

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

IN THE MATTER OF

MERCER ISLAND SCHOOL DISTRICT

OSPI CAUSE NO. 2020-SE-0074

OAH DOCKET NO. 04-2020-OSPI-01054

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

A due process hearing was held before Administrative Law Judge (ALJ) Jacqueline Becker on June 26, 29 and 30, and July 28 and 29, 2020, via video conference. The Parents of the Student whose education is at issue¹ appeared and were represented by Lara Hruska and Whitney Hill, attorneys at law. The Mercer Island School District (District) was represented by Sarah Johnson, attorney at law. Also present for the District were Erin Battersby, Executive Director, and Beth DeGrace, Assistant Director of Special Services.

PROCEDURAL HISTORY OF THE CASE

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on April 29, 2020. The Complaint was assigned Cause No. 2020-SE-0074 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A prehearing conference was held on May 20, 2020, and the matter was set for hearing. The hearing dates were subsequently revised to accommodate an unavailable witness and the ALJ's mandatory furlough dates.

The Parents withdrew one issue for hearing, and one request for relief, via an email exchange with the ALJ and the District's counsel on June 19, 2020. The withdrawal was addressed on the record at the hearing on June 29, and on July 28 and 29, 2020. The withdrawal of the issue and request for relief is also addressed in the Findings of Fact, below.

Evidence Relied Upon

Exhibits Admitted:

Parents' Exhibits: P1 through P27.

District's Exhibits: D1, D2, D3, and D5 through D42.

Court Exhibits: C1.

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

Witnesses Heard (in order of appearance):

Lauren Koshar, learning specialist
Dr. Philip Dunbar-Mayer, psychologist and pediatric neuropsychologist
The Student's Mother
Dawn Winters, District school psychologist
Jessica McMurdie, pediatric occupational therapist
Dr. Karen Wilke, District school psychologist
Meredith Carlson, District third grade teacher
Ahisha Avant, District fourth grade teacher
Jennifer Anderson, District occupational therapist
Heidi Conradt, District special education teacher

Post-Hearing Briefs

The parties' post-hearing briefs were timely filed on September 14, 2020.

Due Date for Written Decision

The due date for a written decision in this case was continued to thirty (30) calendar days after the close of record, at the request of the parties, by Order dated May 26, 2020. The record closed with the receipt of the post-hearing briefs on September 14, 2020, and the due date for the written decision is October 14, 2020.

ISSUES/REMEDIES

The issues considered at the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE), and whether the District significantly excluded the Parents from the educational process, resulting in additional denials of FAPE, in ways including but not limited to the following:
 - i. Whether the District failed to provide prior written notice of its decision to refuse to initiate evaluation or special education service and failed to provide a copy of procedural safeguards in October of 2018 under WAC 392-172A-05010(1)(b) and WAC 392-172A-05015(1);
 - ii. Whether the District violated its Child Find obligations by failing to identify and evaluate the Student for special education in October of 2018, when a private evaluation demonstrating eligibility was provided to the District;
 - iii. Whether the District has failed to deliver FAPE under the IDEA by failing to design an appropriate Individualized Education Program (IEP) to address the Student's academic struggles in reading and writing during the 2018-2019 school year and the 2019-2020 school year; and
 - iv. Whether the private evaluations and services obtained for the Student between October 2018 and March 2020 were appropriate for him.

- b. And, whether the Parents are entitled to their requested remedies, which include:

- i. Declaratory relief that the District denied the Student FAPE;
- ii. Compensatory special education and related services for the Student to allow him to obtain the educational benefit that he would have received but for the District's violation of the IDEA and denial of FAPE, consistent with 20 U.S.C. 1415(i)(2)(c)(iii);
- iii. An order that the District shall reimburse the Parents for private evaluations and services they obtained for the Student between October 2018 and March 2020; and
- iv. Whatever additional relief the court may find just and proper.

FINDINGS OF FACT

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

BACKGROUND

1. The Student is currently ten years old and has attended school in the District since kindergarten. He was in third grade at Island Park Elementary School (Island Park) in the District during the 2018-19 school year and in fourth grade at Island Park during the 2019-20 school year. P2 pp. 1-3.²

2. The Student's Mother describes him as caring and thoughtful, "easygoing," and "a sweet boy all around." Tr. 223-24 (Mother). When the Student was in second grade, his Mother began to notice that his written work product lacked details and did not always make sense. *Id.* at 225. On his second-grade progress report, the Student received a "2.5" in language conventions for the first trimester, and a "3" in the second and third trimesters. P10. "Language conventions" includes standard English grammar, capitalization, punctuation and spelling. *Id.* p.2.

3. The "Academic Standard Descriptors" used on progress reports in the District include: NE-not evaluated, M-modified, 1-Below Standard, 2-Approaching Standard, 3-Meeting Standard, and 4-Exceeding Standard. P10 p.1. "Approaching Standard" is defined as: approaches expectation for grade level standard; and demonstrates some knowledge and understanding. "Meeting Standard" is defined as: meets expectations for grade level standard; demonstrates knowledge and understanding, and applies learning to content areas. *Id.*

THE 2018-2019 SCHOOL YEAR

4. During the 2018-19 school year, when the Student was in third grade, his Mother noticed that his written work product contained run-on sentences, and lacked consistent punctuation and capitalization. Tr. 225-26 (Mother). She observed that his written work product did not seem to

² Exhibits are cited by party ("P" for Parents; "D" for District; "C" for Court exhibits), exhibit number, and page number. For example, a citation to P1 p.5 is to the Parent's Exhibit 1 at page 5. The hearing transcript is cited as "Tr." with references to the page and the witness who offered the cited testimony. For example, a citation to Tr. 80 (Mother) is to the Mother's testimony at page 80 of the transcript.

be on par with the written work product of his classroom peers, which the Mother observed on bulletin boards and in other areas while volunteering at the school. The Student's work product had more spelling errors, was simplistic and basic, and seemed disjointed. *Id.* at 607. The Mother also noticed that completing his math homework, which had always been easy, became a struggle for the Student. She attributed the homework struggle to the story problems contained in third-grade math. *Id.* at 232-33. Due to concerns they had about the Student's school performance, his Parents arranged to have him evaluated by Dr. Philip Dunbar-Mayer, who had performed an evaluation of the Student's older sibling. *Id.* at 234.

5. Dr. Philip Dunbar-Mayer is a licensed psychologist and pediatric neuropsychologist³ who owns and works at the Center for Child Development. P1 p.1. Dr. Dunbar-Mayer holds a Bachelor of Arts degree in psychology, as well as a master's degree and doctorate (Psy.D.) in clinical psychology. *Id.* at 11. He has never been employed in a public school setting. Tr. 163 (Dunbar-Mayer). Dr. Dunbar-Mayer conducts neuropsychological evaluations of approximately 300 children per year. Tr. 172-73 (Dunbar-Mayer). He spends approximately three to four hours of face-to-face time with each student and administers the various tests himself. *Id.* at 218-19. Dr. Dunbar-Mayer performed two neuropsychological evaluations of the Student, at the request of the Student's Parents.

6. The first evaluation was performed in October of 2018, when the Student was eight years old and in third grade. P1 p.1. The Parents felt the Student was struggling in school and they wanted a more complete picture of his strengths and weaknesses. Tr. 133 (Dunbar-Mayer). As part of the evaluation, Dr. Dunbar-Mayer administered a variety of tests, over approximately three to four hours, on two days. P2 p.1; Tr. 218-19 (Dunbar-Mayer). Dr. Dunbar-Mayer did not speak with any of the Student's teachers, did not review any of the Student's schoolwork, and did not observe the Student in the school setting. Tr. 175-76 (Dunbar-Mayer).

7. As part of the October 2018 evaluation, Dr. Dunbar-Mayer administered the Wechsler Intelligence Scale for Children–5^h Edition (WISC-V) assessment to the Student. The WISC-V provides a measure of general intelligence functioning. From that assessment, Dr. Dunbar-Mayer determined the Student's Full-Scale Intelligence Quotient (FSIQ) was 137, i.e. in the "very superior" range, ranking in the 99th percentile. P1 pp.2, 4; Tr. 135 (Dunbar-Mayer).

8. Dr. Dunbar-Mayer also administered the Wechsler Individual Achievement Test–3rd Edition (WIAT-III) to the Student in October of 2018. That test assesses academic functioning. Based on results of the WIAT-III, Dr. Dunbar-Mayer concluded the Student's mathematical functioning was in the superior range; his aggregate reading performance was in the high average range; and his aggregate writing score was in the average range. P1 pp.2-3. Dr. Dunbar-Mayer further found that the Student's sentence building score was in the lowermost tier of the average range, as was his sentence composition index. His essay composition score was in the average range. *Id.* at 3. The Student's written expression composite index score, which is based on alphabet writing fluency and spelling subtests, along with sentence composition and an essay composition, was 98, which is the average range. Tr. 135; P2 p.6.

³ Pediatric neuropsychology is a specialization in testing and evaluation of children. It requires a post-doctorate residency. Tr. 128 (Dunbar-Mayer).

9. Dr. Dunbar-Mayer also administered the Beery-Buktenica Development Test of Visual-Motor Integration-6th Edition (VMI-6) to the Student in October of 2018. This test assesses visual-motor integration skills. P1 p.3. The Student's performance in visual perception was in the lower tier of average, as was his performance in fine motor coordination. *Id.* at 3-4. The Student was also administered the Rey-Osterrieth Complex Figure Test (ROCFT), a design-copying task, as part of the evaluation. P2 p.7. From this test, Dr. Dunbar-Mayer concluded the Student has difficulty organizing information, and this "limits the amount of information he efficiently processes and reduces his ability to retrieve the material over time." P1 p.4.

