moved to dismiss the matter shortly after it was filed. Fourth, the District contracted with NHS to provide services to the Student, rather than reimbursing the Parent for NHS tuition. In order to do so, the District claimed the Student on a P223 form indicating that he was an enrolled student. Accordingly, the District’s reliance on cases indicating that an agreement to reimburse a parent for a student’s placement did not constitute an agreement that the placement was appropriate are misplaced. Lastly, the July 20 IEP expressly indicated that the IEP team considered and selected NHS as the Student’s placement, despite Dr. Galbreath’s testimony indicating that the team had not really considered this issue.

16. Considering all of the above collectively, it is concluded that the District agreed to place the Student at NHS as of January 6, 2020. Therefore, this ALJ has subject matter jurisdiction.

#### ISSUES AND REMEDIES

#### ***Issues Related to the District’s Reevaluation of the Student and the Parent’s Request for an Independent Educational Evaluation (IEE)***

17. Both parties have raised issues related to the Parent’s disagreement with the District’s reevaluation and the Parent’s request for an IEE. In Cause No. 2020 SE-0051 (Issue A), the District

claims that it did not conduct a “new” special education eligibility reevaluation of the Student on March 3, 2020 (reevaluation) that triggered the Parent’s right to an IEE at public expense, and that the Parent does not have the right to a second IEE at public expense. The District also claims that its reevaluation of the Student was appropriate. (Issue B). In Cause Nos. 2020-SE-0052 and 2020-SE-0092, the Parent claims that the District failed to comply with procedures required by WAC 392-172A-03005 through 392-172A-03080 in conducting its reevaluation of the Student. (Issues A.vi.a through e).

*Applicable Law Concerning Reevaluations and IEEs*

18. The IDEA requires a school district to conduct a full and individual initial evaluation of a student before providing special education and related services to a child with a disability. 20 USC §1414(a)(1). The IDEA further requires a school district to reevaluate each child with a disability at least once every three years, unless the parent and district agree that a reevaluation is unnecessary. 20 USC §1414(a)(2).

19. The CFR implementing the IDEA defines the term “evaluation” as the “procedures used in accordance with §§300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.” 34 CFR §300.15. The U.S. Court of Appeals for the Second Circuit recently considered the meaning of “evaluation” under the IDEA and determined that “an evaluation means a comprehensive assessment of the child that follows the mandatory procedures outlined in Section 1414 of the IDEA, including assessing the child in all areas of their disability.” *D.S. v. Trumbull Bd. of Educ.*, 975 F.3d 152, 163 (2d Cir. 2020). Moreover, an evaluation means both an initial evaluation or a reevaluation. *Id.*

20. The state administrative rule similarly defines the term “evaluation” as “procedures used in accordance with WAC 392-172A-03005 through 392-172A-03080 to determine whether a student has a disability and the nature and extent of the special education and related services that the student needs. WAC 392-172A-01070. State administrative rule further requires school districts to conduct reevaluations in accordance with WAC 392-172A-03020 through 392-172A-03080. WAC 392-172A-03015.

21. To be appropriate, a school district’s reevaluation must be sufficiently comprehensive to identify all of the student’s special education and related service needs. WAC 392-172A-03020; see also 34 CFR §300.304. When a school district conducts a special education evaluation, a “group of qualified professionals selected by the school district” must use a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent . . . .” *Id.* The group cannot use “any single measure or assessment as the sole criterion” for determining eligibility or educational programming. The group must use “technically sound instruments that may assess the relative contribution” of cognitive, behavioral, physical and developmental factors. *Id.* Students must be assessed “in all areas related to the suspected disability.” *Id.* Additionally, “[r]evaluations must review existing evaluation data on the student and, on the basis of that review and input from the parents, identify what additional data, if

any, are needed to ensure the child receives a FAPE.” *Smith v. Tacoma Sch. Dist.*, 2020 U.S. Dist. LEXIS 138830 \*27 (W.D. Wash. Aug. 3, 2020) (Internal quotation marks omitted.) .

22. Once assessments and evaluation measures are complete, a group of qualified professionals and the parent determine whether the student is a child with a disability and the student’s educational needs. WAC 392-172A-03040; 34 CFR 300.306. After an initial evaluation or a reevaluation, the District must prepare an evaluation report. WAC 392-172A-03035; 34 CFR 300.306(b). The evaluation report must be sufficient in scope to develop an IEP and must include, among other things, a statement of whether the student has a disability that meets applicable eligibility criteria, the recommendation as to what special education and related services the student needs, and the date and signature of each professional member of the group certifying that the evaluation report represents his or her conclusion. WAC 392-172A-03035(a),(d) and (f); see also 34 CFR §300.304-.306.

23. If the parent of a student eligible for special education disagrees with a school district’s evaluation, the parent has the right to obtain an IEE, which is an evaluation conducted by a qualified examiner not employed by the school district. WAC 392-172A-05005; see also 34 CFR §300.502. If a parent requests an IEE at public expense, the district must provide the parent with information on obtaining IEEs, and must either initiate a due process hearing within 15 days to defend the appropriateness of its evaluation, or else ensure that a publicly-funded IEE is provided without unnecessary delay. *Id.* If the district initiates a hearing, and the final decision is that the district’s evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. *Id.* Parents are entitled to only one IEE at public expense each time the school district conducts an evaluation with which the Parents disagree. WAC 392-172A-05005(2)(b); 34 CFR 300.502(b)(5).

24. “The IDEA does not prescribe substantive goals for an evaluation, but provides only that it be ‘reasonably calculated to enable the child to receive educational benefits.’” *J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 1185 (W.D. Wash. 2002). Minor procedural defects in a district’s reevaluation, where the validity of the evaluation overall is not impacted, do not warrant the award of an independent education evaluation at public expense. See *Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1089 (9<sup>th</sup> Cir. 2002); *RZC v. Northshore Sch. Dist.*, 755 F. App’x 658, 660 (9<sup>th</sup> Cir. 2018).

