

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

IN THE MATTER OF

EDMONDS SCHOOL DISTRICT

OSPI CAUSE NO. 2020-SE-0140

OAH DOCKET NO. 09-2020-OSPI-01158

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

A due process hearing was held before Administrative Law Judge (ALJ) Jacqueline Becker on January 11, 12, 13 and 14, 2021, via videoconference. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Lara Hruska and Whitney Hill, attorneys at law. The Edmonds School District (District) was represented by Susan Winkelman, attorney at law. Also present for the District was Dr. Hayley Etnier, Director of Special Education.

**PROCEDURAL HISTORY OF THE CASE**

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on September 18, 2020. The Complaint was assigned Cause No. 2020-SE-0140 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A prehearing conference was held before ALJ Becker on October 21, 2020, and the matter was set for hearing. The hearing was held as scheduled.

**Evidence Relied Upon**

**Exhibits Admitted:**

Parents' Exhibits: P1 – P14, P16 and P17

District's Exhibits: D1 - D4

Joint Exhibits: J1 – J18

**Witnesses Heard (in order of appearance):**

Dr. Philip Dunbar-Mayer, psychologist and pediatric neuropsychologist  
Karleen Mars Tamte, certified Wired for Reading specialist  
Rosalyn Newman, mental health counselor and play therapist  
The Student's Father  
Stephanie Craton, Assistant Director at Aspiring Youth  
The Student's Mother

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

Gabriela Indivero, counselor at Aspiring Youth  
Dr. Nancy Torgerson, Doctor of Optometry  
Jessica Ruger, Head of Lower School, Hamlin Robinson School  
Melissa Falleroni, District school psychologist and counselor  
Emily Larsen, District special education teacher  
Catherine Mathias, District fifth grade teacher  
Angela Clarke, District special education teacher  
Mitzi Fike, District fourth grade teacher  
Dr. Hayley Etnier, District Director of Special Education  
Anne Accettullo, District special education teacher  
Mackenzie Hess, District occupational therapist

### **Post-Hearing Briefs**

By order dated February 22, 2021, the due date for post-hearing briefs was set as March 8, 2021. The parties' post-hearing briefs were timely filed.<sup>2</sup>

### **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 by order dated November 24, 2020. The record closed with the receipt of the post-hearing briefs on March 8, 2021, and the due date for the written decision is April 7, 2021.

## **ISSUES/REMEDIES**

The issues considered at the due process hearing are:

- A. Whether the District violated its obligations under the Individuals with Disabilities Education Act (IDEA) and its implementing regulations as follows:
  - i. Whether the District failed to provide the Student with a Free Appropriate Public Education (FAPE) since March 2019 by violating its obligations under Child Find by failing to identify and evaluate the Student for special education in March 2019 when the teacher and Parent both raised concerns regarding a suspected disability and the need for special education services;
  - ii. Whether the District inhibited meaningful participation by the Parents in March 2019 thereby denying the Student a FAPE by:
    - a. Providing affirmative misinformation to the Parents about the District's obligations under Child Find;

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<sup>2</sup> The Parents' post-hearing brief exceeded the allowed limit of 70 pages. Therefore, Exhibit A appended thereto was not considered. Moreover, Exhibit A, a document entitled "Essentials of KTEA-3 and WIAT-III Assessment," should have been offered as an exhibit at the hearing if the Parents wanted it to be part of the record. Merely appending it to a post-hearing brief does not permit the ALJ to consider the document as evidence.

- b. Providing affirmative misinformation to the Parents regarding special education eligibility for children with dyslexia;
  - c. Failing to provide Prior Written Notice (PWN) to the Parents documenting the District's decision not to conduct a special education evaluation to address dyslexia concerns; and
  - d. Failing to provide the Parents with procedural safeguards;
- iii. Whether the District Failed to conduct an appropriate evaluation in May 2019; specifically, by:
- a. Failing to properly evaluate the Student in all areas of suspected need, mainly, by failing to appropriately assess needs in occupational therapy, reading, writing, math, social/emotional, behavior, and vision;
  - b. Failing to consider the private services the Student was receiving in development and consideration of the District evaluation;
  - c. Failing to consider and incorporate Parent and teacher concerns regarding educational impact and performance of the Student in the District evaluation; and
  - d. Failing to appropriately qualify the Student in all areas of need (reading and math) when the Student was displaying a severe discrepancy between intellectual functioning and academic achievement;
- iv. Whether the District failed to educate the Student in her least restrictive environment by failing to consider the availability of push-in services from June 2019 to September 18, 2020;
- v. Whether the District inhibited meaningful participation by the Parents, thereby denying the Student a FAPE, in June of 2019, by:
- a. Providing affirmative misinformation about the availability of push-in services;
  - b. Providing affirmative misinformation regarding the District's obligations to consider private evaluations; and
  - c. Predetermining the decision to decline the Parents' request for push-in services;
- vi. Whether the District failed to timely consider the independent neuropsychological evaluation performed by Dr. Dunbar-Mayer and provided to the District in early June 2020;

- vii. Whether the District failed to offer Individualized Education Programs (IEPs) reasonably calculated to allow the Student to make adequate academic progress from September 2018 to September 18, 2020, that included:
    - a. Specially designed instruction in all areas of need, including math, reading, social/emotional, behavior, fine motor, and vision;
    - b. All related services the Student needs, mainly, occupational therapy, behavior consultation, and vision services; and
    - c. Appropriate personnel to deliver services;
  - viii. Whether the District failed to comply with procedural requirements of the IDEA and in turn failed to provide the Student with FAPE since March 13, 2020, by materially and substantially changing the Student's educational placement to one that is not designed to ensure that she will be able to make meaningful educational progress or meet her unique needs; and
  - ix. Whether the services and evaluations provided by the Parents from September 2018 to September 18, 2020, were appropriate.
- B. Whether the Parents are entitled to their requested remedies, which include:
- i. Declaratory relief finding that the District violated the IDEA;
  - ii. Declaratory relief finding that the Student was denied FAPE by the District's actions;
  - iii. Compensatory special education and related services for the Student to allow her to obtain the educational benefit that she would have received, but for the District's violations of the IDEA and denial of FAPE, consistent with 20 U.S.C. 1415(i)(2)(c)(iii);
  - iv. An Order that the District shall reimburse the Parents for private evaluations and services they obtained for the Student between September 2018 and the present;
  - v. An IEP for the 2020-2021 school year that is developed, reviewed, and revised in accordance with WAC 392-172A-03090 that is appropriate and reasonably calculated to meet the Student's unique needs; and
  - vi. Whatever additional relief the court may find just and equitable.

## 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 11 years old and in fifth grade; she was ten years old at the time of the due process hearing. The Student attended school in the District from first grade through fourth grade. J2 p.6.<sup>3</sup> She was in third grade at Seaview Elementary School (Seaview) in the District during the 2018-19 school year and in fourth grade at Seaview during the 2019-20 school year. J2 p.6; J4 p.5. The Student's Mother describes her as creative, smart, funny, caring, and worldly. Tr. 267.
2. The Student is being homeschooled during the 2020-21 school year. She enrolled part-time in the District on January 4, 2021, for the purpose of receiving special education services. J16.
3. The Student was diagnosed with autism when she was five years old. Tr. 597. She was first evaluated for special education eligibility prior to kindergarten and was found eligible under the category of "developmental delay" due to deficits in her behavior and social skills. J2 p.6. Based on a reevaluation conducted in the 2017-18 school year, the Student's eligibility category was changed to "autism," and she was exited from services in emotional regulation. However, she continued to have difficulty with social skills. J2 p. 7.
4. The Student struggles with sensory issues and significant anxiety. Tr. 268-69. According to the Mother, the Student's anxiety affects sleeping routines, her ability to learn, and relationships within the family. *Id.*
5. Rosalyn Newman<sup>4</sup> is a child and family therapist at Seattle Play Therapy. She has worked with the Student and her family since May of 2014. P16 p.1. Play therapy is a developmentally sensitive model for providing mental health services to children up to age 12, through play. Tr. 184. Ms. Newman worked with the Student on decreasing generalized anxiety symptoms, self-regulation, frustration tolerance, executive functioning, sense of self, and social awareness and

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

<sup>4</sup> Ms. Newman has a Bachelor of Arts degree in clinical psychology, and a master's degree in existential and phenomenological therapeutic psychology. She is a licensed mental health counselor in Washington and a registered play therapist. She is also an adjunct faculty member in the Department of Psychology at Seattle University. P12.

social skills. Tr. 188; P16 p.2. The work on executive functioning included developing flexible thinking, problem-solving, and developing strategies to deal with situations that do not go as expected. Tr. 202.