10. Based on the October 2018 evaluation described above, Dr. Dunbar-Mayer concluded that the Student met the criteria for a "specific learning disorder"⁴ in written expression, with mild to moderate impairment in sentence/paragraph formulation and editing. P1 p.4. Dr. Dunbar-Mayer based this diagnosis on his determination that there was a significant discrepancy between the Student's intellectual ability and his academic performance in the area of written expression. Tr. 137-44 (Dunbar-Mayer). The Student's composite index score in written expression was 98, which put him in the 45th percentile, or the average range according to the WIAT-III assessment. In contrast, his FSIQ was 137, which put him in the 99th percentile, or the "very superior" range according to the WISC-V. P2 pp. 4, 6. In Dr. Dunbar-Mayer's opinion, when these scores are compared as set forth in the discrepancy table published by OSPI,⁵ a significant discrepancy is indicated. Tr. 141-42 (Dunbar-Mayer).

11. Dr. Dunbar-Mayer also concluded that the Student is "twice exceptional," meaning that he has an IQ in the gifted range, as well as a learning challenge, i.e. he has two exceptional qualities. Tr. 136 (Dunbar-Mayer).

12. Dr. Dunbar-Mayer opined that the fact that the Student was receiving grades of 2.5 in writing in school indicted that he was having difficulty in academic achievement in written expression. Tr. 183-88 (Dunbar-Mayer). Based on these finding, Dr. Dunbar-Mayer recommended that the Student receive accommodations from the District via a 504 Plan.⁶ P2 pp.9-10. Accommodations recommended by Dr. Dunbar-Mayer included: additional time on tests, check-ins by the teacher, positive encouragement, additional time on written assignments, reduced writing demands in daily assignments, use of a scribe if needed, the option to respond orally on tests, self-correction of work, and weekly parent/teacher consultation. *Id.*

⁴ Dr. Dunbar-Mayer uses the term "specific learning *disorder*" whereas the Washington Administrative Code uses the term "specific learning *disability*." WAC 392-172A-03045.

⁵ The discrepancy table was not admitted into evidence. The ALJ took official notice on the record at the hearing of the existence of the table, which can be found in the "Identification of Students with Specific Learning Disabilities" document published by OSPI. Tr. 140 (ALJ). That document was last revised in December of 2014. RCW 34.05.452(5); WAC 10-08-200; https://www.k12.wa.us/sites/default/files/public/specialed/pubdocs/sld_guide.pdf.

⁶ A "504 plan" refers to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, a federal statute that protects qualified individuals who have disabilities from discrimination based on their disabilities. A person qualifies for a 504 plan if he or she has a physical or mental impairment that substantially limits one or more "major life activities," such as learning, reading, or communicating. P2 p. 9; 42 U.S.C. §12102.

13. Dr. Dunbar-Mayer also recommended that private services be obtained for the Student, by the Parents, to support him in the area of writing, and that he be taught keyboarding skills. P2 p.11. He further recommended that the Student's Parents work with the Northwest Gifted Child Association to find resources designed to support gifted students. *Id.*

14. Dr. Dunbar-Mayer provided the Parents with a four-page summary of the October 2018 evaluation. It sets forth the Student's scores on some of the various assessments, as well as the "diagnostic impressions" of specific learning disorder in written expression and twice exceptional. It also sets forth the recommended 504 plan accommodations. P4; Tr. 146 (Dunbar-Mayer). The FSIQ score of 137, on which Dr. Dunbar-Mayer based his diagnosis of specific learning disorder, in part, is included in the listing of scores. The WIAT-III written expression composite score of 98 is also included, but the percentile score (45th percentile) is not included in the summary. *Id.*

15. After the October 2018 evaluation, Dr. Dunbar-Mayer did not recommend that the Student be evaluated for special education services even though he believed the Student would have qualified for such services and consequently an Individualized Education Program (IEP). He assumed the Student's school would "see the discrepancy... and conduct a further evaluation... to determine what would be the most appropriate, either a 504 or an IEP." Tr. 145 (Dunbar-Mayer).

16. The Mother met with the Student's third-grade teacher, Meredith Carlson, shortly after the Parents received the evaluation report from Dr. Dunbar-Mayer. Ms. Carlson holds a bachelor's degree in early childhood development; she is a certificated teacher and has taught fourth and fifth grade for twenty years. Tr. 731 (Carlson). When they met, the Mother and Ms. Carlson discussed the recommendations in the report. Tr. 629-31 (Mother). The Mother's recollection is unclear as to whether she provided a copy of the full October 2018 evaluation report to Ms. Carlson, or whether she provided a copy of the four-page evaluation summary. *Id.* at 237, 635. Ms. Carlson had no concerns about the Student's writing ability or his classroom performance in any area. *Id.* at 736 (Carlson). Ms. Carlson agreed to place the Student near the front of her classroom and to allow him to use an iPad. She does not recall the Mother asking her to do anything else for the Student. *Id.* at 735.

17. On October 29, 2018, the Mother emailed Dawn Winters,⁷ District school psychologist, and Sally Loeser, District 504 coordinator,⁸ and informed them that a neuropsychological evaluation had been performed on the Student. The Mother requested to "begin the process to get him accommodations in place under a 504 plan." D3. At this point, the Mother did not know what was necessary to qualify for special education services. Tr. 241, 645 (Mother). The Mother asserts that, during a meeting she had with District personnel regarding her oldest son (the Student's sibling) around this same time, she asked for a special education evaluation of the sibling. According to the Mother, the District informed her that the sibling did not qualify for an IEP because IEPs were for children who were significantly behind in school, which the Mother understood to be at least a grade level behind. *Id.*

⁷ Ms. Winters holds a Bachelor of Arts degree in environmental conservation, a master's degree in secondary education, and an Ed.S. (education specialist) degree. She has taught middle school and high school and is nationally certified in school psychology. Tr. 259-60, 316 (Winters).

⁸ Tr. 261 (Winters).

18. The District's practice when considering recommendations made by an outside provider, such as Dr. Dunbar-Mayer, is that such recommendations do not determine whether a student receives a 504 plan or a special education evaluation. The recommendation is considered by the District, but other data is needed before a decision whether to provide a 504 plan or perform a special education evaluation can be made. Tr. 265-70 (Winters).

19. Dr. Karen Wilke is a District school psychologist. She holds a Bachelor of Arts degree in psychology; a master's degree in counseling psychology and child and family therapy; an education specialist degree in school psychology; a certification in children's mental health; and a doctorate in education (Ed.D.). Tr. 497, 514 (Wilke). She has worked as a school psychologist for nineteen years. *Id.* Dr. Wilke has also worked as a children's mental health case manager, and as an outpatient therapist. Dr. Wilke is qualified to make diagnoses using the Diagnostic and Statistical Manual of Mental Disorders (DSM). *Id.* at 514-16. Dr. Wilke explained during her testimony that a "specific learning *disorder*" as used in the DSM is different from a "specific learning *disability*" (SLD) as used in special education eligibility. *Id.* at 520. A specific learning disorder is a clinical diagnosis, whereas an SLD is an educational classification. *Id.* at 523-34. The four criteria needed to diagnose a specific learning *disorder* are: difficulty in an academic area; onset of that difficulty during school age; a substantial difference in functioning from that of the child's same-age peers; and the difficulty is not primarily related to another condition. *Id.* at 520-21. There are three levels of specific learning disorder that a clinician can identify: mild, moderate, and severe. *Id.* at 522-23. A clinical diagnosis of specific learning disorder does not necessarily mean that a student requires special education services. In an educational setting, to qualify for special education services, there must be an adverse impact from an identified disability on the student such that the student requires specially designed instruction (SDI) in order to access the general education curriculum. *Id.* at 524. These "three prongs" as they are known (disability, adverse impact, and need for SDI) are considered by the District when determining whether a student should be referred for a special education evaluation. *Id.*

20. Dr. Wilke opined that the Student did not meet the criteria for a specific learning disorder based on the results of Dr. Dunbar-Mayer's 2018 evaluation because he was not performing substantially below age-level expectations. Tr. 529 (Wilke).

21. Children with high IQs do not necessarily perform well in all academic areas. Gifted children often have strengths and weaknesses. Tr. 526 (Wilke). When looking at Dr. Dunbar-Mayer's summary of the Student's 2018 evaluation, Dr. Wilke noted that the Student was solidly in the average range for written expression on the WIAT-III composite, which means he was performing just as well as other children his age who took the same test. *Id.* at 529. For this reason, Dr. Wilke does not believe the Student met the diagnostic criteria for an SLD. She would likely not have recommended a special education evaluation for the Student based on the 2018 evaluation alone. *Id.* at 529-30. She would have wanted to know, among other things, how he was performing in the classroom and what his teacher had observed. *Id.* Because testing reflects "one moment in time," a test score alone, according to Dr. Wilke, should not form the basis of a decision regarding whether to refer a child for a special education evaluation. *Id.* at 531.

22. On December 5, 2018, the Mother met with a group of District employees, known as the "Building Guidance Team" (BGT), for a 504 meeting. Tr. 310-11(Winters); P18. The BGT included Ms. Carlson, Ms. Loeser, school principal David Hoffman, Dawn Winters, special

education teacher Heidi Conradt, and District speech-language pathologist Cassandra Wozniak. Tr. 242 (Mother); P18. At that meeting, the Mother described what she had noticed regarding the Student, such as: his frustration with writing, his long run-on sentences that did not really make sense, his lack of punctuation and other writing conventions, his poor spelling, and the fact that these deficits impacted his ability to complete his math homework. She stated that he needed help with writing. *Id.* at 226, 242, 652. She then asked for 504 accommodations. The Mother does not recall if the October 2018 evaluation report was discussed at the meeting, or whether she ever provided it to the District. *Id.* at 654. A special education evaluation was not suggested by anyone, and there was no mention of a “discrepancy” at the meeting. *Id.* at 242-44. At the time of this meeting, the Mother did not believe the Student was a grade level behind in writing. *Id.* at 649.

23. At the conclusion of the meeting, the District personnel informed the Mother that they did not see any adverse educational impact on the Student from any potential disability, and he did not seem to be struggling; rather, he was doing fine. The District team told the mother they did not think the Student needed a 504 accommodation plan. *Id.* at 242-44. Ms. Carlson was already providing the students in her classroom with most of the suggested accommodations because that is “good teaching.” The only suggested accommodation that was not provided to the Student was a weekly teacher-parent meeting. *Id.* at 758-59 (Carlson). The Mother did not receive a Prior Written Notice (PWN) or a notice of procedural safeguards at or after this BGT meeting. *Id.* at 242-44 (Mother).