#### *The Reevaluation of the Student*

25. The District contends that it merely engaged in a review of existing records and did not conduct a “new” reevaluation of the Student. The District relies on *F.C. v. Montgomery County Public Schools*, 68 IDELR 6, 216 U.S. Dist. LEXIS 83460 (D. Md. 2016), for the proposition that a review of existing data, without additional steps, does not constitute an evaluation that triggers a parent’s right to an IEE at public expense. The facts do not support the District’s assertion that it merely reviewed existing data without taking additional steps. Here, the Parent disagreed with the District’s October 2018 reevaluation of the Student and requested an IEE. Both parties filed due process hearing requests, which were ultimately dismissed when the parties entered into a settlement agreement in January 2020. The parties agreed that the District would review data in existing assessments obtained by the Parent, but would not conduct any new assessments. The parties also agreed that the District would

conduct an FBA of the Student. After the parties entered into the settlement agreement, the District obtained the Parent's consent for the reevaluation and FBA and prepared a draft reevaluation report and FBA. The reevaluation team met and reviewed the assessments contained in Exhibit J2. In addition to reviewing the data in these assessments, the team considered input from Dr. Fay, Ms. Ting, the Parent, NHS staff, and other team members. As Dr. Fay's testimony established, the team "was really focused on lining out all of the issues that [the Student] brought to the table and [that needed] to be considered in-depth in establishing a comprehensive and effective program for him." T1125. The team determined the Student's eligibility category, considered what SDI and related services to recommend, and prepared a reevaluation report. The reevaluation report contains information from the assessments in Exhibit J2 and the 2018 evaluation, along with information input from team members. In sum, the District followed the procedures that define the term "evaluation" in WAC 392-172A-03005 through 392-172A-03080. This evidence demonstrates that the District took multiple steps beyond a review of records. Accordingly, the District failed to show that it did not engage in a "new" reevaluation of the Student.

26. The District also contends that the Parent is not entitled to an IEE at public expense because her IEE request was premature and because its reevaluation of the Student was appropriate. A parent does not have a right to an IEE at public expense before the school district completes its own evaluation. See, e.g., *Lake Washington Sch. Dist.*, Cause No. 2012-SE-0075 (SEA WA Order on District's Motion for Summary Judgment 10/9/12)<sup>29</sup>; *Letter to Zirkel*, 109 LRP 1463 (OSEP, 2008); *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46689 (Aug. 14, 2006). The District contends that it did not complete the reevaluation before the Parent requested an IEE on March 4, 2020. I found that the District did not complete its reevaluation of the Student until March 11, 2020, when it issued a PWN. Because the Parent requested an IEE before the District completed its reevaluation, the Parent's request for an IEE was premature. Accordingly, the Parent is not entitled to an IEE at public expense.

27. Additionally, the District has demonstrated by a preponderance of the evidence that its reevaluation of the Student was appropriate. It is undisputed the District has sufficient evaluative data to draft an appropriate IEP for the Student. Not only does the Parent agree with this assertion, but it is supported by the overwhelming evidence in the record. The Parent contends, however, that the District failed to adequately consider the data and recommendations in the reports from private providers.

28. The Parent argues broadly that the reevaluation was largely the same as the October 2018 evaluation and that District staff did not seem to be aware of the assessments from private providers. The record does not support this assertion. To the contrary, the evidence in the record demonstrates that the reevaluation team reviewed all of the assessments from private providers. Dr. Fay's testimony, in particular, established that the team spent significant time during the March 3 meeting reviewing all of the assessments and reviewing data in the areas of adaptive, behavior, cognitive, executive functioning, memory, learning, fine and gross motor, family medical history, social/emotional, social skills, sensory issues, auditory processing, and speech. In addition to reviewing the assessments and

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<sup>29</sup>A copy of this order may be obtained from the OSPI Public Records Officer.

reports from private providers, the team also considered input from Dr. Fay, Ms. Ting, the Parent and NHS staff, who were serving the Student. This input was then incorporated into the updated reevaluation report, which contains significant data from the private provider's assessments and reports and input from team members.

29. The Parent also contends that the private providers reports were relegated to the "other" section of the reevaluation report, and were not discussed in the summary. PB14. Regardless, the Parent offers no legal authority to support a conclusion that placement of the information in the "other" section makes the reevaluation inappropriate. The evidence establishes that the District considered the private providers' assessments and reports and included information from those assessments in the reevaluation report. The IDEA does not require that such information must be included in the reevaluation report summary.

30. The Parent also claims that the District's failure to comply with the procedures in WAC 392-172A-03005 through 392-172A-03080 in conducting its reevaluation undermines the appropriateness of the evaluation. Each allegation will be addressed in turn.

31. The Parent first alleges that the District failed to timely complete its reevaluation. In Washington State, once a school district receives parental consent, it must complete a reevaluation within 35 school days. WAC 392-172A-03015(3)(a). The Parent signed the consent form on January 8, 2020. Thirty-five school days after January 8, 2020, was March 3, 2020. Because the District did not complete its reevaluation until March 11, 2020, the reevaluation was untimely by 8 days.

32. "Not all violations of IDEA's procedures, however, deny a student FAPE—they do so only if they `impeded the child's right to a [FAPE]; significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of [FAPE] . . . ; or caused a deprivation of educational benefits.' 20 U.S.C. §1415(f)(3)(E)." *Butte Sch. Dist. No. 1 v. C.S.*, 817 F. App'x 321, 325 (9th Cir. 2020); WAC 392-172A-05105(2).

33. The Parent asserts that the delay in completing the reevaluation prejudiced the Student because it "contributed to the District's failure to timely implement an IEP for the Student, which resulted in a substantive denial of FAPE." PB14. The District argues that the reevaluation meeting was scheduled on March 3, 2020 to accommodate the Parent's schedule, and that the Parent has not shown that the procedural violation denied the Student a FAPE. DB23.

34. The evidence in the record demonstrates that the District sought to schedule the reevaluation meeting on February 10 or 11, 2020, and the IEP meeting on February 25, 2020. To accommodate the schedules of NHS staff and the Parent, who was on vacation until March 2, 2020, the District scheduled the meeting for March 3, 2020. The team did not complete its business on March 3, 2020, and agreed to meet again, but the District's counsel, special education teacher, and Ms. Ting were not available to meet on March 5 or 6, 2020. Although the Parent was willing to excuse the special education teacher, the District's counsel was not available on that date. The District proposed meeting on March 26, 2020, and the team agreed to meet on March 30, 2020. When the team was unable to

complete the IEP on March 30, 2020, the team agreed to meet on April 14, 2020. The Parent cancelled that meeting. The District then offered three dates between April 23, 2020, and May 1, 2020, that did not fall on Thursdays, which were difficult for the Parent. The Parent did not provide her availability. On April 28, May 6, and May 18, 2020, the District offered multiple meeting dates in May. The Parent, again, did not provide her availability. She was not willing to schedule an IEP meeting until after the District responded to her request to have NHS staff draft the IEP and provided her with the records she had requested. When the IEP meeting eventually took place on June 5, 2020, the Parent and her counsel were disconnected from the meeting after only one hour. This made it necessary for the team to schedule another meeting to complete the IEP, which occurred on July 7, 2020. The IEP was then implemented on July 20, 2020. Based on a comprehensive review of the evidence of record, it is concluded the Parent contributed to the delay in completing both the reevaluation and the IEP, and that this delay was necessary to ensure full parental participation.