6. The Student was placed in the Learning Assistance Program (LAP) at Seaview in first grade after a general reading screening. LAP is a pull-out reading program that provides additional reading support to students who qualify. Tr. 601, 816-17. It is not special education. *Id.* at 817.

7. The Parents have been concerned about the Student's vision since she was in first grade. Tr. 272. When she was in second grade, the Student did not pass the school vision screening. The Parents obtained an outside vision evaluation of the Student at Alderwood Vision Therapy Center (Alderwood) on April 6, 2018. *Id.* at 270-71; P3 p.2.

8. The Student presented to Alderwood with blurry vision, farsightedness, and astigmatism. Tr. 356-60. Additionally, her eyes were not tracking properly. "Tracking" refers to the eyes' ability to follow along with the words on a page. After about the age of five, a person's eyes should be able to track without the use of a finger on the page and without head movement. *Id.* at 348. When first assessed, the Student exhibited full head and body movement to try to track the words when reading. This can lead to eye fatigue and frustration. The Student also experienced "stereopsis," in which her left eye would intermittently "turn on and off" because the brain suppresses input from one eye when it needs to in order to avoid double vision. *Id.* at 360-61. Additionally, the Student had "convergence insufficiency," meaning her eyes had difficulty turning, aiming and focusing on the same point. *Id.* at 362; P3 p.5. She would often look at words with her peripheral vision, rather than looking straight on, and this added to the blurring. Tr. 360. Each of these problems can impact one's ability to read. *Id.* at 362.

9. Dr. Kaitlin Hash is a doctor of optometry at Alderwood. P10. She provided services to the Student, as did Kathy Sutherland, an optometric vision therapist. Tr. 353. The Student was prescribed glasses and, beginning in April of 2018, she underwent weekly vision therapy to train her brain and eyes to work together, to teach her eyes how to focus, and to "learn to see with both eyes." *Id.* at 363-64. Dr. Nancy Torgerson is a doctor of optometry, and the owner and director of Alderwood.<sup>5</sup> Tr. 350. Dr. Torgerson opined at the due process hearing that "vision is more than just eyesight;" it is the intake of information, processing of information in the brain, and action that comes from that. Components of vision include depth perception, eye teaming, and focusing. *Id.* at 345. Dr. Torgerson noted that people with ADHD have three times the rate of problems with eye teaming and convergence than does the general population.<sup>6</sup> *Id.* at 347.

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<sup>5</sup> Dr. Torgerson has a Bachelor of Science degree in visual science and a doctorate in optometry. She is a Fellow of the College of Optometrists in Vision Development. Dr. Torgerson is on the faculty of Western University College of Optometry in Pomona, CA, and Pacific University College of Optometry in Forest Grove, OR. P9 p.1.

<sup>6</sup> "Eye teaming" refers to the right and left eyes bringing information to the brain and the brain using the input from both. Tr. 348.

10. According to Dr. Torgerson, “Vision should direct action, whether that be handwriting or tracking across the page with reading. And when there is a mismatch between the eyes or a mismatch on how the tracking – central and peripheral vision work together – it can make for a frustrated learner.” Tr. 345. Notably, a sudden decreased ability of a person’s eyes to track is one sign of a concussion. *Id.* at 346.

11. After the Student completed one year of vision therapy, her progress was “unreal” according to Dr. Torgerson, in that she was able to read a horizontal listing of numbers faster and with many fewer errors than when she started. *Id.* at 365. Her vision was not normal, but it was much closer to normal after the treatment than before. Since leaving treatment, the Student’s vision skills have regressed. *Id.* at 365-66. The Parents are not able to continue the therapy due to its cost, which is not covered by their insurance. *Id.* at 271. Dr. Torgerson estimates the Student needs at least nine more months of vision therapy in order for her vision to improve and stabilize. *Id.* at 384.

12. Dr. Torgerson is not aware of school districts in Washington working with vision clinics to provide vision therapy to students. However, her colleagues in California do see districts working with vision therapy clinics to provide services to students. Tr. 370.

13. Starting in second grade, the Student received vision accommodations from the District, including a slant board and large-print worksheets. Tr. 273. The District did not offer to provide Specially Designed Instruction (SDI) in vision and the Parents did not know to ask for such a service. *Id.* The Mother asked the District if it could pay for the vision therapy in April of 2018. She was told that the District does not pay for vision therapy, and she does not recall if she ever asked about such payment again. *Id.* at 580-81, 591.

#### THE 2018-2019 SCHOOL YEAR

14. During the 2018-19 school year, when the Student was in third grade, her diagnoses included autism, Attention Deficit Hyperactivity Disorder (ADHD), and anxiety.<sup>7</sup> J2 p.6. For much of the school year, she received SDI in the area of social skills for thirty minutes, one time per week. J2 p.7; D1 p.12. Her special education teacher for most of that year was Angela Clarke.<sup>8</sup> Tr. 759.

15. The Student’s IEP of September 20, 2018, created at the beginning of her third grade year, noted that the Parents “inquired about accommodations regarding [Student’s] vision testing.” J1 p.4. It referenced “visual accommodations from information from Alderwood Vision clinic,” and listed “large print” during testing as an accommodation and “incline board when reading close up” as a modification. *Id.* at 4, 8, 14.

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<sup>7</sup> No evidence was presented as to who made the diagnoses of ADHD and anxiety.

<sup>8</sup> Ms. Clarke has been a certificated teacher for 25 years. She has a bachelor’s degree in child development and a master’s degree in special education. She first taught general education, and has taught special education since 2017. Tr. 759, 767.

16. The Student graduated out of the LAP program at the beginning of third grade. At that point, the Parents did not have concerns about her reading ability. Tr. 600-03.

17. The Parents began having concerns about whether the Student was comprehending math when she was partway through third grade. During this time, the Student was having difficulty with anxiety and frustration. She would understand the concept on her homework, for example, but would write a number or letter backwards and her answer would be marked as wrong. Tr. 224-25, 586. She began to tell her Parents that she could not spell and could not perform other academic tasks that were required. *Id.* The Parents had concerns about her executive functioning in that the Student frequently lost her glasses and her backpack “was a mess.” Her Parents felt her self-esteem was low and she was having trouble making friends. *Id.* 587-88.

18. In March of 2019, the Parents were invited to a parent/teacher conference by Mary Ellen Cavallon,<sup>9</sup> the Student’s general education teacher. The Seaview school psychologist and counselor, Melissa Falleroni,<sup>10</sup> also attended the conference, which was held in a classroom. At the conference, Ms. Cavallon expressed concern that the Student tended to “stare off” in class, and Ms. Cavallon could not tell if the Student was comprehending and/or tracking what was being taught. Tr. 304. Ms. Cavallon informed the Parents that the Student was not doing well with reading and writing, and was behind as compared with her peers. *Id.* at 306.