24. Although the Mother requested a 504 plan in her initial email, Ms. Winters noted that, if information about the Student had come to light at the BGT meeting indicating that a special education evaluation was more appropriate, the team would have considered recommending such an evaluation. Tr. 272-73 (Winters). Ms. Winters specifically recalls receiving Dr. Dunbar-Mayer’s four-page summary report of the October 2018 evaluation, but she did not receive the full evaluation report. *Id.* at 274. Ms. Winters was aware of the Student’s FSIQ score of 137 and written expression composite score of 98 at this meeting, and was aware that this met the OSPI discrepancy criteria, but a discrepancy was not raised or discussed. According to Ms. Winters, the Student’s academic scores were “very solidly” in the average range, indicating no adverse impact on his education that would require specially designed instruction. *Id.* at 277, 312. Ms. Winters testified, “While there may be a discrepancy, we still have to look at adverse impact in the education setting.” *Id.* at 276, 279. No concerns with written expression were raised by the Student’s classroom teacher. *Id.* at 285. A writing grade of 2.5 does not indicate that the Student was experiencing an adverse impact and Ms. Winters did not think any more data collection was warranted. *Id.* at 295, 300. Because this was a 504 meeting, not a special education referral meeting, Ms. Winters did not believe a prior written notice (PWN) was required, and thus one was not issued. *Id.* 315.

25. A preponderance of the evidence indicates that the District was not provided with Dr. Dunbar-Mayer’s full 2018 evaluation report prior to or at the BGT meeting. The Mother does not recall whether she provided that report to the District, whereas Ms. Winters specifically recalls the District did not have that report at the BGT meeting in December of 2018. It is therefore found that the four-page summary report of the October 2018 evaluation (exhibit P4) was the only report provided to the District that was considered at the BGT meeting.

26. Ms. Winters has received ten evaluation reports from Dr. Dunbar-Mayer regarding students in the District. Of those ten, eight students were identified by Dr. Dunbar-Mayer as being twice exceptional. According to the bell curve, only two percent of the population has an IQ of 130 or above, i.e. only two percent of the population could potentially be twice exceptional. This raised concerns in Ms. Winters' mind about Dr. Dunbar-Mayer's evaluation methods. Tr. 307-08 (Winters).

27. The Mother did not raise any concerns to the District about the Student's academic performance during the remainder of his third-grade year. Tr. 672-73 (Mother). However, she believed he was on a "downward trajectory" in third grade because, as the work got harder, his assessment grades went down. *Id.* at 662. The Mother believes the Student was below grade level in some subject areas in third grade because he received 2.5s on his progress report in those areas. *Id.* at 641-42.

28. The Student's teacher did not raise any concerns about his academic performance or his social/emotional status during his third-grade year. Tr. at 673 (Mother). She described him as "a very typical third-grade boy" and observed that he applied what he learned. Tr. 738-40 (Carlson). The Student did not need an unusually high amount of support in the classroom. *Id.* at 747. Ms. Carlson observed the Student to be a classroom leader, and he never appeared to be anxious or withdrawn. *Id.* at 750. She observed him to do a good job advocating for himself in the classroom. He used his iPad appropriately and was not reluctant to use it. *Id.* at 753-54.

29. The Student's end-of-year progress report for third grade indicates that his handwriting was generally, but not consistently, legible. D7. Ms. Carlson described his handwriting as "typical, average, normal third-grade handwriting." Tr. at 769 (Carlson). The Student received 3s on his progress report in the areas of "writing: informative/explanatory structure," and "informative/explanatory elaboration." D7. He received 2.5s in the areas of "writing: opinion structure" and "opinion elaboration," in "writing: narrative structure" and "narrative elaboration," and in "writing language conventions." *Id.* The Student received 2.5s or higher in all areas that were assessed in third grade. *Id.* Thus, the Student was either part way between approaching and meeting standard, was meeting standard, or was exceeding standard in all areas that were assessed. Ms. Carlson described a 2.5 as meaning a student "doesn't have it independently quite yet." Tr. 741 (Carlson). In order to get a 3, a student's writing needs to be close to perfect, and it is difficult to get a 3 in writing conventions. The majority of students get a 2.5 in conventions. *Id.* at 741-42. In Ms. Carlson's view, a 2.5 means a student is "doing incredibly well." *Id.* at 743.

30. The Student's score on the third-grade Smarter Balance English language arts/literacy assessment was a 2559, which put him in the "exceeds the grade level expectations in English language arts" range. He exceeded the average score for students in Washington and for Students in the District. P17 p. 1. The analysis of the score shows that the Student was above standard in reading, listening, and research/inquiry, and was "at/near standard" in writing. *Id.* at 2. On the opinion-writing rubric of the assessment, the Student's performance demonstrated "inconsistent structure including an unclear opinion, uneven development, few transitions, and loosely connected ideas." It showed "uneven elaboration to support the opinion including few facts and details cited from sources, weak elaborative techniques, and ineffective language for the audience and purpose." It also demonstrated a partial understanding of conventions. *Id.*

31. Jessica McMurdie is a pediatric occupational therapist. She is the owner and clinical director of Stepping Stones Therapy Network (Stepping Stones), which provides occupational therapy (OT) for children ages one through eighteen. Tr. 361, 369 (McMurdie). Ms. McMurdie has been a pediatric occupational therapist for twenty years. She holds a Bachelor of Science degree in occupational therapy and a certificate in sensory integration, and she is a “sensory processing advanced mentored clinician – level 1.” P12 pp.7-8.⁹ Ms. McMurdie is a board certified occupational therapist nationally and in Washington State. *Id.* at 9. Stepping Stones began working with the Student in November of 2018 after he was referred by Dr. Dunbar-Mayer. *Id.* at 4.

32. The Student’s initial OT evaluation was performed by Stepping Stones in November of 2018. P12. Standardized tests administered as part of that evaluation included the VMI-6, which tests visual motor integration skills (hand-eye coordination); the Bruininks-Oseretsky-2 (BOT-2 Short Form), which tests fine motor skills; the Sensory Processing Measure (SPM), which is a caregiver questionnaire; and the Integrated Writing Test (IWT) which tests visual motor/handwriting.¹⁰ P12 pp.11-14. The evaluation concluded that the Student had sensory functioning similar to that of typical children. *Id.* at 17. The BOT-2 indicated the Student’s fine motor skills were on the low end of average. *Id.* at 13. His visual motor skills on the VMI-6 were higher than average for visual motor, and at the low end of average for visual perception and motor coordination. *Id.* at 12-13. His IWT results were average and above average. *Id.* at 14. His handgrip strength was at the low end of average for boys his age. *Id.* at 12.

33. Clinical impressions from the Stepping Stones evaluation concluded the Student was having difficulty remembering how to form certain letters and this was interfering with the fluidity of his writing, and his motor skills did not keep pace with his thoughts. P12 p.14. The evaluation concluded that areas of concern for the Student were: visual perceptual skills, fine motor coordination, core weakness, intrinsic hand muscle weakness, dexterity, and executive functioning skills related to organizing and sequencing thoughts for written expression. *Id.* The executive functioning deficit identified by the evaluation was based on clinical judgment and impression, as well as the amount of prompting the Student required. Tr. 409-11 (McMurdie). In Ms. McMurdie’s professional opinion, the Student had “severe difficulties” in written expression and he lacked the underlying motor function to organize his thoughts when writing. P12 p.3.

34. Based on the evaluation, the Student began receiving OT at Stepping Stones for one hour per week on November 5, 2018. He worked with therapist Jessica Blue, who is supervised by Ms. McMurdie, on goals related to handwriting motor coordination, handwriting executive functioning, typing, self-advocacy, and frustration. P12 pp.2-3; Tr. 378-79 (McMurdie).

35. The Mother does not recall if she provided this Stepping Stones evaluation to the District. Tr. at 654-55 (Mother).

36. The Student was reevaluated at Stepping Stones in August of 2019. That evaluation showed he had made “excellent progress” in that he was able to write for ten minutes without

⁹ Exhibit P12 is numbered incorrectly in that the pages are not in numerical order. The first five pages are correctly ordered as follows: 1, 4, 3, 2, 5.

¹⁰ The version of the IWT used in the evaluation was from 2006. Tr. 408 (McMurdie).

hand fatigue, was able to write a well-rounded paragraph with moderate assistance for clarity and legibility, and could type eleven words per minute. P12 p.21. His handgrip strength had increased. *Id.* at 22. His visual motor score on the VMI-6 was above average, as was his visual perception score, and his motor coordination score had increased but remained on the low end of average. *Id.* at 22-23. The IWT showed average scores in productivity, vocabulary, legibility, and spelling, and low average scores in clarity and punctuation. *Id.* The evaluation noted that the Student's handwriting performance varied greatly depending on his level of self-regulation and he continued to have difficulty with letter formation, sizing and legibility. *Id.* at 24. From this evaluation, Ms. McMurdie concluded the Student continued to have deficits in written expression and needed therapy every other week for 6-9 months. *Id.* at 3, 24.

37. The August 2019 evaluation also recommended classroom accommodations for the Student while at school, such as a rubric for written assignments, a word bank for transition words, graphic organizers, and the opportunity to self-edit. Tr. 384 (McMurdie).

38. Jennifer Anderson is the District's occupational therapist. She holds a bachelor's degree in health and human physiology, and a master's degree in occupational therapy. Tr. 898 (Anderson). She has been a licensed occupational therapist since February of 2019 and has worked at the District since becoming licensed. *Id.* at 899. According to Ms. Anderson, none of the Student's scores on the VMI-6 in the 2019 evaluation, standing alone, would qualify the Student for special education services in the area of fine motor in the public school setting. *Id.* at 926.