35. As discussed in *T.K. v. Mercer Island School Dist.*, 2020 U.S. Dist. LEXIS 46227 \*14 (W.D. Wash. Mar. 17, 2020), “IDEA deadlines are not to be given priority over full parental participation.” Here, the District delayed holding the reevaluation meeting for several weeks to ensure participation by the Parent and NHS staff. Moreover, the Parent made clear that she has “never argued that [NHS] is inappropriate or that [NHS] has failed to provide the student FAPE.” T25. In keeping with this, the record demonstrates that the Student made “tremendous progress” at NHS. Accordingly, the Parent has not established that the 8-day delay in finalizing the reevaluation impeded the Parent’s right to participate, resulted in a denial of FAPE, or deprived the Student of educational benefit. WAC 392-172A-05105(2)

36. The Parent next alleges that the District violated the IDEA by failing to correctly document the various private provider reports into the reevaluation. The Parent argues that this constitutes a violation of the IDEA because the reevaluation did not match the scope of the Parent’s consent, which contained a “specific requirement to `consider[] all existing reports conducted by private providers.” PB16. In the Parent’s view, the reevaluation report failed to include all the essential information about the Student and does not provide an accurate depiction of his disabilities because the District “back-paged” the private provider reports and “cherry-picked” the information that was included. PB16.

37. Under WAC 392-172A-03035, a reevaluation report must be sufficient in scope to develop an IEP, and at a minimum, must include: a statement of whether the student has a disability that meets eligibility criteria; a discussion of the assessments and review of data that supports the eligibility conclusion; a discussion of how the disability affects the student’s progress in the general education curriculum; and the recommended special education and related services the student needs. Here, it is undisputed that the District has sufficient data to develop an appropriate IEP. Additionally, the evidence establishes that the District considered all existing assessments and reports by private providers. The Parent’s brief does not articulate what required information is missing from the reevaluation report or how it fails to meet the requirements of WAC 392-172A-03035. The record establishes that the initial draft of the report contained information from the private provider assessments and reports, but the District updated the reevaluation report to include significantly more information from the private provider reports, as well as input from the Parent, NHS staff, Dr. Fay, Ms.

Ting and the team. Accordingly, to the extent that the initial draft of the reevaluation report failed to include information that the team considered important, the District updated the report to reflect that input. To the extent that the Parent believes that essential information is missing from the updated reevaluation report, she has not identified that information in her closing brief. In sum, the Parent has not met her burden to show that the reevaluation did not match the scope of the Parent's consent.

38. The Parent also claims that the District failed to have individuals who could interpret the instructional implications of the SLP and PT reports at the March 3 meeting. With respect to the SLP reports, the record does not support the Parent's contention that Ms. Allen was "unable to interpret the results" of the SLDT-E: NU. PB14. I found that Ms. Allen was capable of interpreting the results of the SLP reports but was deemed incompetent and prevented from speaking by the Parent's counsel. The Parent further argues that Ms. Allen's unfamiliarity with the assessments by the UW Autism Center, Evergreen and Seattle Therapy "is apparent from the communication summary she provided as part of the reevaluation." PB14. It appears that the Parent's claim is that the reevaluation report does not contain enough information from these reports to demonstrate Ms. Allen's command of them. The reevaluation report discusses all three reports (Seattle Therapy at J5p19; Evergreen at J5p13; and UW Autism Center at J5p13). With respect to the UW Autism Center report, the Parent contends that the reevaluation report only contained "a paragraph and a half" documenting the 10-page UW Autism report, only documented the results of half of the assessments, and does not mention the recommendation for weekly sessions with an SLP. PB15. The brevity of the reevaluation report does not on its own establish that Ms. Allen was unable to interpret the instructional implications of the SLP reports. Ms. Allen credibly testified that she sought to summarize the relevant information and did not include information that she believed to be duplicative. Based on a review of the evidence in the record, the Parent has not met her burden to show that it is more likely than not that Ms. Allen could not interpret the instructional implications of the SLP reports.

39. The Parent also contends that the District's failure to have a PT present at the March 3 meeting makes the reevaluation inappropriate. She argues the District "consistently undervalues the necessity of physical therapy, as documented in the [Mary Bridge] Physical Therapy Evaluation." PB20. The PT report from Mary Bridge, however, contains no school-based recommendations. The report recommends 8 in-clinic visits and a home based program. The Parent has not met her burden of proof on this claim.

40. The Parent next claims that the reevaluation is insufficient to identify the nature and extent of the special education and related services that the Student needs. As discussed above, it is undisputed that the District has sufficient evaluative data to draft an appropriate IEP for the Student. Moreover, the evidence demonstrates that the District considered all of this information and drafted an appropriate reevaluation report. Accordingly, the evidence does not establish by a preponderance of the evidence that the reevaluation is insufficient to identify the nature and extent of the special education and related services that the Student needs.



### ***Claims Related to Timely Development of an IEP for the Student***

41. The Parent next claims that the District violated the IDEA and denied the Student a FAPE since January 8, 2020, by failing to ensure that he had a current annual IEP for the 2019-2020 school year. (Issue A.i.) PB23. The Parent further claims that the District failed to hold an IEP meeting on March 5 or 6, 2020, and failed to develop a new annual IEP for the Student within thirty calendar days of completing the reevaluation. (Issues A.vii and A.viii.) PB18-19.

42. It is important to establish up front what is not at issue. Although the Parent's closing brief appears to assert that the District was required to have an IEP in place for the entirety of the 2019-2020 school year, the Parent's issue statement is clearly limited to the timeframe after January 8, 2020. PB23. Additionally, the Parent has not introduced any evidence to support such a claim, and has not provided any argument as to why this claim should be considered despite not having been raised. *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS 37815 \*15-16 (E.D. Cal. Mar. 7, 2019), *aff'd* 810 Fed. Appx. 588 (9th Cir. 2020); *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 \*34-35, 37 (W.D. Wash. May 8, 2019). Accordingly, this claim is not addressed.

43. A school district must ensure that it "holds a meeting to develop the student's IEP within thirty days of a determination that the student is eligible for special education and related services . . . ." WAC 392-172A-03105(2)(a). The District completed its reevaluation of the Student on March 11, 2020. Therefore, the District was required to hold an IEP meeting by April 10, 2020, thirty calendar days after the District completed its reevaluation.<sup>30</sup> The District held an IEP meeting on March 30, 2020, well within the thirty-day time period required by WAC 392-172A-03105(2)(a). Even if the reevaluation had been completed on March 3, 2020, as the Parent contends, the District had until April 2, 2020 to hold the IEP meeting. PB 19.

44. Because the District was not required to hold the IEP meeting until April 2020, there is no merit to the Parent's claim that the District violated the IDEA by refusing to hold an IEP meeting on March 5 or 6, 2020. Additionally, although the Parent was willing to excuse the special education teacher's participation in order to meet on those dates, the District's counsel was unable to attend. The Parent points to no legal authority requiring a District to hold an IEP meeting without legal counsel when the deadline for holding the meeting has not yet expired.