19. The Student’s Father<sup>11</sup> expressed concern at this conference that the Student might have dyslexia, and noted that he is dyslexic. Tr. 218, 227, 304. Ms. Cavallon replied to the Father’s concern by stating that the District had a “learning concern” or “learning difference concern” regarding the Student. *Id.* at 304. The Parents then asked whether they should get the Student evaluated for dyslexia. They were told by the District staff that the District could not diagnose dyslexia, and an outside professional would need to make such a diagnosis. *Id.* at 306. According to the Mother:

We asked if we think she has dyslexia, can we get her evaluated for that. And the school is like we can’t diagnose, you would need to go and see a doctor or get an evaluation done. And we were like okay, you know, we could look at that like because I think it would be – the team agreed we should all get more information because if it is dyslexia, we will know exactly how to support her both as parents and teachers.

*Id.*

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<sup>9</sup> Ms. Cavallon did not testify at the due process hearing.

<sup>10</sup> Ms. Falleroni has been a school psychologist and counselor for six years. She has a Bachelor of Science degree in secondary education and a master’s degree in school psychology. She is a certificated teacher and holds a state educational specialist license in school psychology. She is also a nationally certified school psychologist. Tr. 622, 684.

<sup>11</sup> The Student’s Father teaches instrumental music at Eastside Preparatory School, and has students in fifth through twelfth grade. Tr. 435. He is not a certificated teacher and does not hold any degrees in education. *Id.* at 435, 449-50.



20. The Parents asked for additional services for the Student at this conference. According to the Mother, the Parents wanted “further help in reading, writing and spelling.” Tr. 473. The Mother recalls, “[W]e were thinking that was dyslexia from what they were describing their concerns as, then we wanted services that would help specifically with that disability.” *Id.* According to the Mother, the District responded to the Parents’ requests as follows:

They had said for that we would actually need a dyslexia disability on her IEP and that she would have to get diagnosed with dyslexia and they don’t diagnose, so in order for – I think our understanding was in order to get services specific to dyslexia, we would need our own dyslexia diagnosis to provide so that then we would see if she would qualify, but they also said in order to qualify, it would be tricky, because she would have to be a least two years educationally behind.

*Id.*

21. The Parents took this to mean that even if the Student were to be diagnosed as dyslexic, she would have to be two grade levels behind her peers to qualify for special education services. Tr. 307, 473. Ms. Falleroni denied ever stating that a student would not qualify for special education services unless she was two grade levels behind. *Id.* at 651-52. Ms. Falleroni does not know what may have caused the Parents to form the belief that the Student needed to be two years behind in order to qualify for services. According to Ms. Falleroni:

There are times when I am explaining like the bell curve when we are in a meeting and we are going over the results and we are talking about a student being in the below average range, showing a student is below grade level, below age level depending where they fall... [W]e discuss a lot about a student’s performance and grade level when we are talking about students.

*Id.*

22. The Mother testified that Ms. Falleroni said that in order for the Student to get services specific to dyslexia, she would need an evaluation saying she was dyslexic. The Parents believed certain services would be “triggered if she actually had dyslexia, which we would need to prove.” Tr. 547-48. The Father wanted the District to diagnose the Student because he thought it would lead to increased educational services. *Id.* at 447. According to the Father, “She was working quite hard, we were working quite hard at home and the teachers were working quite hard in the classroom and this little girl was getting frustrated and if we could diagnose her and get her the services that she needed, I feel like she would get a better education.” *Id.* According to the Mother, “We thought we were supposed to care about the label because the label would give us one of the criteria to get the services.” *Id.* at 608. According to the Father, “My understanding is we weren’t qualified for certain services unless she had this – unless this word was attached to her learning profile.” *Id.* at 456. The Father believed the Student would not be eligible for reading and math services without a diagnosis. *Id.* at 458. However, the Mother understood that the Student could still be evaluated for the need for SDI in the areas of reading, writing, and math, even without a dyslexia diagnosis. *Id.* at 608. The Parents asked the District to evaluate the Student in reading, writing, and math at the parent/teacher conference. *Id.* at 548, 608.

23. According to Ms. Falleroni, dyslexia is a common concern among parents she works with. When a dyslexia concern is raised, she explains her role as a school psychologist and the range of what she can assess. She cannot diagnose dyslexia but she can identify a specific learning disability (SLD) in reading. She describes to parents that she follows a specific set of guidelines in the law and the Washington Administrative Code (WAC) in order to identify a reading SLD. Tr. 626. She testified she did not tell the Parents that the Student needed a diagnosis in order to qualify for special education. *Id.* at 652.

24. The Parents left the conference with the understanding that if they wanted to know if the Student was dyslexic, they would have to get an outside evaluation. *Id.* at 308. They did not receive a Prior Written Notice (PWN) from the District following this conference. *Id.* at 228, 308. The Father believes the Parents were told the Student “did not meet the criteria” for an evaluation even though they asked for a dyslexia evaluation at the conference. Tr. 227, 308. According to the Mother, the District said they were not going to evaluate the Student for dyslexia because they cannot diagnose that condition. *Id.* at 308.

25. Later in March of 2019, the District initiated a reevaluation (2019 Reevaluation) of the Student to address the following areas: review of existing data, social/emotional, cognitive, general education, and academic. J2 p.3. The Parents believed this was a regularly required triennial evaluation, and was not in response to the concerns they raised at the parent-teacher conference. Tr. 229, 309. However, the notification of the 2019 Reevaluation proposed to initiate the evaluation on March 22, 2019, and indicated that it had been requested by the Parents due to “concerns around [Student’s] reading performance.” J2 p.3. The Student’s previous evaluation had been performed in September of 2017, so this was less than two years from her previous evaluation. Tr. 544-45. On the 2019 Reevaluation notification/consent form that was provided to the Parents, they indicated that their concerns regarding the Student’s reading were “per information of concerns from Ms. Cavallon at mid-winter conference.” J2 p.4. The Parents specifically requested the following areas be considered when assessing the Student: “learning disability, reading comprehension, spelling, and common characteristics of dyslexia.” *Id.* at 5. By “common characteristics of dyslexia,” the Parents meant decoding, comprehension, and spelling, though that was not indicated on the form. Tr. 546. The evaluation summary document noted that the 2019 Reevaluation was being conducted early “per the request of her parents due to concerns around [the Student’s] academics.” J2 p.7.

26. The Parents were sincere and credible in their testimony regarding the March 2019 parent/teacher conference, and this conference was undoubtedly a source of confusion for them. However, the evidence is clear that the District informed the Parents that the District cannot diagnose dyslexia, and declined to offer an evaluation to assess for dyslexia. The District *did* offer and provide an evaluation of academic, cognitive, and social/emotional functioning of the Student. To the extent the Parents believe the District denied their request for an evaluation, they are mistaken.

27. Similarly, the Parents’ understanding that they were told by the District that the Student would have to be two grade levels behind in order to receive special education services is mistaken. Again, the Parents were credible in their testimony that this was their belief about what they were told. However, the District witnesses were equally credible and provided persuasive detail as to what they discuss with parents about eligibility and assessment results during

meetings. The Parents' assertion as to this issue is not supported by a preponderance of the evidence.

28. The Parents have received copies from the District of the required procedural safeguards at IEP and evaluation meetings. Tr. 442-42. Ms. Falleroni has a link to the safeguards in her email signature, as well. *Id.* at 650.