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39. On September 16, 2019, the Mother wrote to the principal of Island Park and asked for 504 accommodations for the Student during fourth grade because she had observed a downward trend in his progress report scores. Tr. 248 (Mother). She believed he was "losing ground" in terms of writing and that the Stepping Stones reevaluation supported her observation. *Id.* In that letter, the Mother stated the Student was previously diagnosed with a specific learning disorder in written expression, and that he continued to struggle with writing. She included the Stepping Stones reevaluation report of August 2019. D10. After she sent the letter, the District offered to hold another BGT meeting regarding the Student. Tr. 253-54 (Mother). The Mother then scheduled a reevaluation with Dr. Dunbar-Mayer, and sought representation from attorney Lara Hruska. *Id.*

40. Lauren Koshar is a "learning specialist" with expertise in language-based learning differences.¹¹ Ms. Koshar owns a business called Beautiful Brains Academic Intervention, and has been a learning specialist for approximately three years. P6 p.2. She began working privately with the Student in October of 2019. Ms. Koshar works with the Student for 50 minutes twice per week. Tr. at 62 (Koshar). Ms. Koshar observed the Student's handwriting was difficult to read

¹¹ Ms. Koshar holds a bachelor's degree in natural sciences, and received her teaching certificate from the University of Washington. Tr. 66 (Koshar). She does not have a special education endorsement. *Id.* at 68. Ms. Koshar taught public school for four years prior to 1990, and is currently a certificated teacher for grades K-12. Her certification lapsed for approximately 20 years after she stopped teaching in 1990. *Id.* at 31-32, 67-71.

and her initial work with him, from October to approximately December of 2019, focused on teaching him cursive handwriting. *Id.* at 47, 90. In January or February of 2020, she began working with the Student on essay writing, focusing on spelling, expression, and punctuation. *Id.* at. 39-41, 90. Ms. Kosher progressed to working with the Student on sentence structure, recognizing sentence fragments, recognizing run on sentences, and composing paragraphs. *Id.* She observed the Student needed improvement in his editing skills, and in expressing himself in an organized manner. *Id.* at 43-44. Ms. Koshar did not develop written goals for the Student. She consistently referred to the Student as having dyslexia during her testimony, and believes Dr. Dunbar-Mayer had diagnosed the Student as being dyslexic. Tr. 75 (Koshar).

41. Dr. Dunbar-Mayer conducted a second evaluation of the Student in October and November of 2019 (November 2019 evaluation) because the Parents continued to have concerns about the Student in the area of writing, and had new concerns about his emotional functioning. Tr. 147-48 (Dunbar-Mayer). Based on the November 2019 evaluation, Dr. Dunbar-Mayer determined the Student had benefitted from private occupational therapy, but was experiencing difficulties in learning and in his social/emotional functioning. P3 p.2. Dr. Dunbar-Mayer was told by the Parents that the Student was not receiving the necessary support at school, and Dr. Dunbar-Mayer opined that, as a result of that lack of support, the Student was experiencing increased stress and frustration regarding his writing abilities. *Id.*; Tr. 198-200 (Dunbar-Mayer).

42. When performing the November 2019 evaluation, Dr. Dunbar-Mayer did not observe the Student in his classroom, did not review any of his schoolwork, and did not talk with his teachers. Dr. Dunbar-Mayer did receive a Behavior Assessment System for Children - 3rd Edition (BASC-3) questionnaire completed by the Student's teacher, and none of the scores she reported were in the "at-risk" range. P3 p.3; Tr. 204, 209-11 (Dunbar-Mayer). Dr. Dunbar-Mayer also reviewed the Student's Smarter Balanced Assessment scores, his third-grade report card from Island Park, and the re-evaluation from Stepping Stones. Tr. 205 (Dunbar-Mayer).

43. As part of the November 2019 evaluation, Dr. Dunbar-Mayer again administered the WISC-V and determined the Student had a FSIQ of 143 (as opposed to 137, as had been determined in the October 2018 evaluation). P3 p.4. Based on subtests of verbal comprehension, visual-spatial, and fluid reasoning indices of the WISC-V, Dr. Dunbar-Mayer further determined that the Student's General Ability Index (GAI) was 145, which is in the very superior range at the 99th percentile. *Id.* pp.4-5. (This score was determined to be 136 in the October 2018 evaluation. *Id.* at 5.)

44. On the WIAT-III, also administered as part of the November 2019 evaluation, the Student achieved a composite score of 95 in written expression, which equates to the 37th percentile. P3 p.6. This score was 98 in the previous evaluation, but the difference is not clinically significant. Tr. 202 (Dunbar-Mayer). The Student's spelling ability was in the lowermost tier of the average range, and his sentence building and essay composition skills were in the average range. P3 p. 7. The Student's visuomotor integration skills were in the low average range, and his fine motor skills were average. *Id.* at 8.

45. As part of the social/emotional/behavioral portion of the November 2019 evaluation, Dr. Dunbar-Mayer administered the Revised Children's Manifest Anxiety Scale-2nd Edition (RCMAS-2) and the BASC-3. P3 p.9. The Student reported, among other concerns, that it is hard for him

to keep his mind on schoolwork, he worries about what is going to happen, nobody listens to him, he feels lonely, and his life is getting worse and worse. *Id.*

46. Following the November 2019 evaluation, Dr. Dunbar-Mayer diagnosed the Student with specific learning disorder in written expression - moderate; twice exceptional; and "specified anxiety/depressive disorder." P3 p.11. He changed the specific learning disorder level from "mild to moderate" to "moderate" because the Student was receiving OT and tutoring support but was not making adequate progress to close the gap between his writing ability and his intellectual functioning. Tr. 203-04 (Dunbar-Mayer). In the "Recommendations" section of the evaluation report, Dr. Dunbar-Mayer noted that the Student was "previously denied specialized accommodations via a Section 504 Accommodation Plan last year." P3 p.12. He further noted that the Student "presents with learning deficits in written expression and these vulnerabilities have detracted from his capacity to demonstrate academic proficiencies commensurate with his profound intellectual giftedness." *Id.* Dr. Dunbar-Mayer recommended the Student be provided with specialized services and accommodations via an IEP under the disability category of SLD. *Id.* However, Dr. Dunbar-Mayer conceded that, while he is able to make recommendations, it is up to the Student's IEP team to determine whether the Student is eligible to receive special education services. Tr. 164-65, 190 (Dunbar-Mayer).

47. Dr. Dunbar-Mayer went on to recommend in the November 2019 evaluation report that the Student be provided with targeted instruction in written expression by a special education teacher for 30 minutes, five times per week. P3 p.13. He based this recommendation, in part, on his conclusion that the Student had been receiving private one-on-one tutoring and OT services but still was not making adequate progress. Tr. 155 (Dunbar-Mayer). However, he did not know what the Student was working on with Ms. Koshar and did not speak to Ms. Koshar as part of the evaluation. *Id.* at 207. Dr. Dunbar-Mayer also recommended the Student be directly taught organizational strategies, and be provided with weekly check-ins by the school counselor. *Id.* at 155. Dr. Dunbar-Mayer also laid out recommended accommodations for the Student, including additional time on tests, reduced writing demands, ability to type assignments, preferential seating, copies of teacher notes, access to an iPad, and use of a scribe, among others. *Id.* at 14. He also recommended the Student continue to receive services from Lauren Koshar and that he be referred to one of three listed psychologists to obtain cognitive behavioral therapy. *Id.* at 15.

48. The Parents were provided with a summary of the November 2019 evaluation, which set forth Dr. Dunbar-Mayer's recommendations. P5.

49. The BGT met regarding the Student on November 6, 2019. Tr. 255 (Mother); D15. Prior to this meeting, on October 31, 2019, Ms. Hruska emailed Ms. Battersby, the District Executive Director, and asked that the Student's potential eligibility for special education be evaluated. P25. The Mother believes she gave the District the November 2019 evaluation summary at the meeting. She does not recall if she ever gave the District the full evaluation report. Tr. 324-25 (Mother). Ms. Winters recalls receiving only the evaluation summary. *Id.* at 301 (Winters). The ALJ finds that the Mother provided the District with only the summary of the November 2019 evaluation at this meeting, not the full evaluation report.

50. At the BGT meeting, the Student's fourth-grade teacher, Ahisha Avant,¹² reported that he was doing well and was on par with grade-level expectations, and his writing was comparable to that of other students. D15 p.1. She did not believe he needed SDI in any areas. Tr. 822 (Avant). She had no concerns about his handwriting and noted that he was capable of producing neat, legible work. *Id.* at 823. She also noted that the Student completed and performed well on classroom spelling tests. *Id.* at 82. The Mother expressed concern that the Student was overwhelmed and anxious, particularly around writing tasks, and that he felt isolated and that he had no friends. D15 p. 1. The team noted the need to determine whether the Student required SDI, but that current standardized test scores and classroom observations were "not a red flag for SDI." The report of the meeting specifically noted that the "school team" does not think SDI is warranted. *Id.* at 2.

51. The District evaluated the Student for special education eligibility in December of 2019 and January of 2020. The evaluation was conducted by Dr. Wilke. She met with the Student three times and the testing took approximately three and one half hours of total time. Tr. 587 (Wilke). Among the assessments administered by Dr. Wilke was the Woodcock-Johnson-4th Edition: Tests of Cognitive Abilities (WJ-IV: COG). The scores on that battery of tests indicated the Student fell in the high average to superior range on measures of comprehension-knowledge, fluid reasoning, and novel problem-solving abilities. He fell in the average range on measures of short-term working memory, auditory processing, and cognitive efficiency. D23 p. 11. Notably, the Student's Gf-Gc composite score on the WJ-IV: COG was 127. D24 p.1. This score represents the Student's fluid reasoning ability (Gf) and crystallized intelligence (Gc, i.e. material that has already been learned). The Gf and Gc are two primary components of intelligence. Tr. 558-59 (Wilke). The Student's GAI score according to the WJ-IV: COG was 108, which is in the 70th percentile, i.e. the average range.¹³ D23 pp.11-13.; Tr. 560 (Wilke).