45. Although the District timely held an IEP meeting, the IEP team did not *develop* an IEP for the Student until July 7, 2020, and did not implement that IEP until July 20, 2020. The District argues that WAC 392-172A-03105 requires only that the IEP meeting be held within thirty days, and does not expressly require that the IEP must be developed within that time period. It is not reasonable to read the phrase "holds a meeting to develop the student's IEP" in WAC 392-172A-03105 to mean that the District must hold a timely IEP meeting, but can take as long as it wants to develop the IEP. Such an

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<sup>30</sup> To the extent that the settlement agreement set deadlines pertaining to the reevaluation and IEP apart from the requirements of the IDEA, the interpretation and enforcement of that agreement is not before this ALJ.

interpretation is not consistent with the overall purpose of the IDEA. Under a reasonable reading of WAC 392-172A-03105, the District was expected to develop an IEP for the Student by April 10, 2020. Ultimately, the team did not develop an IEP for the Student until July 7, 2020, a delay of approximately three months. Therefore, the District violated WAC 392-172A-03105.

46. However, as discussed above, not all procedural violations of the IDEA deny a student FAPE. WAC 392-172A-05105. The remaining question is whether the procedural violation impeded the Student's right to FAPE, significantly impeded the Parent's opportunity for participation, or caused a deprivation of educational benefits.<sup>31</sup> *Id.* The Parent's brief states that the delay in implementing the Student's IEP denied him FAPE, but offers no discussion or analysis.

47. As discussed previously, the record establishes that the Parent contributed to the delay in developing the Student's IEP, and that the delay was necessary to ensure her participation. The record demonstrates that the Parent cancelled the April 14, 2020 IEP meeting. She was not willing to provide her availability, or to even schedule an IEP meeting, until the District responded to her request to have NHS staff draft the IEP. A meeting was finally scheduled for June 5, 2020, but the Parent and her counsel were disconnected after only one hour. Rather than continue the meeting without the Parent, the District rescheduled to ensure her participation. In this case, the District's procedural violation did not impede parental participation, but, in contrast, was necessary to ensure her participation.

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

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<sup>31</sup> The District argues that the delay in developing an IEP did not constitute a procedural violation of the IDEA because the Parent contributed to it. The District relies on *Jackson v. Chicago Pub. Sch.*, 2017 U.S. Dist. LEXIS 90381 (N.D. Ill. June 13, 2017), in which a school district timely reevaluated the student but failed to develop a timely IEP due to its efforts to include the parent in developing of the IEP. The Independent Hearing Officer determined that the delay was excusable; the District court agreed, holding that it would be inconsistent with the parental participation mandate of the IDEA "to penalize [the school district] because it was unable to complete the IEP within the . . . deadline because it went out of its way to include the [parent] in the development of her child's IEP." *Id.*, at \*8. While the District reads this holding to mean that no violation of the IDEA occurred, it could also be interpreted merely as limiting any remedy for a procedural violation. In any case, the District has not provided any authority from the Ninth Circuit indicating that the failure to timely develop an IEP does not constitute a procedural violation if the delay stems from efforts to include the parents.

49. In this case, although it took until July 7, 2020, to develop an IEP for the Student, the District made continual efforts to complete the IEP and to ensure full parental participation throughout the process. Unlike in *M.P.*, there is no evidence that the District ignored its obligation to draft an IEP for the Student. Rather, the District “continue[d] working with [the Parent] in order to develop a mutually acceptable IEP,” which is one of the options expressly noted in *M.P. Id.*, at 1056. The District held IEP meetings on March 30, June 5, and July 7, 2020, in an effort to develop an IEP for the Student with parental input, along with input from staff from NHS and Seattle Therapy. It subsequently held IEP meetings on July 28, October 7, and October 16, 2020, to amend the IEP with input from the Parent, NHS, and Seattle Therapy.

50. The Parent also suggests that the District’s failure to properly conduct IEP meetings caused the delay in completing the Student’s IEP. She argues that “[a]s a result of the District’s failures to properly conduct IEP meetings, the Parent provided extensive feedback on the IEP implementation process that was consistently ignored or failed to be addressed.” PB 17-18. The Parent points to feedback she sent to the District after the March 30 meeting in Exhibit D47. Although the Parent categorizes this as “feedback on the IEP implementation process,” close review indicates that it focused largely on data from the private provider reports that the Parent felt should be included and goals the Parent thought were appropriate for the Student. The Parent seems to be suggesting that if the District had simply incorporated all of the changes she wanted, the IEP process would have run more smoothly and quickly. That is not what the IDEA requires. Although parental participation is paramount under the IDEA, “a district does not necessarily violate the IDEA if it refuses to implement a parent’s requests, and a parent does not have ‘veto’ power over IEP provisions.” *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 \*58 (W.D. Wash. May 8, 2019). “The IDEA does not require a school district to comply with every request a parent makes; rather, the district must ‘seriously consider’ the parents’ input and concerns. *K.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d 995, 1008 (N.D. Cal. 2008).” *L.C.* at \*63. The Parent also points to the District “ignoring parental and team feedback” following the July 7 meeting. At that point, however, the IEP had already been developed, meaning actions taken after that point could not have contributed to the delay in developing the IEP.

51. The Parent further argues that the District included “irrelevant” individuals at IEP meetings, which contributed to the delay and impeded participation by the individuals she considered to be the “real” members of the IEP team – the Parent, the Grandfather, NHS staff, Seattle Therapy staff, and one District administrator. The overwhelming evidence in the record establishes that IEP meetings were contentious and difficult. Counsel for both parties attended IEP meetings and spent valuable time arguing. The resulting delay cannot be attributed solely to the District. Moreover, the Parent’s closing brief does not provide any discussion or legal authority to support her suggestion that any of the District’s staff improperly attended the Student’s IEP meetings. Finally, to the extent that NHS and Seattle Therapy were unable to voice their views during IEP meetings because so many people attended, they submitted emails that clearly voiced their opinions. Based on a comprehensive review of the record, the Parent has not shown that the District’s failure to timely develop an IEP significantly impeded her right to participation.

52. The remaining question is whether the District's failure to develop a timely IEP deprived the Student of FAPE or caused a deprivation of educational benefit. The Parent argues that the delay in providing the Student the communication services he required denied the Student a FAPE. PB23. The record shows that the Student has made progress at NHS. As discussed previously, the Parent has "never argued that [NHS] is inappropriate or that [NHS] has failed to provide the student FAPE." T25. The Student has made educational progress at NHS, showing "tremendous growth" with "academic gains across all domains." The Student has not, however, received the SLP services he requires pursuant to an IEP, and was therefore denied the educational benefit of those services. Accordingly, the Parent has established that the District's delay in implementing an IEP for the Student denied the Student an educational benefit. 20 USC §1415(f)(3)(E)(ii); see WAC 392-172A-05105(2); 34 CFR §300.513(a)(2). Whether the Parent is entitled to a remedy, given her contribution to the delay in developing an IEP for the Student, is discussed later in this decision.