29. At the time of the 2019 Reevaluation, the Student had been in vision therapy at Alderwood for approximately a year. The Parents provided records from Alderwood to the District periodically. Tr. 271-72, 396. As of December 20, 2018, Alderwood noted the Student to have demonstrated considerable improvement with "tracking and central/peripheral integration." Her vision measured 20/20 for the first time, and her focus flexibility and stamina had "greatly improved." P3 pp.77-80. She was still having challenges with visual-manipulation, visual memory, and other areas, and was continuing to build eye teaming and tracking abilities for "ease of keeping pace with reading." The therapy notes from December 20, 2018, state, "Big gains already though. OK to break, or continue to push these areas." *Id.* at 80.

30. At the time of the 2019 Reevaluation, Ms. Falleroni was the Student's case manager. J2 p.6. Ms. Falleroni assessed the Student in the areas of academics, cognitive, and social/emotional. The information obtained from Ms. Cavallon for purposes of the 2019 Reevaluation indicated that the Student had low stamina, avoided work that she perceived as difficult, had low confidence, and gave up easily. According to Ms. Cavallon, the Student was below grade level in writing and spelling, and sometimes had a hard time comprehending what she read. *Id.* at 10.

31. The Student's visual processing as measured in the 2019 Reevaluation was in the low average range. Visual processing is "the ability to make use of simulated imagery (often in conjunction with currently perceived images) to solve problems with visual patterns and stimuli." J2 p.19. A vision assessment was not performed as part of the 2019 Reevaluation.

32. The 2019 Reevaluation indicated that the Student's social skills had improved and fell in the average range, such that they no longer adversely impacted her education. J2 pp.7, 11. It further indicated that her "problem behaviors" fell in the average range at school but were in the "caution" range at home. She was noted by her Mother to have temper tantrums and be inattentive and easily distracted at home. J2 p.11. However, Ms. Falleroni determined that the Student's overall social/emotional functioning was similar to that of her same-age peers and did not adversely impact her to a degree that she required SDI in that area. *Id.* The Parents did not disagree with this conclusion. Tr. 629.

33. For the cognitive portion of the 2019 Reevaluation, Ms. Falleroni administered a cross-battery assessment consisting of three testing tools in order to assess for an SLD. A cross-battery identifies a student's strengths and weaknesses. It is a researched approach to SLD diagnosis and allows an in-depth examination of cognitive skills that goes beyond what one standard cognitive battery would allow. Tr. 630. Ms. Falleroni selected subtests that assessed similar skills and she was not limited to two subtests as would be the case with a typical cognitive battery assessment. *Id.* at 631.

34. Ms. Falleroni administered to the Student portions of the Kaufman Test of Educational Achievement – Third Edition (KTEA-III), the Differentiated Ability Scales (DAS-II), and the Wechsler Intelligence Scales for Children Integrated (WISC-V). J2 p.12. The results of these tests indicated that the Student had “a general intellectual ability score falling within the Average classification range.”<sup>12</sup> J2 p.12. She demonstrated high and above average skills on two subtests measuring crystalized knowledge<sup>13</sup> and language skills. *Id.* She demonstrated fluid reasoning skills in the average to low average range on two different measures. This pattern suggested the Student’s ability to reason, form concepts, and solve problems was similarly developed to that of peers of her same age. *Id.* at 12, 19.

35. The cognitive testing performed as part of the 2019 Reevaluation indicated the Student’s general overall functioning was average, but her short-term memory and auditory processing skills were “areas of weakness.” J2 p.7. Specifically, her short-term memory, which is described in the testing results table as “the ability to encode, maintain, and manipulate information in one’s immediate awareness and apply it within a few seconds,” was below average. *Id.* at 19. This indicated the Student may have difficulty following multistep instructions, prioritizing, sequencing, initiating, and organizing. *Id.* at 13, 19.

36. The Student’s auditory processing, which is described in the testing results as “the ability to perceive, analyze and synthesize patterns among auditory stimuli and to discriminate subtle nuances in patterns of sound and speech when presented under distorted conditions,” was also below average. Her score on the KTEA-III phonological processing assessment was the lowest score on the Student’s cross-battery cognitive assessment. J2 pp.13, 19.

37. The academic portion of the 2019 Reevaluation consisted of the Student taking the KTEA-III in three domains: reading, math, and written language. On the reading portion of the KTEA-III, the Student performed in the average range on all of the assessments.<sup>14</sup> J2 p.18. Her comprehension was average. J2 p. 14. Her ability to decode words, including nonsense words, was in the average range. *Id.* Ms. Falleroni administered to the Student additional reading assessments beyond the core battery in order to assess for the concerns she believed the Parents were raising with their use of the phrase “common characteristics of dyslexia.” She assessed reading fluency, reading understanding, decoding, and “rapid naming” (a skill in which students are expected to recall information that is placed in front of them rapidly, and in which a deficit is associated with dyslexia). Tr. 686. The Student was assessed for an SLD in reading and did not meet the criteria to establish such a disability. *Id.* at 687-88.

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<sup>12</sup> The actual general intellectual ability score was not provided in 2019 Reevaluation report.

<sup>13</sup> Crystalized knowledge includes acquired knowledge, the ability to communicate one’s knowledge, and the ability to reason using previously learned knowledge. J2 p.12

<sup>14</sup> The text of the 2019 Reevaluation is inconsistent with the listing of scores contained therein. The text states that the Student’s letter and word recognition skills and reading fluency scores were “below average.” J2 p.14. The listing of KTEA-3 scores indicates that the scores were “average.” *Id.* at 18. Ms. Falleroni testified that the Student’s reading scores were all in the average range. Tr. 634. No evidence regarding the reason for this discrepancy within the 2019 Reevaluation was presented.

38. In the math portion of the academic testing, the Student performed overall in the below average range. In computation, she was in the average range, while in “concepts and applications” she scored in the below average range. J2 p.15.

39. In the written expression portion, the Student performed in the below average range. She had the greatest difficulty with capitalization and punctuation, and correct sentence structure. J2 p.15. The Student struggled with phonetic word and sentence writing. *Id.* at 7.

40. Because dyslexia was a concern, Ms. Falleroni evaluated patterns of strengths and weaknesses. Tr. 687-92. The District uses software that examines testing scores and determines if an SLD exists, as defined by the OSPI discrepancy model. If no “learning disability addendum” is generated by the software, this means the student does not have a significant discrepancy between intellectual ability and academic achievement. *Id.* at 669. The Student did not meet the criteria employed by the software to establish an SLD in any area as of the 2019 Reevaluation. *Id.* at 687-88, 702. If the software had detected a pattern of results within the cognitive and academic scores that might indicate an SLD, known as a “high alignment,” Ms. Falleroni could have gone to her supervisor to seek permission to use professional judgment to determine that an SLD existed. *Id.* at 687-92. However, no “high alignment” was indicated by the testing scores.

41. The 2019 Reevaluation report defines “general intellectual ability” in the assessment summary. It states, “GENERAL INTELLECTUAL ABILITY: General cognitive ability (GCA) is also referred to as an Intelligence Quotient or IQ. It is a one-number average that quantifies the mental ability underlying results of various tests of cognitive ability.” J2 p.12. The summary goes on to state, “On the DAS-II, [Student] attained a general intellectual ability score falling within the Average classification range; this pattern of performance suggests that [Student’s] cognitive abilities are similarly developed when compared to children his [sic] same age.” *Id.* Nowhere does the 2019 Reevaluation report set out the Student’s IQ score or other GCA score.

42. Ms. Falleroni did not provide the Student’s IQ score or other GCA score when asked about how she assessed the Student for an SLD.

Q: [W]hy don’t you tell me what you did for the Student that caused you to determine she did not have a specific learning disability in reading?