52. Dr. Wilke administered several academic assessments to the Student, including the Kaufman Test of Educational Achievement-3rd Edition (KTEA-3), the Woodcock-Johnson-4th Edition: Tests of Achievement (WJ-IV: ACH), the Test of Written Language-4th Edition (TOWL-4), and the Process Assessment of the Learner-2nd Edition (PAL-2). D23 p. 13. The Student's skills on standardized writing assessments generally fell within the average range, but were lower than his performance in other academic areas. Weaknesses were evident in skills such as spelling, conventions, word choice, and sentence formulation. These weaknesses affected the readability of his work and impacted his ability to communicate his thoughts and ideas in clear and coherent written form. D23 p.15. The Student scored in the 34th percentile on spelling of dictated words in isolation, the 37th percentile on spelling of words in dictated sentences, the 37th percentile in understanding and use of punctuation in dictated sentences, and the 37th percentile in completing a story with words and sentences and then retelling it. *Id.* at 16-15. However, his ideas and thought processes were "on target," leading to a "solidly average" score in composition fluency. Tr. 566-67 (Wilke). Dr. Wilke noted that the individual writing instruction and OT the Student had received from private sources "could not be ignored" as those services had potentially rendered

¹² Ms. Avant holds an undergraduate degree in liberal studies. She holds master's degrees in teaching and in human resources, and is a certificated teacher. Tr. at 796 (Avant). She has taught third and fourth grade for five years. *Id.* at 795-97.

¹³ No evidence was presented as to why this score is so much lower than the FSIQ scores obtained by Dr. Dunbar-Mayer. However, the Parents did not contest the appropriateness of the District's cognitive and/or academic testing, and did not take issue with the District's GAI determination.

a positive effect on the Student's ability to perform in the average range on the assessments of these skills. D23 p.15.

53. Dr. Wilke assessed the Student's handwriting as part of the evaluation. The Student performed in the average range on this assessment. Tr. 563 (Wilke); D23 p.14. His letters were quite small but were distinguishable according to the evaluation criteria. His handwriting became less legible over time. *Id.*

54. The fine motor portion of the evaluation was performed by Ms. Anderson. School-based occupational therapists identify and support students who have fine motor, visual motor, visual perceptual and/or sensory processing disorders that may inhibit their ability to fully access and participate in their education or functioning during the school day. Tr. at 900 (Anderson). School-based occupational therapists do not deliver instruction in the area of writing or written expression. *Id.* at 900, 928-29.

55. Ms. Anderson had attended the BGT meeting on November 6, 2019. She noted that the Stepping Stones reevaluation of August 2019 had been reviewed before the meeting, and the Student's scores were all average or above average. The decision to continue OT at Stepping Stones was based on the staff's clinical judgment. Tr. 906 (Anderson). Nothing in the 2019 evaluation caused Ms. Anderson to believe the Student needed SDI in the area of fine motor. *Id.* at 929. Similarly, nothing in the 2018 Stepping Stones evaluation caused Ms. Anderson to believe the Student needed SDI in fine motor.¹⁴ *Id.* at 940-41.

56. Ms. Anderson administered the Developmental Test of Visual Perception (DTVP-3) to the Student. He scored in the average or above average range on all parts of that assessment. She also administered the BOT-2. D23 p. 19. The Student scored in the average or above average range on all subtests of that assessment. In addition, Ms. Anderson observed the Student in his classroom during his writing period. *Id.* at 20. She noted that he was able to sit upright in his chair, thereby demonstrating core strength. He held his pencil with a correct grasp. He manipulated materials with his hands and fingers. He aligned letters correctly on the page, and he was able to cut shapes. Everything she observed was age appropriate and she had no concerns about the Student's fine motor skills. Tr. 913-16 (Anderson).

57. Ms. Anderson spoke with the Student's therapist at Stepping Stones, Jessica Blue, as part of the evaluation. Ms. Blue acknowledged that the scores the Student had achieved on the evaluations at Stepping Stones would probably not qualify him for special education services. Tr. 932 (Anderson).

58. Based on her evaluation of the Student, Ms. Anderson concluded that his fine motor coordination and visual motor integration skills are within and above the expected range of performance for a student his age, and that occupational therapy services in the educational setting are not necessary. D23 p. 17.

59. Ms. McMurdie of Stepping Stones took issue with the appropriateness of Ms. Anderson's evaluation at the due process hearing. Ms. McMurdie opined that the evaluation was not

¹⁴ Ms. Anderson first received and reviewed the 2018 Stepping Stones evaluation prior to performing her assessment of the Student. Tr. 920 (Anderson).

appropriate because it was too broad and the tests administered did not focus on the Student's areas of deficiency. P12 p.2. Ms. McMurdie also opined that the DTVP-3 evaluates visual processing skills and does not correlate with the Student's needs in the area of handwriting, and that the BOT-2 failed to assess his deficits in written expression and executive functioning. *Id.* Ms. McMurdie further opined that the District should have considered the Stepping Stones evaluations, which were more thorough and contained clinical observations from working with the student for months. She opined that Ms. Anderson "lacked clinical reasoning and did not exercise professional judgment in drafting this portion of the evaluation." P12 p.2.

60. Ms. Anderson disagrees with Ms. McMurdie's opinion of the District's OT evaluation. Tr. 942-43 (Anderson). According to Ms. Anderson, the DTVP-3 looks closely at eye-hand coordination, similar to the VMI, and the BOT looks closely at manual dexterity and fine motor coordination, which contribute to handwriting ability. *Id.* Written expression was assessed by Dr. Wilke and was not Ms. Anderson's responsibility to assess. Moreover, Ms. Anderson spoke with the Student's classroom teacher and observed him in his classroom, as well as in a one-on-one setting. *Id.* at 944. She reviewed the Stepping Stones evaluations and spoke with Ms. Blue as part of her evaluation. Ms. Anderson stands by her determination that the Student did not meet the criteria to qualify for special education services in OT, and that there was no showing of adverse impact on his ability to access his education based on fine motor skills or handwriting. *Id.* at 945.

61. Dr. Wilke performed a social-emotional evaluation of the Student as part of the eligibility evaluation. D23 pp.9-10. All scores on Parent, teacher, and Student standardized ratings fell within the average range in social-emotional and behavioral functioning, with the exception of a mild elevation on behaviors relating to emotional regulation as assessed by the Parents. *Id.* Dr. Wilke had no concerns about the Student's social-emotional status based on the evaluation. Tr. 554 (Wilke).

62. After completing the evaluation, Dr. Wilke's professional opinion was that the Student generates good thoughts and ideas for use in written expression. He "could use work with punctuation and spelling ... [b]ut that support could come in a number of different ways." Tr. 571 (Wilke). She would not have recommended the Student receive SDI because supports in the general education program would have been able to address his weaknesses. *Id.* at 571-72.

63. The District provided the results of the January 2020 evaluation to the Mother at an evaluation team meeting held on January 29, 2020. The District informed her that the Student did not qualify for special education services. Tr. 330 (Mother). The evaluation team determined he could be served through section 504 accommodations in the general education program. They determined there was no educational impact from any potential disability in that the Student had been able to access the general education curriculum and make progress toward grade level standards, and he exceeded standards on the state-mandated Smarter Balanced Assessment. D23 p. 24; Tr. 506 (Wilke). Dr. Wilke agreed with this decision. Tr. 572 (Wilke).

64. The Mother refused to sign the "piece of paper that didn't have anything attached to it" that was presented to her at the evaluation team meeting. Tr. 330 (Mother). She stated to the team that she needed to consult with her attorney. The Mother believed that writing had become a huge source of stress for the Student that continued to worsen in the 2019-20 school year. His

spelling had become so problematic that the Mother discontinued having him write the words and instead allowed him give oral answers to her. *Id.* at 717.

65. According to Dr. Wilke, the Mother was disappointed by the determination that the Student was not eligible and planned to consult an attorney. Tr. 506 (Wilke). Dr. Wilke met with Dr. Sue Ann Bube, District Director of Student Services, and was “encouraged to revisit the eligibility with an eye to finding him entitled to services.” *Id.* at 506-07, 573, 585-86. Dr. Wilke determined, after thinking about the decision, that she should have contacted Ms. Koshar to determine what supports Ms. Koshar had been providing to the Student. *Id.* at 507. Dr. Wilke rewrote the evaluation summary (D23 p.4) after consulting with Dr. Bube. Tr. 573 (Wilke).¹⁵

66. Approximately a week after the meeting, the Mother got a call from Ms. Wilke informing her that the District had changed its decision and was finding the Student eligible for special education services. *Id.* at 331. The PWN issued on January 29, 2020, proposing to initiate an eligibility category reevaluation, states that the Mother planned to consult with legal counsel after reviewing the initial report, and that the team reversed its position “after further deliberation.” D23 p. 24.

67. After the determination was changed, the “LD Addendum Summary of Deliberations”¹⁶ page of the evaluation report indicated that the Student has an SLD in written expression due to the finding of a severe discrepancy between achievement and ability, which is not correctable without special education and related services. D23 p. 21. The basis for this determination was as follows:

Although [Student’s] performance on standardized assessments of written language falls within the average range, he demonstrates deficits in specific elements of composition that significantly affect the readability of his work and impact his ability to communicate his thoughts and ideas in written form. His performance on writing tasks is also significantly lower than would be predicted by his thinking and reasoning abilities, and lower than his reading and math skills, suggesting an area of specific deficit. In addition, [Student] has been receiving weekly private tutoring and occupational therapy services to support writing development which may be mitigating the effects of his deficits.

P23 p. 21. The LD Addendum goes on to state that the evaluation team used “professional judgment” to determine that the Student is eligible to receive special education services. *Id.* at 22. This “professional judgment” consisted of using the Student’s Gf-Gc score of 127, rather than his GAI score of 108, in order to determine that a discrepancy existed. Tr. 574-75 (Wilke). Additionally, because he was performing in the average range, professional judgment was exercised to determine that the Student was eligible for special education services. *Id.*

¹⁵ It does not appear that Ms. Wilke ever contacted Ms. Koshar. Tr. 507-08 (Wilke).

¹⁶ Although this was not made clear at the hearing, the ALJ infers that “LD” stands for “learning disability.”

68. No evidence was presented purporting to explain the difference between the GAI score of 108 determined by the District, and the FSIQ scores of 137 and 143, and GAI scores of 136 and 145, determined by Dr. Dunbar-Mayer.