### ***Functional Behavioral Assessment***

53. The Parent next claims that the District violated the IDEA and denied the Student a FAPE since January 8, 2020, by (1) failing to ensure that the Student had a current Functional Behavior Assessment (FBA) or Behavior Intervention Plan (BIP) during the 2019-2020 school year; and (2) failing to ensure that he will have a current FBA and BIP for the 2020-2021 school year that appropriately address the behaviors that impede his learning. (Issue A.ii.)

54. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). A functional behavior assessment is one type of behavioral intervention or strategy that helps identify causative factors and objectionable behaviors. *J.L. v. Manteca Unified Sch. Dist.*, 2016 U.S. Dist. LEXIS 77441 (E.D. Cal. June 14, 2016); see also *S.J. v. Issaquah Sch. Dist.*, 2007 U.S. Dist. LEXIS 67735 (W.D. Wash. Sept. 12, 2007). As the Ninth Circuit recently held in *Butte Sch. Dist. No. 1 v. C.S.*, 817 F. App'x 321 (9th Cir. 2020):

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

*Id.* at 326.

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

56. The record demonstrates that Ms. Kelso conducted an FBA of the Student in January and February 2020. The FBA recommended a BIP, but the team has never discussed whether such a plan is necessary for the Student to receive FAPE. Ms. Kelso was prepared to discuss the FBA and BIP during the March 3 meeting but was unable to do so due to lack of time. Ms. Kelso then attended all of the Student's subsequent IEP meetings and was prepared to discuss the FBA and BIP at each meeting. The Parent contends that it was the District's obligation to provide the Student with a BIP, and that the District "shirk[ed]" its responsibility to do so. PB23-24. The record does not support this assertion. To the contrary, the evidence establishes that the Parent affirmatively told the District she did not want to discuss the FBA and BIP at the March 30 meeting. The June 5 meeting ended early when the Parent and her counsel were disconnected. As of the July 7 meeting, the Parent did not wish to discuss the Student's FBA and BIP until the Student returned to in-school learning. This placed the District in the difficult position of discussing the FBA and BIP in defiance of the Parent's express wishes, or complying with her wishes and waiting until the Student returns to in-school learning. In her closing brief, the Parent did not address whether the Student has been adversely impacted because he did not have a BIP in place. Based on this record, the Parent has not met her burden to prove that the District has violated the IDEA or denied the Student a FAPE by failing to have an FBA and BIP in place since January 8, 2020, or for the 2020-2021 school year when the Student has not returned to in-school learning.

#### ***Issues Related to IEP Team Members***

57. The Parent raises several issues pertaining to attendance at the March 3, March 30, June 5, July 7, and July 28 IEP meetings. First, the Parent claims that the District failed to include necessary team members—specifically, a counselor and a PT—and proceeded with IEP meetings even after the Parent declined to excuse them. (Issues A.ix. and A.x.) Second, the Parent claims that the District failed to include individuals who could interpret the instructional implications of evaluation results in the areas of social/emotional and behavior, SLP, OT, and PT at IEP meetings. (Issue A.xi.)

58. Under WAC 392-172A-03095(1), a student's IEP team must include:

- (a) The parents of the student;
- (b) Not less than one general education teacher of the student if the student is, or may be, participating in the general education environment;
- (c) Not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;
- (d) A representative of the public agency who:
  - i. Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students eligible for special education;
  - ii. Is knowledgeable about the general education curriculum; and
  - iii. Is knowledgeable about the availability of resources of the school district.
- (e) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in (b) through (e) of this subsection;

- (f) At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and
- (g) Whenever appropriate, the student.

See also 20 U.S.C. §1414 (d)(1)(B).

59. WAC 392-172A-03095 does not require that a student's IEP team include a PT, counselor, SLP, or OT. Instead, it gives parents and school districts discretion to determine when it is appropriate to include individuals who have knowledge or special expertise regarding the student, including related services personnel. Additionally, an IEP team must include a representative who can interpret the instruction implications of evaluation results.

60. As discussed above, the Mary Bridge PT report does not contain any school-based recommendations. Although Ms. Veliz discussed her belief that the Student required PT services, I gave little weight to her testimony because the record does not demonstrate that she has the experience, training, or qualifications to make this determination. Accordingly, the Parent has not established that the failure to invite a PT to IEP meetings violated WAC 392-172A-03095.

61. The Parent argues that she identified a counselor as a necessary team member, and that the District's failure to invite a counselor deprived the IEP team of important information that could impact team decisions. PB19-20. The District argues that a counselor was not a necessary team member and that the lack of a counselor did not deny the Student a FAPE. The plain language of WAC 392-172A-03095 indicates that a counselor is a discretionary, rather than a required member of the IEP team, and the Parent has not articulated or demonstrated that a counselor was a necessary team member in this case. Additionally, the Parent has not briefed or provided any legal authority to establish that a District's failure to invite a discretionary team member violates the IDEA.

62. Further, the evidence demonstrates that the Parent did not ask the District to include a counselor as part of the Student's IEP team until June 4, 2020. Accordingly, the Parent has not established that the District violated WAC 392-172A-03095 by failing to invite a counselor to meetings on March 3 or March 30, 2020. With respect to the June 5 meeting, the Parent did not request that a counselor attend until the day before the meeting. Dr. Galbreath asked for the counselor's contact information but was unable to secure her presence. Given the last-minute nature of the Parent's request and the District's efforts to comply with it, the Parent has not shown that lack of a counselor at this meeting violated of the IDEA. With respect to the July 7 and July 28, 2020 meetings, the Parent informed Dr. Galbreath that the Student's counselor no longer worked for NHS and the Parent did not know if the counselor's successor would be available to attend meetings during the summer. There is no evidence that the Parent ever provided any subsequent information indicating that a counselor had become available or consented to a District counselor attending. Therefore, the Parent has not established that the District violated the IDEA by not having a counselor present at IEP meetings. Moreover, other than broadly stating the team was deprived of important information, the Parent's brief does not articulate how the IEP team's ability to understand evaluation results or to make

decisions was impacted by the absence of the Student's counselor. PB19-20. Thus, even if the District's failure to include a counselor at IEP meetings violated WAC 392-172A-03095, the Parent has not shown that it impeded the Student's right to a FAPE, significantly impeded the Parent's participation, or deprived the Student of educational benefit. WAC 392-172A-05105(2).

63. The Parent's brief does not address her allegation that the District failed to have individuals present at IEP meetings who could interpret the instructional implications of the OT and SLP reports. As discussed previously, I found that Ms. Allen was qualified to interpret the SLP assessments and that Ms. Brubaker was qualified to interpret the OT assessments. The evidence demonstrates that Ms. Allen and Ms. Brubaker were present for meetings on March 3, March 30, June 5, July 7 and July 28, 2020. Even if the Parent could establish a procedural violation, however, she cannot prevail because she specifically notified the District before the March 30, 2020 meeting that she considered it a "waste of [District] resources" for Ms. Allen to attend since Ms. Krefft would be present, and that it was unnecessary for Ms. Brubaker to attend because Ms. Ting would be present. Accordingly, the Parent has not met her burden of proof on this claim.