A: So it is cross-battery assessment that is – that is a cognitive software that the School District has purchased for us psychs to use. And I would put her full scale IQ, which was generated through the DAS and I would put several of those other areas in there as well. And it would say high probability of like a specific learning disability. And then I would also reference – because I have to reference the discrepancy table, I would also reference that as well. They are two separate things...

Q: And how would you determine whether there was a high alignment?

A: The software, it aligns – so I plug in all the scores that I have done through the assessment, cognitive and academic, and it would – it indicates a pattern within there. So I would run it through that software.

Tr. 690-691.

43. When asked what full scale IQ number she used in determining if an SLD existed, Ms. Falleroni was unable to provide it.

Q: What is your understanding of what her [the Student's] appropriate cognitive score would have been in May 2019 to use the discrepancy table?

...

A: So typically...when you use a cross-battery assessment, you don't always necessarily report the overall BCA<sup>15</sup> because you want to consider each cognitive area. So I don't see an overall cognitive score, but what would have been done is I would have put that through the cross-battery assessment software when scoring all of this and it would have shown if there was a significant discrepancy there. I wouldn't have, you know, not done that because that is part of the process when you used the cross-battery.

Q: So when I am looking at the significant discrepancy table for OSPI – are you familiar with that table?

A: I am familiar with that table.

Q: What number would I have used for the cognitive score for the Student from May 2019?

A: I don't have that information in front of me. It would be on the software that I used when completing the evaluation.

Q: Okay. So that's not anywhere in the report either?

A: Not that – not that I see.

Q: How are parents supposed to interpret scores if they are not provided complete information?

A: Well, I believe when I looked at the specific learning disability in reading, I would have – there is an additional page when a student meets eligibility for that called a learning disability addendum that would go into an evaluation and that is where I would have to identify that score. So that score was checked through the software program and then if she was made eligible through that, which I can get that score – you know, I still have it.

Q: It is not -

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<sup>15</sup> "BCA" was not defined.

A: I still have it in the records. And when you make a student eligible through that, they receive that additional – that additional information within their evaluation. It is an additional assessment page and that score would be put in there as well.

Q: But if a student doesn't qualify, they are not provided with anything?

A: If a student didn't meet the discrepancy model, that page – or made eligible under that category, that page would not be included in the report. It is called an LD addendum, the learning disability addendum.

Q: But if a student doesn't qualify, they don't get an LD addendum and they don't know about this process, it is kind a [sic] black box for parents, yeah?

A: Not a black box, but we are looking at all areas of the cognitive score and when I put it through the software and it is not showing me that there is a learning disability, that's what I'm conveying, you know, to the parents.

Tr. 667-669. Thus, the Student's full scale IQ as determined from the 2019 Reevaluation was never provided to the Parents, it was not included in the evaluation report, and it was not provided at the due process hearing. Ms. Falleroni did not describe how she "referenced the discrepancy table" or whether she ever manually put the relevant numbers into the table to check for a discrepancy herself.

44. There is no documentation in the 2019 Reevaluation report that a classroom observation of the Student was conducted as part of the determination as to whether she had an SLD. However, information from Ms. Cavallon was noted to "be an accurate account of [Student's] current functioning in the classroom setting." J2 p.10.

45. Based on the 2019 Reevaluation, Ms. Falleroni concluded the Student's deficits in written language skills were adversely impacting her educational progress in the general education classroom. Consequently, Ms. Falleroni recommended the Student receive SDI in the area of written language. J2 pp. 7, 15. Based on the 2019 Reevaluation, Ms. Falleroni determined the Student continued to meet the eligibility criteria for autism "due to her having a medical diagnosis of Autism Spectrum Disorder." *Id.* at 7.

46. The Student's reevaluation team met on May 16, 2019, to discuss the 2019 Reevaluation. J2 p.1. The team consisted of the Parents, Ms. Cavallon, Ms. Falleroni, and Ms. Clarke. Discussion at the meeting indicated the Student was consistently making progress on her math skills in the classroom. *Id.* at 7. It was determined that her math and reading performances would continue to be monitored, but she did not need SDI in those areas. *Id.* at 20. The Mother recalls the decision was made as a team but the Parents relied on Ms. Falleroni's assessment as to whether the Student qualified for SDI in particular areas. Tr. 589. The Parents continued to have concerns about the Student's reading and math abilities even though she had not qualified for services. *Id.* The District team members reported at this meeting that they were not seeing any social/emotional concerns with the Student at school and the team agreed that the Student no longer needed SDI in this area. *Id.* at 549.

47. In June of 2019, the Student's IEP team met to review her IEP. The team consisted of the Parents, Ms. Falleroni, Ms. Cavallon, and Emily Larsen,<sup>16</sup> the Student's new special education teacher.<sup>17</sup> J3 p.3. Ms. Larsen drafted the proposed new IEP. The IEP team's "considerations" note that the Student's third grade DIBELS<sup>18</sup> standardized reading assessment indicated an oral fluency score of 76 words per minute (the expectation is 86 words) and an oral reading accuracy score of 97% (the expectation is 96%). *Id.* at 4.

48. The Parents provided the District with the Student's vision records from Alderwood prior to this meeting. Tr. 590-91. The "team considerations" noted as follows:

[Student] does not have a visual impairment that would require instruction in or use of Braille. She does wear glasses and should wear them at all times at school. Outside of school [Student] receives vision therapy for visual skills related to blur and tracking. At school it is recommended that she use a tracker while reading, hold a book/paper 14-16" away, and have short breaks from visually demanding tasks. See Accommodations page for additional supports related to vision.

J3 p.4. This was the first mention of vision therapy in the Student's IEPs.

49. The June 2019 IEP indicates the Student's writing skills were assessed by Ms. Larsen prior to her drafting the proposed IEP, including the new goals. Tr. 719. The assessment showed that the Student "can produce a basic sentence that makes sense." J3 p.6. When working on a paragraph, she made errors in spelling, capitalization, and punctuation. Overall, her paragraph was not grade-level work, and she repeated words and ideas. The assessment demonstrated that the Student needed to work on composing complete sentences, composing paragraphs and multi-paragraph responses, and editing. She also needed to learn strategies for working through the writing process, such as brainstorming and planning. *Id.*

50. The June 2019 IEP contained two written language goals; one pertains to writing a multi-sentence paragraph and the other pertains to editing for capitalization and punctuation. J3 p.7. The IEP also provided for a number of accommodations and modifications, including large print for math assignments, and "limit screen time to increments of 30 minute [sic] or less" on computer/screen based tasks in general education. *Id.* at 8-9.

51. The IEP provided for SDI in written language, to be provided by a paraeducator monitored by a special education teacher. The SDI would occur for 30 minutes, five times per week in the special education setting. J3 p.11. The IEP states, "[Student] will receive services for written

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<sup>16</sup> Ms. Larsen has an undergraduate degree in elementary education and psychology, and a master's degree in special education. She has been a special education teacher for eight years. Tr. 716-17.

<sup>17</sup> In May of 2019, Ms. Clarke's caseload increased and Ms. Larsen replaced her as the Student's special education teacher. Tr. 764.

<sup>18</sup> The DIBELS is a standardized assessment tool used by the District throughout the school year to determine students' functioning levels in English language arts and math. Tr. 817-18.



language in special education, as these needs cannot be entirely met by general education.” *Id.* at 12.

52. The PWN proposing to initiate the June 2019 IEP notes that “vision therapy report provided by parent was referenced and additional accommodations were added to IEP after IEP meeting, per parent request.” J3 p.14.