69. The special education teacher on the evaluation team, Heidi Conratt,¹⁷ dissented from the revised determination that the Student was eligible for special education. She wrote on February 13, 2020, that, while the Student showed a relative weakness in writing skills in comparison to reading and math, she did not believe his writing ability inhibited him from accessing the general education curriculum. She did not believe he required SDI to access the classroom curriculum.¹⁸ D23 p. 23.

70. Ms. Conratt met with Dr. Bube and Principal Hoffman after learning of the decision to change the Student's eligibility determination. Dr. Bube informed Ms. Conratt that, in an effort to work with the family, she had decided to provide the Student with an IEP. Tr. 969-70 (Conratt). Ms. Conratt felt this was a compromise to "make the family happy," and that an exception to the usual special education eligibility criteria was made for the Student. *Id.* at 970, 997.

71. An IEP was prepared for the Student by Ms. Conratt. D31. The "Adverse Impact Summary" of the IEP states:

[Student's] specific learning disability in written expression affects his ability to communicate his thoughts and ideas in a clear and cohesive manner. He has a well-developed oral vocabulary but when required to communicate in writing, his word choice tends to be simplistic. He has good ideas when composing narratives but struggles to organize his thoughts clearly. [Student] has not yet mastered grade level spelling patterns and he does not utilize conventions such as punctuation and capitalization, which makes his writing difficult to read. When constructing an informative piece or retelling a story, [Student] does not vary his use of transition words and instead uses "and then" or "so" to string together a list of events. [Student's] weak orthographic knowledge (spelling), lack of editing, poor legibility, and limited word choice make his written work difficult to follow. [Student] requires specially designed instruction in written expression to address these areas of need.

D33 p. 6.

72. When preparing the IEP, Ms. Conratt had to revise the Student's lone goal, and the method by which to assess whether he met it, because he scored so highly on assessments she gave him on February 24, 2020, that there was no room for growth. D31 p. 1. The finalized IEP contains only one goal, which reads:

¹⁷ Ms. Conratt holds a bachelor's degree in special education, a master's degree in education, and a specialist certificate in school psychology. Tr. 960 (Conratt). She is a certificated teacher and holds a special education endorsement. *Id.* at 961-63. She is qualified to work as a school psychologist, and did so in Utah for two and a half years. *Id.*

¹⁸ It is common for elementary school students to be able to express themselves more fully orally than in writing. They have had much more practice talking than writing, so speaking ability is typically more advanced. Tr. 1013 (Conratt).

By 02/25/2021, when given a writing prompt or assignment Student will write at least a 6 sentence response and self-edit it for content, conventions and language improving written expression from writing at least a 6 sentence response with an average score of 2.05 points on a 4th grade, 4-point rubric measuring content, conventions and language (see attached [rubric]), to an average score of 3.0 points over 4 consecutive writing responses as measured by data collection on goal performance probed at time of progress reporting and/or previously observed performance.

D33 p.7.

73. This goal sets an expectation that is higher than what would be expected of a typical fourth-grade student in general education. Producing an independently-written, self-edited work is challenging for a fourth grader. Tr. 987 (Conradt). Ms. Conradt views this SDI as “enrichment” for the Student rather than instruction that is needed for him to keep pace with the curriculum. *Id.* at 988. Ms. Conradt’s understanding of the Parents’ expectation is that they want the Student to perform perfectly on his initial draft writing projects. *Id.* at 989. This is not the typical expectation of a fourth grader. *Id.* at 990.

74. The initial draft of the Student’s IEP offered ten minutes of SDI in writing two times per week. D33 p.7. Ms. Conradt believed this level of service would be sufficient to meet the Student’s needs. Tr. 972-73 (Conradt). An IEP meeting was held on February 26, 2020, to discuss this IEP. By the time of the meeting, the IEP had been revised to offer fifteen minutes of instruction twice weekly.¹⁹ Tr. 332 (Mother). The Mother did not agree to this IEP because the Student had been receiving far more minutes of instruction in writing from private providers, and she did not feel 30 minutes per week was enough. *Id.* at 332-33, 697. In contrast, Ms. Conradt felt that fifteen minutes twice weekly was adequate based on the Student’s evaluation. According to her, “He was able to successfully be in the general education classroom, and pulling him out just made very little sense.” *Id.* at 991 (Conradt). Moreover, the District is required to educate students in their least restrictive environment. Ms. Conradt opined that 150 minutes of SDI would be too much and would cause the Student to miss more general education than necessary. *Id.* at 998.

75. The IEP team reconvened on March 12, 2020. At this meeting, the District agreed to increase the amount of SDI in written expression to 15 minutes, four times per week. The District concedes in its post-hearing brief that this increase in services was “an ongoing effort to work with the family and their counsel.” District Post-Hearing Brief p. 20. The Mother initially agreed to this, but at some point after the meeting, Ms. Hruska informed the District that this offer was unacceptable and the Parents wanted 150 minutes of SDI per week. Tr. 333, 703. (Mother). The District sent a PWN to the Parents describing the reasons that 150 minutes of SDI each week was rejected. The District asserted that the Student was showing grade-level skills in writing. D34 p.3. The Parents disagreed with this and attributed the Student’s growth to private, out-of-school interventions. P21 p.1. The Mother and her attorney revised the PWN to reflect their assertion and sent it back to the District. Tr. 335-38 (Mother).

¹⁹ This change was based on an email exchange between the Mother and Ms. Conradt wherein the Mother advised that the Student would be willing to try pull-out SDI. D32.

76. The Student's finalized IEP, dated March 2, 2020, provides:

Specially designed instruction will consist of individualized lessons and practice presented in the special education classroom, 2 times a week, prepared, adjusted and monitored by the Special Education Teacher. Specially designed instruction is designed to provide grammar, format, and spelling lessons which are meant to be practiced in his general education classroom. This allows for a minimal amount of time out of the general education classroom.

D33 pp.3, 7.

77. The above is inconsistent with the service matrix set forth later in the IEP, which provides for 15 minutes of SDI four times per week. D33 p.12.

78. The Student received special education services as called for in the IEP after the IEP was implemented, and the Parents do not take issue with how the IEP, as written, was implemented. Tr. 880 (Hruska).

79. In Dr. Dunbar-Mayer's opinion, the District's provision of fifteen minutes of SDI in written expression four times per week is inadequate. He recommends the Student receive 30 minutes of SDI five times per week, for a total of 150 minutes per week. He bases this recommendation on the Student's lack of progress in closing the gap between his level of intelligence and his scores in written expression, "lack of sufficient intervention support" after the first evaluation in 2018, the Student's third-grade report card scores, and Dr. Dunbar-Mayer's belief that the Student has difficulty advocating for himself in the classroom. P1 p.8; Tr. 153, 157 (Dunbar-Mayer). Dr. Dunbar-Mayer is not familiar with the "particulars" of special education services in the District. Tr. 214-15 (Dunbar-Mayer). Ms. Koshar concurs with Dr. Dunbar-Mayer and believes the Student needs approximately 150 minutes of SDI per week, as does Ms. McMurdie. Tr. 63 (Koshar); P12 pp.2-5.

80. Ms. Avant observed the Student to be on par with his classmates in all academic areas in fourth grade. Tr. 799 (Avant). She had no concerns regarding his writing abilities. *Id.* at 803. On his fourth-grade year-end progress report, the Student received 3s in "writing: informative/explanatory structure," in "writing: informative/explanatory elaboration," and "writing: narrative structure." He received 2.5s in "writing: narrative elaboration," and in "language conventions." P15 p.2. In the third trimester comments, Ms. Avant noted that the Student "made such progress in his writing." *Id.* She also noted that the Student's handwriting is generally, though not consistently, legible. *Id.* p. 1. When he slowed down and focused, he was able to write legibly, and Ms. Avant had no concerns about his handwriting. Tr. at 839-40 (Avant). It is not unusual for student to receive a 2.5 in language conventions. *Id.* at 841.

81. The Student did not receive any score less than a 2.5 in any subject area on his fourth-grade progress report. P15. Ms. Avant had no concerns about the Student's social skills, and did not observe him to be anxious or withdrawn. Tr. 845-46 (Avant). He was well able to keep up in class and never needed a scribe. She thought he did "a wonderful job" in fourth grade. *Id.* at 846-47.

82. The Parents are seeking to recover from the District \$13,177.90 in out-of-pocket expenses. This figure includes the cost of services from Beautiful Brains (Ms. Koshar), from Dr. Dunbar-Mayer in 2018 and 2019, and from Stepping Stones, as well as psychological services provided by the Evidence Based Treatment Centers of Seattle (EBTCS). P20; Tr. 613-14 (Mother). EBTCS provided psychological services for the Student at the recommendation of Dr. Dunbar-Mayer from January 31, 2020, through March 27, 2020. *Id.*

83. The Parents are also seeking an award of compensatory education of 150 minutes per week, commencing as of October of 2018. Tr. 618-19 (Mother).

84. As argued and ruled upon on the record, relief sought by the Parents is limited to the time period preceding closure of the District school buildings due to the COVID-19 crisis, which occurred on March 12, 2020. C1; Tr. 879-890 (ALJ, colloquy).

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

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

The IDEA and FAPE

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

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures

reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

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

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

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

Id. at 188-189.

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

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

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

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

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

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

7. When a student is fully integrated in the regular general education classroom, provision of FAPE typically means providing a level of instruction reasonably calculated to permit the child to advance through the general curriculum. *Andrew F.*, 137 S. Ct. at 1000.

Whether the District violated its Child Find obligations by failing to identify and evaluate the Student for special education in October of 2018, when a private evaluation demonstrating eligibility was provided to the District.

8. The IDEA mandates that school districts shall conduct “Child Find” activities “calculated to reach all students with a suspected disability for the purpose of locating, evaluating and identifying students who are in need of special education and related services, regardless of the severity of their disability.” WAC 392-172A-02040(1). The IDEA further mandates that school districts shall have policies and procedures in effect that describe the methods used to conduct Child Find activities. Methods used may include, but are not limited to, activities such as:

Using internal district child find methods such as screening, reviewing district-wide test results, providing in-service education to staff, and other methods developed by the school districts to identify, locate and evaluate students including a systematic, intervention based, process within general education for determining the need for a special education referral.