### ***Claims Alleging Predetermination***

64. The Parent alleges that the District predetermined a number of decisions prior to IEP meetings, including: 1) the SDI, related services, and supplementary aids and services the Student would receive from the District (Issue A.xiv.a.); 2) that the Student's communication and OT services would be categorized as social/emotional/behavioral services (Issue A.xiv.e); 3) that the Student would be provided either remote dedicated services or would be required to go to a District facility to access dedicated services (Issue A.xiv.c); 4) that the Student would not receive dedicated services at home while he is receiving remote instruction (Issue A.xiv.d); and 5) what ESY services would be offered to the Student without consideration of his unique needs (Issue A.xiv.b.). She also alleges that the July 20 IEP does not reflect the decision-making of the IEP team and is contrary to the determinations of the IEP team. (Issue A.xiv.f). The Parent's closing brief does not individually address any these claims, except for the assertion that the District refused to consider providing a para educator for the Student while learning remotely at home.

65. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. Appx 342, 344 (9<sup>th</sup> Cir. 2007). According to the Ninth Circuit, a school district violates IDEA procedures "if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003). 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.*

66. "Denying parental access to the IEP process is a serious procedural violation of the IDEA." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d at 1131. "Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to

developing a comprehensive IEP and which only they are in a position to know.” *Id.* (quoting *Amanda J. v. Clark County*, 267 F.3d at 882).

67. The Parent does not appear to claim that she was denied an opportunity to participate or provide input. Even if she did make this claim, the overwhelming evidence in the record establishes that the Parent had ample opportunity to participate in the reevaluation meeting and at all subsequent IEP meetings. NHS and Seattle Therapy also provided extensive input. The record contains ample evidence that all of this input was considered and that much of it was incorporated into the reevaluation report and/or the Student’s IEP. Rather, the Parent asserts that on multiple occasions the IEP team would make a decision, “but when it came time for the District to implement the decision, the implementation bore little resemblance” to the team’s decision. PB21.

68. The evidence indicates that some team members found it frustrating to work with Dr. Galbreath because it was necessary to repeat information, to check to ensure that the information was incorporated, and to check that it was incorporated with accuracy. This evidence, without more, does not establish that the District made decisions in advance of IEP meetings and was unwilling to consider parental input. A review of the record as a whole establishes that Dr. Galbreath made significant efforts to obtain and incorporate input from the Parent, NHS, Ms. Ting, and others on multiple occasions. At a minimum, the record demonstrates that Dr. Galbreath updated the reevaluation report to include information from the private provider assessments and reports in response to the concerns of the Parent, NHS, Dr. Fay, and other team members, and incorporated extensive information provided by the Parent, NHS, Seattle Therapy and team members into the IEP.

69. Although the Parent argues that the IEP team made multiple decisions during the July 7 meeting that were not incorporated into the IEP, she does not identify a specific decision that was made but not included. PB22. It is the Parent’s burden to make this showing and she has not done so. The record demonstrates that Dr. Galbreath made changes to the IEP after the July 7 meeting in response to feedback from NHS and the Parent. The fact that Dr. Galbreath did not make every change the Parent requested, or made some mistakes in doing so, does not establish by a preponderance of the evidence that the District predetermined decisions about the Student or was unwilling to consider the Parent’s input. “[A] district’s failure to implement a parent’s requests does not necessarily violate IDEA because although the formulation of an IEP is ideally to be achieved by consensus among the interested parties at a properly conducted IEP meeting, sometimes such agreement will not be possible. [*Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d at 1131]. When there is no agreement, a district should create a plan to the best of its ability based on the information it has and provide the parent with the opportunity to challenge the IEP at a due process hearing. *Id.*” *K.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d at 1007 (internal quotation marks omitted.).

70. The Parent also argues that everyone on the IEP team, aside from District staff, stated that “remote para educator support was not going to work for my son, yet that’s what the District was proposing; so it clearly was not a team decision.” PB22. The Parent contends that the District refused to consider providing a para educator at home, and was only willing to consider allowing a para educator to assist the Student remotely or in-person at a school building. *Id.* The evidence establishes,



however, that the team has never had a full discussion of this issue to date, and has not made a decision. Moreover, when Dr. Galbreath contacted the Parent and Ms. Veliz in July 2020, to raise the options of having a para educator work with the Student at a District building or remotely, Dr. Galbreath stated “if you or [Ms. Veliz] have other ideas about how you could see this working, please let us know. We want to be creative and flexible to meet [the Student’s] needs.” P26p14. A review of the evidence does not establish that the District was not willing to listen to the Parent or to consider her input.

71. The Parent also claims that the District’s insistence on drafting the IEP, rather than allowing NHS to draft the IEP, “points to an overall pattern by the District to rely on its own staff and decision making,” instead of permitting NHS staff, who were working with the Student, to draft his IEP. T22. It is important to note that the Parent has not provided any legal authority indicating that the District was obligated to permit NHS staff to draft the IEP. Additionally, the fact that the District decided to draft an IEP for a student for whom it was responsible, without more, does not establish that the District predetermined decisions concerning the Student’s needs. The evidence clearly demonstrates that the IEP team broke down into two factions, with District staff on one side and the Parent, the Grandfather, NHS, and Seattle Therapy on the other. Both sides were represented by counsel, who attended IEP meetings and spent valuable IEP meeting time arguing. These factors made the entire process slow, painful, and contentious. This record does not, however, establish that the District made decisions in advance of IEP meetings, refused to consider parental input, or offered a “take it or leave it” approach. *Ms. S. ex rel. G. v. Vashon Island Sch. Dist*, 337 F.3d at 1131. After considering the arguments of the parties and reviewing the evidence of record, it is concluded that the Parent has not shown by a preponderance of the evidence that the District engaged in predetermination.

### ***Claims Involving ESY***

72. The Parent raises several issues related to the provision of ESY services during the summer of 2020. She claims that the District failed to ensure that the Student had a current annual IEP in place to facilitate his receipt of ESY services during the summer of 2020. (A.xii.) The Parent also claims that the District failed to offer the Student appropriate ESY services during the summer of 2020, by failing to provide him with the accommodations, modifications, and supplementary aids and services he needed to access ESY at NHS, specifically recreational therapy and a dedicated para educator. (Issue A.xiii.)