53. The Student’s third grade report card was completed by Ms. Cavallon at the end of the school year. The grades indicate that the Student was progressing and/or proficient in literacy and math during both semesters. She received grades of 2 (2 indicates “Progressing: the student performs at a level that is approaching expectations at this time”) and 3 (3 indicates “Proficient: the student performs at a level that meets expectations at this time”). J18 pp.1-2. Literacy includes reading, writing, and communication. The Student received all 3s in “lifelong learning skills,” which include independent work habits, problem solving and decision making, responsibility, and self-awareness. *Id.* The end-of-year comments note that the Student’s reading level is below grade level, and that she showed an understanding of most math concepts and would benefit from continued practice to keep up her multiplication and division math facts. *Id.* at 4.

54. The Parents took the Student to see psychologist Heather McDonald during the summer of 2019 in order to pursue an independent psychological evaluation. Ms. McDonald reviewed the Student’s educational records and recommended use of an evidence-based reading program, such as “Wired for Reading,” for the Student. She also recommended the Parents obtain a neuropsychological evaluation of the Student in order to assess for dyslexia. Tr. 523-24

55. During the summer of 2019, the Parents arranged for the Student to attend the Hamlin Robinson School’s summer program. Tr. 316. Hamlin Robinson is a private school for grades one through eight that is designed to support students with dyslexia or language-based learning differences. Tr. 413. The school uses a structured literacy approach for language-based instruction, and also offers math, science, social studies, art, and other subjects. *Id.* at 413-14. The Student had a very positive experience at Hamlin Robinson and the Parents observed that the multi-sensory approach to reading instruction used at the school worked well for her. *Id.* at 317. Her decoding skills advanced and the Student showed a “dramatic change” in her attitude toward school during this time. Tr. 234, 420.

56. The Student also attended the Aspiring Youth summer program during the summer of 2019. The Parents hoped the program would help the Student develop more friendships. Tr. 319-20. Aspiring Youth is a social support program. It provides summer camps and in-person social skills groups after school during the school year. Most of the youth who attend are receiving special education services at their schools. *Id.* at 253-54.

#### THE 2019-2020 SCHOOL YEAR

57. The Parents continued to have concerns regarding the Student’s reading, writing, and spelling at the start of her fourth grade year. Tr. 322. In September of 2019, they engaged Karleen Mars Tamte as a reading tutor for the Student. Ms. Tamte is a “dyslexia tutor.” She has a bachelor’s degree in psychology and interdisciplinary studies, and is certified in the Wired for

Reading program. P14. Wired for Reading is a multisensory, research-based reading program, similar to the Orton-Gillingham model. Tr. 135. Ms. Tamte worked as a paraeducator in the District for four-and-a-half years. *Id.* at 130-33. She charges \$70 per hour for her tutoring services. *Id.* She has never designed special education instruction. *Id.* at 151.

58. Ms. Tamte initially observed the Student to exhibit what Ms. Tamte felt were significant behavioral and social difficulties that inhibited her academic progress. For example, the Student has a very low tolerance for making mistakes and disengages when she realizes she has made an error. P1. Ms. Tamte feels she made good progress with the Student, meeting one time a week for an hour, up until the COVID-19 pandemic prohibited in-person sessions. P1; Tr. 136. The Student made progress in her reading comprehension, fluency, and stamina. Tr. 142. Ms. Tamte did not feel that the IEP the Student had in place in the fall of 2019 adequately addressed her needs. *Id.* at 143.

59. The Student's fourth grade general education teacher was Mitzi Fike.<sup>19</sup> Early in the school year, Ms. Fike was concerned that the Student was not completing all of her math homework. Tr. 325-26. The Parents conferred with Ms. Fike and informed her of the difficulties the Student had completing the homework and the associated frustration. *Id.* at 325-27.

60. At the due process hearing, Ms. Fike described the Student as having had some struggles with relationships during fourth grade. Ms. Fike recalls the Student was "right on the cusp" of needing special education in reading and math that year. She described the Student as having reading skills "slightly below grade level" due to difficulties with phonics and decoding. Tr. 776. Ms. Fike also noticed "vision issues" in that the Student would skip words; she would make errors when reading and not self-correct. *Id.* at 792.

61. At the beginning of that school year, the Student's math skills were at grade level, and she participated in a group with a push-in<sup>20</sup> paraeducator who worked on math skills with selected children. Tr. 777-78. As the year went on, the Student had difficulty applying math facts to actual problems but Ms. Fike felt the paraeducator assistance the Student received in math benefited her. *Id.* at 775-80. Ms. Fike recalls it was difficult for the Student to copy things from the board, so she was accommodated as to where she was placed in the classroom. Ms. Fike opined that the Student was able to access the curriculum with the accommodations. *Id.* at 781.

62. The Student continued in vision therapy at Alderwood through October of 2019. Her progress evaluation from October 9, 2019, states "less blur noticed" and "still tough to keep place and gets overwhelmed." P3 p.168.

63. The Parents contend that at one or more of their meetings with the District, in approximately October or November of 2019, they asked for "push-in" services for the Student as

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<sup>19</sup> Ms. Fike has a bachelor's degree in psychology and has taught first, second, third, and fourth grade at Seaview for 26 years. Tr. 773-74.

<sup>20</sup> The meaning of "push-in" was never defined by either party. The parties appeared to use the term to refer to the provision of any type of individual or small group services or instruction occurring in the general education classroom. The term was not used to refer exclusively to special education or exclusively general education instruction. Rather, it appeared to indicate the *location* of the referenced instruction.

a means of extra support and extra help in reading and math. Tr. 474-75, 609-11. According to the Parents, Ms. Fike and Ms. Falleroni informed them that the District does not provide push-in services. *Id.* The Father recalls the District staff members stating the District did not have the personnel to provide push-in services and it was “a difficult thing to do.” *Id.* at 240.

64. The Parents envisioned push-in services as a way to help the Student with her schoolwork in the general education classroom. The mother described her understanding as follows:

What could have been provided in my mind is having someone talk the Student through the steps when there is an original direction given orally or even written out to help the Student with those organization skills of, you know, pulling out the paper, the specific page that the teacher has referenced, opening up that page in the book, having your pencil ready, all of those little details. It just helps having someone to help them prep her just to get to that point where she is able to then receive the instruction.

Tr. 612. Ms. Falleroni testified that Seaview does provide special education services in the general education setting in some cases. *Id.* at 649. She does not recall ever telling the Parents that the District does not provide push-in services. *Id.* at 650. The Student had received push-in instruction in emotional regulation during first and second grade. *Id.* at 738-41.

65. The evidence does not support the Parents’ contention that they were informed by District personnel that the District does not provide push-in services. While the Parents were credible and sincere in their belief that this is what they were told, the evidence does not support their belief as being accurate. District witnesses were credible and consistent in their testimony that they did not inform the Parents that the District does not provide push-in service. Moreover, the District actually does provide such services, and the Student had received such services in earlier grades. The evidence indicates the Parents were envisioning, and may have requested, what sounds like a one-to-one aide for the Student, based on the Mother’s description of push-in services. It is possible the District declined to provide a one-to-one aide and the Parents took that to mean that no push-in services of any kind were available. It is found the District did not provide the Parents with inaccurate information regarding push-in services.

66. On October 28, 2019, the Parents emailed the District and asked for an IEP meeting for the Student. D2 p.4. Anne Accettullo,<sup>21</sup> the Student’s special education teacher that year, followed up to schedule the meeting and asked what the Parents would like to discuss. The Parents replied as follows:

We want to review her IEP, around her accommodations, (review the results from last May’s evaluation) and would like to discuss the possibility of having her pulled out for math and reading support, (in addition to her current writing support) based on how we, and Mrs. Fike think [Student] is currently doing (fresh off our recent parent teacher conference). We will want to discuss the schedule for all of these

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<sup>21</sup> Ms. Accettullo has a bachelor’s degree in anthropology and a master’s degree in teaching and special education. Tr. 843.

pullouts and to understand what exactly (and when) she will be missing content wise with what's going on in her classroom.