WAC 392-172A-02040(3)(f).

9. A “specific learning disability” is defined in the Washington Administrative Code as follows:

Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia, that adversely affects a student's educational performance.

WAC 392-172A-01035.

10. OSPI’s “Identification of Students with Specific Learning Disabilities” document contains the severe discrepancy table and provides guidance to school districts regarding SLD eligibility determinations. The document provides that a determination of SLD cannot be made using a single criterion, i.e. teams may not use one screening assessment score, one observation, or a single assessment score to determine eligibility.²⁰ Regardless of the process used to determine SLD eligibility (severe discrepancy, research-based intervention, or a combination of both), the following three criteria must be met: (1) determination of underachievement in that the student does not achieve adequately for his age or meet state grade level standards in one or more areas, including written expression; (2) determination that a student’s underachievement is not due to lack of appropriate instruction; and (3) observation in the student’s learning environment including the general education classroom.²¹

²⁰ https://www.k12.wa.us/sites/default/files/public/specialed/pubdocs/sld_guide.pdf. at p. 1.

²¹ https://www.k12.wa.us/sites/default/files/public/specialed/pubdocs/sld_guide.pdf. at pp. 2-3.

11. Based on the statutory provisions and guidance above, the issue presented here is whether the Student was “suspected” of having an SLD in 2018, as such a “suspicion” would have triggered the District’s obligation to identify and evaluate the Student for eligibility to receive special education and related services.

12. A disability is “suspected” when a school district “has notice that the child has displayed symptoms of that disability.” *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016). In *Timothy O.*, the child at issue had displayed symptoms of a developmental disorder from a very young age. When he was 27 months old, he began receiving speech, language and occupational therapies at a regional center contracted with the State of California to provide early intervention services to at-risk infants and toddlers. Just before he turned three years old, at which point local school districts typically become responsible for the education of children with disabilities, the Paso Robles School District conducted an initial evaluation of the child. However, the regional center that had been providing services to the child retained the ability to serve him, as well, because it was permitted to continue to service children with “autistic disorder,” among other conditions, such as epilepsy, cerebral palsy and mental retardation. The school district psychologist later admitted that, at the time of the district’s initial evaluation, “there was a possibility of looking at autism as a handicapping condition” of the child. *Id.* at 1114. Rather than scheduling a formal social/adaptive behavior assessment for autism, however, the school psychologist informally observed the child for 30-40 minutes. Based on that brief, casual observation, the district concluded the child had an expressive language impairment and did not need to be assessed for autism. At no point did the district inform the child’s parents that it had considered assessing him for autism but had decided against doing so based on the informal observation. Two weeks after the district’s evaluation, the regional center conducted a psychological evaluation of the child to determine if he had autistic disorder. The child was provisionally diagnosed with “Pervasive Developmental Disorder, Not Otherwise Specified,” a disorder on the autism spectrum, pursuant to that evaluation and was noted to have “autistic symptoms which are a concern.” *Id.* at 1114-15. The evaluator concluded that the child had more conditions than just a language disorder. The evaluator sent her report to the district and it was received prior to the student’s first IEP meeting. Despite its diagnosis and observations, the report was not discussed at the IEP meeting and the district did not revisit its decision declining to assess the student for autism. Rather, the district maintained that the report and observations did not create a suspicion of autism because the earlier informal observation by the school psychologist had dispelled any such suspicions. Almost a year later, based on a second outside evaluation, the district performed an autism evaluation, at which point the child was formally determined to have autistic-like behavior. The Ninth Circuit found the district’s decision not to evaluate the student for autism as part of the initial evaluation was “directly contrary the provisions of the IDEA and our precedent, which establish that if a school district is on notice that child may have a particular disorder, it *must* assess that child for the disorder, regardless of the subjective views of its staff members concerning the likely outcome of such an assessment.” *Id.* at 1121 (emphasis in original).

13. Notice that a child may have a particular disability can come from expressed parental concerns about a child’s symptoms, expressed opinions by informed professionals, or less formal indicators such as the child’s behavior. *Timothy O.*, 822 F.3d at 1121.

A school district cannot disregard a non-frivolous suspicion of which it becomes aware simply because of the subjective views of its staff, nor can it dispel this

suspicion through informal observation. Rather, such notice automatically triggers mandatory statutory procedures: the school district must conduct an assessment for all areas of the suspected disability.

Id. at 1121-22. See *Pasatiempo v. Aizawa*, 103 F.3d 796, 803 (9th Cir. 1996) (“The informed suspicions of parents, who may have consulted outside experts, should trigger the statutory protections.”); *J.K. v. Missoula Cnty. Pub. Sch.*, 713 F. App’x 666, 667 (9th Cir. 2018) (“The duty to evaluate a student arises when disability is ‘suspected,’ or ‘when the district has notice that the child has displayed symptoms of that disability’”); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202 (9th Cir. 2009) (The requirement to evaluate a student may be triggered by the informed suspicions of outside experts).

14. A school district may not take a passive approach and wait for a parent to refer a student for evaluation. Rather, a district is obligated to locate and identify IDEA-eligible students. *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181, 1183-84 (9th Cir. 2010). Moreover, a district is obligated to procure its own evaluation; any failure of the parents to turn over portions of a specialist’s report “cannot excuse the district’s failure to procure the same information for itself.” *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1523 (9th Cir.), *cert. denied*, 513 U.S. 965, 115 S. Ct. 428 (1994).

15. The Parents in the present case did not request a special education evaluation of the Student at any point during the 2018-19 school year. However, they contend that Dr. Dunbar-Mayer’s evaluation of October 2018 raised a suspicion that the Student had an SLD, and consequently that the Student should have been evaluated for special education eligibility. The evidence supports this contention. The District was in possession of Dr. Dunbar-Mayer’s four-page evaluation summary. That document identifies a diagnosis of “specific learning disorder in written expression” which, although different from an SLD, certainly raises a concern. The summary shows a FSIQ in the 99th percentile, and a written expression composite in the average range at 98. Ms. Winters was aware that these scores met the discrepancy criteria, but a discrepancy was not raised or discussed at the December 2018 BGT meeting.

16. The District argues that the Student’s academic scores were solidly in the average range, at the time, indicating no adverse impact on his educational performance by a potential disability, and no need for SDI. Moreover, the staff members who worked with him did not see any indication that the Student was having difficulty accessing the general education curriculum or that he required SDI. However, *Timothy O.* is clear that District staff members’ opinions that the Student did not have an SLD and/or that he did not meet one or even two of the “three prongs” required to qualify for special education does not excuse the District from conducting a formal evaluation to obtain objective evidence and thorough, reliable standardized testing that the IDEA requires. 822 F.3 at 1122. See *Doe v. Cape Elizabeth Sch. Dist.*, 832 F.3d 69, 81 (1st Cir. 2016) (Students with high cognition may still be eligible for special education services based on their difficulty in a particular academic area; because academic performance can mask a learning disability, evaluations for eligibility purposes must use technically sound instruments that assess the relative contribution of cognitive factors).

17. A preponderance of the evidence shows that the scores in the Dunbar-Mayer summary report, combined with the concerns raised by the Parents, gave rise to a suspicion of an SLD that triggered the District’s obligation to identify and evaluate the Student for eligibility to receive

special education and related services in December of 2018. It is concluded, therefore, that the District violated its Child Find obligation at the BGT meeting in December of 2018 when it failed to identify the Student as a child with a suspected disability who may be in need of special education services and failed to refer him for an evaluation.

Whether the District failed to provide prior written notice of its decision to refuse to initiate evaluation or special education service and failed to provide a copy of procedural safeguards in October of 2018 under WAC 392-172A-05010(1)(b) and WAC 392-172A-05015(1).

18. The Parents contend the District should have issued a PWN following the December 2018 BGT meeting pursuant to WAC 392-172A-05010(1)(b). That regulation provides, in part:

- (1) Written notice...must be provided to the parents of a student eligible for special education, or referred for special education a reasonable time before the school district:
 - (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or
 - (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student.

19. According to the Parents, the District “refused” to initiate an evaluation at the December 2018 BGT and, consequently, a PWN documenting this refusal was required. However, it is undisputed that special education and/or the need for an evaluation of the Student was never discussed at this meeting. As concluded above, the District’s Child Find obligations were not met at the BGT meeting and the Student should have been referred for an evaluation. However, the claim that a PWN was required to document an action that was never discussed and was never decided, is not supportable. While the practical effect of the BGT meeting may have been that the Student was not referred for an evaluation, it cannot be said that the District “refused” to refer him. “Refusal” implies an act of decision-making, not a passive failure to even address the issue. Requiring a PWN when the District has failed to address an issue or make a decision of any kind would be a highly strained interpretation of the IDEA. On its face, the regulation does not require a PWN in such a circumstance.

20. The Parents further contend the District should have provided the Mother with procedural safeguards at the December 2018 BGT meeting. WAC 392-172A-05015(1) provides, in part:

- (1) School districts must provide a copy of the procedural safeguards that are available to the parents of a student eligible for special education one time a school year, and:
 - a. Upon initial referral or parent request for evaluation;
 - b. Upon receipt of the first state complaint and receipt of the first due process complaint in a school year;
 - c. When a decision is made to remove a student for more than ten school day in a year, and that removal constitutes a change of placement; and
 - d. Upon request by a parent.

21. The reasons for the Parents’ contention are not clear. On its face, the regulation does not apply to the circumstances of the December 2018 BGT meeting: no referral was made; the

Parents did not request an evaluation; and none of the other circumstances enumerated in the regulation existed.

22. It is possible that, had the Mother received a PWN and/or procedural safeguards at the BGT meeting, she would have changed her conduct afterward based on increased awareness of her rights under the IDEA. However, that possibility is more appropriately considered in the analysis as to whether the Child Find violation denied the Student FAPE, not as a separate procedural violation(s).