73. The evidence demonstrates that the District entered into a contract with NHS to serve the Student “through the last day of the extended school year of July of 2020.” D1p1. When the team discussed ESY at the June 5 meeting, however, the Student did not have a plan in place. Dr. Galbreath stated that because the Student’s IEP had not been completed, it was not possible to amend it or reach the discussion of an ESY program for the Student. Ms. Veliz believed Dr. Galbreath was stating that the Student would not be able to attend ESY because he did not have a finalized IEP in place. Regardless, the Parent was aware the Student could attend NHS even if he did not have an IEP in place, as he had done the previous summer. The Parent opted not to enroll the Student in the NHS ESY program because she was concerned about how much time he was spending in front of the computer and wanted him to spend time outdoors. She therefore enrolled him in a hippotherapy

program. Because the evidence establishes that the Parent chose not to enroll the Student in the NHS ESY program for reasons independent of his lack of a current IEP, the Parent has not shown that the District's failure to have an IEP in place or to have appropriate supports in place for the Student to attend the NHS ESY program denied the Student a FAPE.

***Claims Related to the Provision of FAPE***

74. The Parent next claims that the District has failed to offer the Student an IEP for the 2020-2021 school year that is reasonably calculated to provide him with a FAPE. (Issue A.xv.) She also alleges that the District has failed to provide the Student with SDI and sufficient related services from an SLP and OT, and with related services from a PT. (Issues A.iii.; A.iv; A.v.)

75. “[A] school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can make progress in the general education curriculum . . . taking into account the progress of his non-disabled peers, and the child’s potential.” *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 138 S. Ct. 556 (2017) (citations omitted; internal quotation marks omitted). The determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is “a snapshot, not a retrospective.” *Id.*

76. Specially designed instruction (SDI) means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction to address the student’s unique needs that result from the student’s disability and to ensure access of the student to the general education curriculum. WAC 392-172A-01175; 34 CFR §300.39(b)(3). Related services are transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education, including SLP and OT services and parent counseling and training. WAC 392-172A-01155(1).

77. Speech and language pathology, physical therapy, and occupational therapy services may be provided as related services or as SDI, “if the student requires those therapies as specially designed instruction and meets the eligibility requirements which include a disability, adverse educational impact, and need for [SDI].” WAC 392-172A-01035(1)(d).

78. Neither party’s brief addresses the legal distinction between SDI and related services. The Parent merely states that Student’s July 20 IEP lacked sufficient SDI and related services from an SLP and OT and related services from a PT. PB25. The District argues that whether the Student’s SLP and OT therapy “is classified as SDI or related service is a distinction without a difference.” DB33. Because the parties have not addressed this distinction, and because this claim may be resolved without such analysis, it is not addressed.

79. With respect to PT services, as discussed previously, the Mary Bridge PT report did not recommend any school-based PT therapy for the Student. Although Ms. Veliz thought the Student should receive PT services, I gave no weight to that testimony because there is no evidence in the

record that she has the necessary experience, training or qualifications to make such a determination. The Parent has not proven by a preponderance of the evidence that the Student requires related services in PT to make progress in light of his circumstances.

80. The Parent does not point to any evidence in the record that demonstrates that the Student required SDI in OT, or required additional related services in OT, in order to make educational progress. Moreover, a review of the evidence in the record does not support such a conclusion. During the hearing, when Ms. Ting was asked which of her OT recommendations focused on providing SDI, she responded that she “did not point to any of these recommendations being SDI.” T816. Her comments in Exhibit P26, page 7, are consistent with this testimony; they recommend related services in OT. This is also consistent with Ms. Brubaker’s testimony that the Student’s OT therapy or interventions would be similar, regardless of whether they were classified as SDI or related services. Based on the evidence in the record, the Parent has not met her burden to prove that the Student requires SDI in OT in order to make educational progress in light of his circumstances. Additionally, the Parent has not shown that the Student required additional related services in OT when the team developed the July 20 IEP. The Seattle Therapy OT report recommended school-based OT services for 60 minutes per week. That is precisely what the July 20 IEP provided. The Parent has not established that the Student required additional related services in OT in order to receive a FAPE.

81. With respect to SLP therapy, the Parent does not point to any specific evidence in the record that supports a need for SDI, rather than related services. Nor does she articulate this claim in her brief, other than to assert broadly that the District’s “failure to properly determine and support [the] Student’s communication needs, which are well documented in . . . each of the SLP reports [the Parent] provided and confirmed by his teachers [sic] . . . was simply not reasonable under the *Rowley* test.” PB25

82. A review of the evidence in the record does not support the Parent’s claim that the Student required SDI, rather than related services. The private provider reports by Ms. Gratz and Ms. Krefft do not use the terms SDI or related services; this distinction is not addressed and there is no specific recommendation for SDI. If the Parent interprets the reports to include such a recommendation, she has failed to articulate the basis for such a belief in her brief. Additionally, the testimony in the record does not demonstrate that the Student required SDI rather than related services. Ms. Ristow’s testimony demonstrates that the Student requires communication goals and direct instruction by an SLP. This is consistent with the evaluative data. The July 20 IEP provides both. It provides 60 minutes, one time weekly, of services by an SLP, as recommended by Ms. Gratz. It also provides goals addressing the Student’s communication needs. Although the goals were included under the heading of social / emotional / behavioral, rather than under the heading of communication, Ms. Allen’s testimony established that this placement in the IEP made no meaningful difference. Finally, WAC 392-172A-03090(2)(b) plainly states that an IEP team is not required “to include information under one component of a student’s IEP that is already contained under another component of the student’s IEP.” Based on a comprehensive review of the evidence in the record, the Parent has not met her burden to show that the Student required SDI, rather than related services, in communication to make

educational progress. Therefore, she has not shown by a preponderance of the evidence that the July 20 IEP denied the Student a FAPE by failing to include SDI in communication.

83. The remaining question is whether the Student required additional related services in SLP in order to make educational progress. This issue must be assessed at the time the IEP was developed. *Adams v. State of Oregon*, at 1149. As discussed above, the July 20 IEP provided 60 minutes, one time weekly, of services by an SLP, which is consistent with Ms. Gratz's recommendations. Ms. Gratz also recommended that the Student participate in a social skills group. Before the March 3 meeting, the Parent opined that the Student required a social skills group led by an SLP, in addition to direct services by an SLP. Ms. Royster's notes from the July 7 meeting, which the Parent considered accurate, indicated that the SLP minutes could be split into two thirty-minute sessions "if a social group can be one of the groups." On July 21, 2020, one day after the implementation of the IEP, the Parent informed the District the Student required a social communication group in addition to one hour weekly sessions with an SLP. The team ultimately agreed with this request; the October 16 IEP amendment provides a 30 minute weekly social skills group led by an SLP, in addition to 60 minutes weekly of SLP services. The evidence in the record does not indicate that the Student's needs in this area changed between the implementation of the July 20 IEP and the October 16 IEP amendment. The only new evaluative data during this time was Ms. Gratz's updated report, which repeated her original recommendation for the Student to participate in a social skills group. Compare J2p41 with J14p10. Significantly, both Ms. Allen and Ms. Ristow agreed with Ms. Gratz's reports. Accordingly, the Parent has shown by a preponderance of the evidence that the July 20 IEP was not reasonably calculated to enable the Student to made educational progress because it failed to provide him with sufficient related services from an SLP. Namely, the July 20 IEP failed to provide a 30 minute weekly social skills group led by an SLP, in addition to 60 minutes weekly of SLP services. By October 29, 2020, the October 16 IEP amendment had been implemented to provide the Student with the related services in SLP he required.