*Id.* at 2.

67. In response, on November 6, 2019, a meeting was held between Ms. Falleroni and the Mother. At the meeting, the decision was made to again assess the Student's reading and math skills. J4 p.5.

68. Ms. Falleroni performed an academic assessment, which the District referred to as an "assessment revision" (Assessment Revision), that was completed on January 6, 2020.<sup>22</sup> According to Ms. Falleroni, a student's eligibility for special education cannot be changed by an assessment revision; however, services can be added to a student's IEP, including services in a new area, such as reading or math, based on an assessment revision. Tr. 697-98.

69. The Assessment Revision notification/consent form indicates the Assessment Revision would include assessing the Student in the area of academics, which had been requested by the Parents due to "concerns with academics, specifically reading and math." J4 p.3. A cognitive assessment was not performed because Ms. Falleroni felt the previous cognitive scores were valid and she did not think a cognitive reevaluation was necessary. Tr. 647.

70. The Assessment Revision consisted of portions of the KTEA-III and the Wechsler Individual Achievement Test – Third Edition (WIAT-III) being administered to the Student. Ms. Falleroni administered the two different assessments in order to see how the Student's performance on them compared. Tr. 637. The Student had been inconsistent in her school performance, so Ms. Falleroni administered two academic batteries that she felt are similar in order to be able to assess consistency. *Id.* at 637-38. On the reading portion of the KTEA-III assessment, the Student performed in the average range. J4 p.5. On the reading portion of the WIAT-III assessment, the Student performed in the average range in all areas that were assessed, including comprehension, decoding, and speed/accuracy of single-word reading. *Id.* at 6.

71. On the math portion of the KTEA-III assessment, the Student performed in the below average range. J4 p.5. On the math portion of the WIAT-III, the Student performed in the average range on the two subtests (problem solving and numerical operations.) *Id.* at 6.

72. The Student's KTEA-III scores in math were all lower on the Assessment Revision than they had been on the 2019 Reevaluation. J2 p.18; J4 p.9. Her reading composite was 89 on Assessment Revision, while it was 86 on the earlier 2019 Reevaluation. The Student's reading comprehension score of 96 on the Assessment Revision was higher than the 88 it had been on the 2019 Reevaluation, and she moved from the 21<sup>st</sup> percentile to the 39<sup>th</sup> percentile in comprehension. *Id.*

73. The KTEA-III assessments administered to the Student as part of the January 6, 2020 Assessment Revision had also been administered to her during the May of 2019 Reevaluation.

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<sup>22</sup> The term "assessment revision" is not defined or used in the IDEA.

Ms. Falleroni acknowledged the potential for a “practice effect,” in that there “sometimes is concern around a student having recollection or having learned a test or skill area” if a test is readministered within too short an interval. Tr. 647-48. Ms. Falleroni could not quantify the time period which would constitute too short an interval for readministration of the KTEA-III, and could not say whether it was more than or less than a year. *Id.* at 671-72. She stated, “That’s why I gave the WIAT-III which is a different academic skills test.” *Id.* at 648. She acknowledged, “It is best practice to not give it too close together.” *Id.* at 672. She also acknowledged that the Student’s three-point increase on her KTEA-III reading composite score could have been due to the “practice effect,” though the difference is not statistically significant. *Id.* at 74, 693.

74. In contrast, Dr. Philip Dunbar-Mayer<sup>23</sup> testified that standardized testing should not be readministered within twelve months due to the practice effect, which can artificially inflate the scores of the second administration. Tr. 45-48. According to Dr. Dunbar-Mayer, the practice effect invalidates the second round of testing. Tr. 46. He is not aware whether the KTEA testing manual states that the test should not be administered more frequently than once per year. *Id.* at 72. No evidence regarding testing instructions or protocols for the KTEA was offered at the hearing.

75. A preponderance of the evidence supports a finding that the administration of the KTEA-III assessments less than one year apart invalidated the Assessment Revision testing results. Ms. Falleroni’s explanation that she gave the WIAT-III along with the KTEA-III in order to control for the practice effect is not consistent with her explanation of giving the two assessments in order to compare the Student’s performance on them. Dr. Dunbar-Mayer’s testimony is more persuasive as to this point. The KTEA-III testing results on the Assessment Revision are found to be invalid. Likewise, any conclusions reached from comparing the Student’s performance on the two assessments are found to be invalid.

76. Excluding the KTEA-III results from the Assessment Revision leaves the WIAT-III as the only reliable testing data. The Student scored in the average range on all of the WIAT-III assessments. J4 p.9. To the extent the District software examined scoring patterns in the Assessment Revision for the presence of an SLD, it would have incorporated the invalid KTEA-III results, and the software’s conclusion is therefore also invalid.

77. Dr. Dunbar-Mayer also opined that the Assessment Revision was inadequate in scope and should have included cognitive testing. Tr. 60. A preponderance of the evidence does not support this contention. Cognitive testing had been performed less than a year earlier, in the spring of 2019. No evidence was presented as to why those cognitive scores would not have been valid at the time of the Assessment Revision.

78. On January 9, 2020, the Student’s evaluation team met to discuss the Assessment Revision. Although the team consisted of the Parents, Ms. Fike, Ms. Falleroni, and Ms. Accettullo, Ms. Accettullo did not attend the meeting. J4 p.1; Tr. 858-62. Ms. Accettullo signed the “Members

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<sup>23</sup> Dr. Dunbar-Mayer is a licensed psychologist and pediatric neuropsychologist who owns and works at the Center for Child Development. P11 p.1; Tr. 38. Dr. Dunbar-Mayer holds a Bachelor of Arts degree in psychology, as well as a master’s degree and doctorate in clinical psychology (Psy.D.). P11 p.1. He is a certified child mental health specialist. Tr. 38.

present, their signatures and conclusions” page of the Assessment Revision at some point after the meeting was concluded. Ms. Accettullo believes signing the “Members present” sheet even though she was not present was an accepted practice in the District. Tr. 857-77.

79. At the January 9, 2020 meeting, the Parents remained concerned about the Student’s reading abilities and the possibility that she had dyslexia. Tr. 333. However, the team determined that the Student’s reading skills did not adversely impact her education. The team further determined that the Student’s performance in math was most likely impacted by her short-term memory weakness and that, with the right tools and repeated practice, the Student could perform the necessary math skills. J4 p.6. The team decided that additional accommodations should be provided to the Student, including access to a multiplication chart, word problems being read to her, modeling of problems, and opportunities for repeated practice. The team discussed the option of math SDI but was concerned about the impact of pulling the Student out of the general education curriculum for additional SDI. The Parents were “on the fence” as to the best decision and they were concerned about “tipping the ratio to being more special education versus general education.” Tr. 560-61. They were concerned the Student would miss out on social connections in her classroom if she were pulled out for SDI too much of the time. *Id.* at 454. The team determined that no change in services to the Student was required. J4 p.10. The team agreed that the Student’s math performance did not adversely impact her and that she did not require SDI in math. *Id.* at 6. The Parents agreed with this decision and described the decision as “the general consensus.” Tr. 333.