23. For these reasons, it is concluded that the District was not required to issue a PWN and was not required to provide the Parent with procedural safeguards at or following the December 2018 BGT. No violation of the IDEA is found as to this issue.

Whether the District has failed to deliver FAPE under the IDEA by failing to design an appropriate IEP to address the Student's academic struggles in reading and writing during the 2018-2019 school year and the 2019-2020 school year

24. The Parents contend the District failed to deliver FAPE by failing to design an IEP for the Student that is reasonably calculated to address his struggles in "reading and writing" during his third- and fourth-grade school years. No evidence was presented at the due process hearing that the Student struggled with reading. Therefore, it is concluded that the District did not fail to provide the Student with FAPE in the area of reading.

25. As to the issue of whether the District failed to deliver FAPE under the IDEA by failing to design an appropriate IEP to address the Student's academic struggles in writing during the 2018-2019 and 2019-2020 school years, the 2019-20 school year will be addressed first.

26. In developing an IEP, the IEP team must consider, among other things: the concerns of the parents for enhancing the education of their student; the results of the most recent evaluation of the student; and the academic, developmental, and functional needs of the student. WAC 392-172A-03110(1).

27. "Specially designed instruction" 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(c); 34 CFR §300.39(b)(3).

28. The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry that must focus on the unique needs of the student at issue. As the U.S. Supreme Court has made clear, "A focus on the particular child is at the core of the IDEA," and an IEP must meet a child's "unique needs." *Andrew F.*, 137 S. Ct. at 999 (emphasis in original). "An IEP is not a form document" and the "essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.* However, any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal. *Id.* (emphasis in original; citations omitted). In order for a school district to provide a FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200-201.

29. In the present case, the Parents contend the March 2020 IEP provides inadequate minutes of SDI to address the Student's needs in written expression. The evidence shows the Student was not found to be eligible for special education services after his initial evaluation. When the Mother was informed that the Student did not qualify, she refused to sign the document presented to her at the meeting and informed the District that she would consult with her attorney. It is clear that, after this meeting, Dr. Wilke was pressured by the District Director of Student Services to change the determination and find the Student eligible for services. Ms. Conradt confirmed this when she testified that the District compromised on eligibility in order to "make the family happy," and an exception to the usual special education eligibility criteria was made for the Student. Neither Ms. Wilke nor Ms. Conradt believed, in their profession opinions, that the Student needed SDI. Nonetheless, the District appears to have gone to great lengths to work with the Student's family, and a significant amount of "professional judgment" was required in order to find the Student eligible for special education services.

30. The March 2020 IEP provides for fifteen minutes of pull-out SDI, four times per week, i.e. 60 minutes per week. Ms. Conradt opined that this is very adequate for the Student. Moreover, school districts are required to educate students eligible for special education in their least restrictive environments, pursuant to WAC 392-172A-02050.²² The opinion of Ms. Conradt is accorded significant weight because the evidence indicates the Student was accessing the general education writing curriculum successfully and should therefore be removed from the general education setting as little as possible.

31. The Parents contend 60 minutes of SDI per week is insufficient, and that 150 minutes, as per the recommendation of Dr. Dunbar-Mayer, is more appropriate. This assertion is not supported by the evidence. Dr. Dunbar-Mayer has never worked in a public school and he never observed the Student in the school setting. He is not familiar with the delivery of special education services in the District. There is no evidence that Dr. Dunbar-Mayer knows how much time delivery of SDI to the Student would require. His opinion as to the amount of SDI the Student should receive is therefore given little weight.

32. It is concluded that the Parents have not met their burden of showing the March 2020 IEP is not appropriate. The Parents have not shown the IEP provides the Student with inadequate SDI, and/or is not reasonably calculated to enable him to make progress appropriate in light of his circumstances.

²² WAC 392-172A-02050 provides:

Subject to the exceptions for students in adult correctional facilities, school districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided:

- (1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and
- (2) Special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.

33. As to the 2018-19 school year, the Student had not been determined to be eligible for special education during that school year. The issue, then, is whether the Student was denied FAPE by not having been referred for a special education evaluation that may have found him eligible to receive SDI starting around December of 2018. For the reasons set forth in the “remedies and relief” section, below, it is concluded that the Student was not denied FAPE during the 2018-19 school year by not having been referred for a special education evaluation that may have found him eligible for special education services.

34. In summary, it is concluded that the District did not fail to deliver FAPE under the IDEA to the Student during the 2018-2019 school year and the 2019-2020 school year.

Appropriateness of the District’s OT Evaluation

35. The Parents contended at the due process hearing that the OT evaluation conducted by the District as part its evaluation of the Student was inappropriate. The District objected that this issue had not been raised prior to the hearing and should not be considered by the ALJ.²³ No argument regarding the procedural appropriateness, or the substantive evidence, regarding this issue is set forth in the Parents’ Post-Hearing Memorandum. WAC 392-172A-05100(3) provides, “The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request unless the other party agrees otherwise.” Neither the issue statement contained in the Parents’ due process hearing request, nor the issue statement contained in the controlling prehearing order, raised the appropriateness of the District’s OT evaluation as an issue to be considered at the hearing. The Parents argued at the hearing that the issue is contained within the enumerated issue pertaining to the appropriateness of the IEP because the IEP cannot be appropriate if it is based on a faulty evaluation. The logical extension of this argument is that any inadequacy in the District’s evaluation effects the appropriateness of the IEP and is therefore subsumed in the issue regarding appropriateness of the IEP. This is not in keeping with the intent of WAC 392-172A-05100(3). The Parents could easily have articulated the OT evaluation issue in their original complaint or by amendment to their complaint, thereby putting the District on notice to prepare to litigate the issue at the hearing. The Parents did not do so. It is concluded, therefore, that the issue of the appropriateness of the District OT evaluation was not properly raised at the hearing and it will not be considered.

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

36. The Parents have sustained their burden of proving one violation of the IDEA, the failure of the District to meet its Child Find obligation when it failed to refer the Student for a special education evaluation in December of 2018. A Child Find violation is a procedural violation of the IDEA and the ALJ must determine if the violation led to a denial of FAPE. *See Timothy O.*, 822 F.3d at 1124.

37. As set for above, procedural violations of the IDEA amount to a denial of FAPE only if they:

²³ The ALJ allowed evidence on the issue to be presented at the hearing over the objection of the District, but advised that the relevance of the evidence, if any, would be determined once the case had been heard in its entirety. Tr. 362-65 (ALJ, colloquy).

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

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

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

39. To succeed on a claim that a child was denied FAPE, the aggrieved party need not definitively show that the child's educational placement would have been different absent the procedural violation. *Timothy O.*, 833 F.3d at 1124 (citation omitted). In *Timothy O.*, the Ninth Circuit determined that, due to the district's Child Find violation, the child's IEP team lacked adequate information to craft an appropriate IEP; this denied the student educational opportunities and substantially hindered his parents' ability to participate in the IEP process. *Id.*

40. In the present case, the Parents contend it is unknown whether the Student would have qualified for special education services in October of 2018 had the Child Find violation not occurred. Parents' Post-Hearing Memorandum at 26. Moreover, the Parents may have made different choices after that time had they been apprised of their rights via a PWN and receipt of IDEA procedural safeguards. However, based on the evidence, it is unlikely the Student would have qualified for special education services had he been evaluated in late 2018, or earlier in 2019. As discussed above, the Student was only found eligible in 2019 in an effort to work with the family after the Student was initially determined to be ineligible for special education services. This decision was in opposition to the professional opinions of both Dr. Wilke and Ms. Conradt, and appears to have been made in response to factors apart from the Student's impairment.

41. Further, the record shows the Student's impairment was less severe in 2018 than in 2019. The Student's composite score in written expression on the WIAT-III had dropped from 98 in 2018 to 95 in 2019 (although the change is not clinically significant). His FSIQ increased by six points on the 2019 evaluation, thereby increasing the discrepancy between his FSIQ and the written expression composite score all the more. At the time of the 2019 evaluation, the Student had been receiving OT for a year but his Parents felt he was falling farther behind, and he was deemed by Stepping Stones to still require OT services.²⁴ Dr. Dunbar-Mayer had diagnosed the Student with "mild to moderate" impairment in written expression in 2018, whereas the diagnosis had progressed to "moderate" in 2019. The Mother had observed "downward progress" throughout third grade, and new concerns had emerged about the Student's social/emotional functioning by the time of the 2019 evaluation. In contrast, in 2018, the District staff felt strongly that the Student

²⁴ The Student had been receiving tutoring from Ms. Koshar for only about three months at the time of the 2019 evaluation, and that had focused on learning cursive.

was not showing signs of an adverse educational impact from any potential disability, and that the Student did not need SDI. In short, the Student had milder indications of adverse effects of a potential disability on his educational performance, and milder indications of a need for SDI, in third grade than he did in fourth. Moreover, there is no reason to conclude the District would have been as willing to “work with the family” and essentially grant an exception for the Student in 2018, as it was in 2019.

42. The Parents have failed to show by a preponderance of the evidence that the Student lost an educational opportunity or was deprived of educational benefits as a result of the District’s Child Find violation. Similarly, the evidence does not support a conclusion that the Parents’ opportunity to participate in the decision-making process as to the provision of FAPE to their child was significantly impeded by the District’s procedural violation.

43. It is concluded that the Student was not denied FAPE as a result of the District’s Child Find violation, and the Parents are therefore not entitled to any relief.

Whether the private evaluations and services obtained for the Student between October 2018 and March 2020 were appropriate for him

44. Because it has been concluded that the Parents are not entitled to any relief, the issue of the appropriateness of the private evaluations and services the Parents obtained for the Student, for which they seek reimbursement, need not be reached.

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

ORDER

1. The Parents have failed to prove by a preponderance of the evidence that the Mercer Island School District denied the Student FAPE.

2. All remedies requested by the Parents have been considered and are DENIED.

Served on the date of mailing.



Jacqueline H. Becker
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

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

Parents



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Erin Battersby, Executive Director of Compliance, Legal
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Dated October 2, 2020 at Seattle, Washington.

lan

Representative
Office of Administrative Hearings
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cc: Administrative Resource Services, OSPI