84. The Parent also contends that the July 20 IEP was not reasonably calculated to provide the Student with FAPE because it did not include a safety goal and a task completion goal, and did not address other items Dr. Fay discussed during the hearing. The October 7 IEP amendment contained a safety goal and a tasks completion goal, and the Parent has not articulated how the Student was denied FAPE because these goals were not in place in July 2020. The October 7 IEP amendment also moved the communication goals to a communication section. As discussed above, Ms. Allen's testimony establishes that the placement in the IEP had no practical difference for the Student. See WAC 392-172A-03090(2)(b). With respect to deficiencies identified by Dr. Fay during the hearing, it appears that most of these issues were address by the time of the October 16 IEP amendment. To the extent that deficiencies that are relevant to the issues in this case have not been addressed, the Parent's brief does not discuss them.

85. The District's brief argues that "the Student's excellent performance at [NHS] establishes that the IEP offered to the Student is reasonably calculated to enable him to make progress appropriate in light of his circumstances." DB 38. The record demonstrates that the Student has made progress at NHS, where he has shown "tremendous growth." The record also establishes that the Student required

SLP services to make educational progress, and that Parent provided those services, which were not being provided through an IEP.

86. Based on a comprehensive review of the evidence in the record, the Parent has established that it is more likely than not that the Student's July 20 IEP was not reasonably calculated to enable him to make progress appropriate in light of his circumstances because it did not provide a 30 minute weekly social skills group led by an SLP, in addition to 60 minutes per week of SLP services. The Parent has not established any other deficiency in the July 20 IEP that denied the Student FAPE.<sup>32</sup>

### **Summary of Violations**

87. The District violated the IDEA and denied the Student FAPE by:

- i. Failing to timely provide the Student with an IEP (COL 52); and
- ii. Failing to provide the Student with all of the related services in SLP that he required in his July 20 IEP (COL 83 and 86).

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

89. 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.

### **Remedies**

90. When a parent proves a violation of the IDEA, a tribunal may "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).

91. Because the October 16 IEP amendment provided that NHS is the Student's placement and provided the Student with sufficient related services in SLP to meet his needs, there is no need for an order directing the District to timely move forward with an IEP meeting, as requested.

92. The next question is whether an award of compensatory education is appropriate. "Compensatory education is an equitable remedy that seeks to make up for 'educational services the child should have received in the first place,' and 'aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA.'" *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir 2011)(quoting *Reid v. Dist. of Columbia*, 401 F.3d

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<sup>32</sup> The Student's July 20 IEP provided dedicated support by a para educator, but the IEP team has not yet decided how this support will be provided. Because the Parent has not challenged the implementation of the Student's IEP, that issue is not addressed. Additionally, the Parent has not raised or briefed issues concerning the October 7 or October 16 IEP amendments, which were developed after the hearing had started, and they have not been addressed.

516, 518 (D.C. Cir. 2005)). "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra*, 401 F.3d at 524. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Id.* at 524.

93. A hearing officer may fashion individualized relief for students seeking compensatory education. As stated in *R.P. v. Prescott*:

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

*R.P. v. Prescott*, at 1126.

94. The record is clear that the Student made progress at NHS. It also demonstrates that he has significant communication deficits and requires SLP therapy to make progress in his education. The District has not provided any SLP services to the Student. Accordingly, it is appropriate to provide SLP services to make up for the services the Student has missed. Because NHS does not provide SLP services, and because the Student is not attending a District school, it is appropriate for a private provider, such as Seattle Therapy, to provide these services.

95. To determine the appropriate award, it is necessary to balance the equities. As discussed above, the Parent contributed to the delay in developing the IEP. Dr. Galbreath made efforts to include input from the Parent, NHS, and Seattle Therapy in updating the Student's IEPs, but she did not always include that information accurately, which led to frustration and tension. The fact that both parties had counsel present also made the process contentious and slow. After balancing these factors, it is appropriate to reduce the award of compensatory education by one third.

96. The District's failure to implement the Student's IEP and to deliver the appropriate amount of SLP services resulted in the Student missing out on 720 minutes of service during the 2019-2020 school year, and 210 minutes of service during the 2020-2021 school year,<sup>33</sup> for a total of 930

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<sup>33</sup> The minutes are calculated as follows.

The 2019-2020 school year is calculated from April 15, 2020, when the IEP should have been implemented, to June 12, 2020, when the NHS school year ended. (8 weeks X 90 minutes per week = 720 minutes).

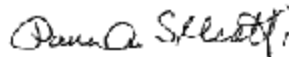
The 2020-2021 school year is calculated from September 8, 2020, the start of the NHS school year, through October 29, 2020, when the October 16 IEP amendment was implemented. (7 weeks X 30 minutes per week = 210 minutes). The award does not include the ESY period because the Parent did not enroll the Student in ESY.

minutes. Reduced by one third, this amounts to 620 minutes, or 11 hours, rounded up. Accordingly, the District shall pay for 11 hours of SLP services by Seattle Therapy or by a comparable provider selected by the Parent who has the required education, training and experience to serve the Student's needs, at a rate not to exceed that charged by Seattle Therapy. The District shall contract with the chosen provider, so long as the provider is available and willing to provide this service, and the services shall be available to the Student within 30 days of when the Parent identifies the chosen provider. The services will be delivered at any time during the two years following the date of this decision at the duration and frequency determined appropriate between the Parent and the provider. If the provider bills the District for time the Student failed to appear for scheduled sessions under the provider's billing policy, that time shall count toward this compensatory education award.

### ORDER

1. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education as set forth in Conclusions of Law 52, 83, and 86.
2. The Parent has not otherwise established that the District denied the Student a free appropriate education.
3. The District is ordered to provide compensatory education and other relief as set forth in Conclusions of Law 94 through 96.
4. The Parent's remaining requested remedies are denied.

SERVED on the date of mailing.



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Pamela Meotti  
Administrative Law Judge  
Office of Administrative Hearings

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The award also does not precede April 15, 2020, because the District was not required to implement an IEP prior to that time.

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

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

**DECLARATION OF SERVICE**

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

Parent



Kelly McClure  
Amy Royster  
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PO Box 1315  
Tacoma, WA 98401-3791

Dated February 9, 2021, at Seattle, Washington.

*lan*

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Representative  
Office of Administrative Hearings  
600 University Street, Suite 1500  
Seattle, WA 98101

cc: Administrative Resource Services, OSPI