80. The Student’s IEP team met on February 6, 2020, for an “IEP amendment meeting” to discuss changing some of the Student’s accommodations as had been suggested by the evaluation team. J5 p.13. In attendance at the meeting were the Mother, Ms. Fike, and Ms. Accettullo. J5 p.3. The “team considerations” document notes that the Student wears glasses and receives vision therapy related to “blur and tracking.” *Id.* at 4. Ms. Accettullo contributed her assessment of the Student’s present level of educational performance, as of February 2020, in the area of writing. Ms. Accettullo noted the Student achieved 17 correct word sequences in the curriculum-based measure she administered. The average performance of fourth graders on this test is 25-51 correct word sequences. The Student wrote a story that was very creative, but was one run-on sentence. She often omitted punctuation and capitalized some words that did not need to be capitalized, such as “his.” *Id.* at 5. The Student’s writing also exhibited a lack of organization. *Id.* at 6.

81. Accommodations and modifications provided in the IEP after that meeting were as follows:

Accommodations	Frequency	Location	Duration m/d/y to m/d/y
Extended Time	On daily assignments	General education	02/15/2020 to 06/20/2020
Extended Time	During testing	Testing locations	02/15/2020 to 06/20/2020
Text-to-Speech Excluding Reading Passages	On computer based tests	General education	02/15/2020 to 06/20/2020

Modification(s)	Frequency	Location	Duration m/d/y to m/d/y
Behaviorally Related:access to a quiet space/break area for self-regulation	daily, in all school environments	general education	02/15/2020 to 06/20/2020
Behaviorally Related:unrestricted access to food	consistent food intake to prevent dysregulation	general education	02/15/2020 to 06/20/2020
Behaviorally Related:movement breaks (run errand, pass out papers, wiggle break)	at least every 30 minutes	general education	02/15/2020 to 06/20/2020
Behaviorally Related:allow use of silent fidgets	to support focus and attention	general education	02/15/2020 to 06/20/2020
Content Area:Provide opportunities for repeated practice	During instruction	Classroom locations	02/15/2020 to 06/20/2020
Content Area:Have math word problems read aloud	During instruction	Classroom locations	02/15/2020 to 06/20/2020
Content Area:Include examples of completed work	Daily	Classroom locations	02/15/2020 to 06/20/2020

Modification(s)	Frequency	Location	Duration m/d/y to m/d/y
Content Area:Scribe allowed for homework assignments as needed	As needed	Home and school	02/15/2020 to 06/20/2020
Content Area:Reduce length of classwork and homework assignments	As needed	Classroom locations	02/15/2020 to 06/20/2020
Content Area:break material into manageable parts and use concise directions	directions and tasks with multiple steps or parts	general education	02/15/2020 to 06/20/2020
Content Area:reduce length of assignments	copying from board or books	general education	02/15/2020 to 06/20/2020

J5 pp.7-8.

82. Ms. Accettullo recalls the Parents asking if the Student could receive her SDI as a push-in in the general education setting as opposed to a special education setting. However, the IEP team ultimately decided the SDI should be provided in the special education setting because it is smaller and allows an instructor to work more closely with the Student. Tr. 854-55.

83. The PWN proposing to initiate the amended IEP noted that “screen time” was not occurring in the classroom for long enough periods to require an accommodation to reduce it. Additionally, the PWN noted the Student does not qualify for assistive technology. J5 p. 13. The PWN proposed to initiate this IEP on February 15, 2020. *Id.*

84. On March 6, 2020, a new IEP was developed for the Student in order to correct two errors in the previous IEP and “be in compliance.” J6 p.13. No evidence was presented as to the precise nature of the “errors” but they appear to be procedural, and they did not affect the services or other substantive areas of the IEP. J5; J6.

85. On March 12, 2020, the Student underwent a vision examination at Alderwood. She was diagnosed with refractive amblyopia in her right eye, i.e. “lazy eye,” meaning that visual acuity of one or both eyes cannot be corrected to 20/20 with glasses. P3 p.176. She was further diagnosed with saccadic eye movements, which can create problems with reading, such as repeating or omitting words or lines of text. *Id.* at 177.

86. Ms. Accettullo did not notice the Student having any difficulties with vision during the year that she worked with her. Tr. 853-54. Ms. Accettullo also did not observe the Student to exhibit behavioral issues that needed to be addressed with special education. *Id.* at 854. She felt the Student’s social skills were on par with those of her peers, and that the Student was socially successful. *Id.* at 856. Ms. Accettullo also did not observe the Student’s handwriting to be any worse than that of other students of the same age. *Id.* at 872.

87. On March 15, 2020, the COVID-19 pandemic caused the District to close its school buildings. No instruction was provided to any student in the District from March 15 through March 27, 2020. Instruction resumed remotely on March 28, 2020. Tr. 818. The District provided the Student with a “Special Education Continuous Learning Plan” that was to be in effect from March 24 through June 19, 2020. J7. It provided for 30 minutes of SDI in writing, five times per week, as specified in the Student’s IEP. *Id.*

88. It is unclear precisely when the provision of SDI resumed for the Student after the District’s school buildings closed. The Mother estimates it was “about a month” later. Tr. 401. Her recollection is supported by an email she sent to Ms. Accettullo on April 14, 2020 at 3:52 p.m.<sup>24</sup> In the email the Mother states, “Great timing hearing from you and thank you so much. It will be great to add [Ms. Accettullo/Student] Zoom meetings to the schedule.” D2 p.26. This implies that such meetings were not “on the schedule” prior to that time. It is found that SDI was not provided to the Student between March 15 and April 14, 2020, whereas general education instruction resumed in the District on March 28, 2020.<sup>25</sup> Given that some of this time was spring break, the Student missed seven days of special education. D4 p.2.

<sup>24</sup> There is no evidence as to what the Mother was responding to in this email.

<sup>25</sup> The District calendar indicates that April 6-10, 2020, were “non-student” days, i.e. spring break. D4 p.2.



89. During the spring of 2020, the Mother assisted the Student with her schoolwork and often typed her writing assignments for her. Tr. 336-39. Ms. Fike approved of the Mother acting as a “scribe.” The Mother recalls Ms. Fike noting the Student “had the content” but “didn’t have the ability to connect the idea to her arm and her hand to write it down...there were too many steps.” *Id.* at 338.

90. The Father also assisted the Student with her schoolwork during the spring of 2020. He observed the Student to be “so frustrated with the process,” especially with regard to multistep assignments. Tr. 445. When he observed her interact with her class on the Zoom videoconference platform, she was not engaged. According to the Father, “It was quite difficult for her to stay focused ...it was an uphill battle.” *Id.* at 446.

91. Ms. Tamte continued to work with the Student in March of 2020, but could not do so in person. The Zoom platform worked for a couple of sessions, but then the Student required shorter sessions due to her limited attention span. Eventually the Parents stopped the sessions altogether because the Student did not want to do them. Tr. 477. Starting approximately May of 2020, during warmer weather, Ms. Tamte was able to work with the Student in person in the outdoors. After school ended in June, the Student wanted a break so the Parents again stopped the sessions with Ms. Tamte. They anticipated resuming the sessions in person in September, but that did not occur. *Id.* at 479. Ms. Tamte does not recommend virtual instruction for the Student and noted that, even though she had a positive and trusting relationship with the Student, the Student was not able to successfully access material via virtual instruction. Tr. 147.

92. In March of 2020, the Student’s play therapy sessions with Ms. Newman went virtual, but they did not go well. The Student would close her laptop or get under a blanket and cry. She became frustrated with the technology and sometimes left the room. P16. p.3. She did not want to do the sessions on Zoom. Tr. 480. Ms. Newman changed the appointments to every other week, and added sessions with the Parents in the off weeks in order to provide them with additional support. P16 pp.2-3. In April of 2020, Ms. Newman noted the Student was displaying depressive symptoms that had not previously been observed. P16 p.3. The Student lost interest in previously pleasurable activities, and appeared indifferent, disengaged, and sad. *Id.*; Tr. 210. Ms. Newman opined at the hearing that the Student was experiencing significant challenges with the distance learning and that she could not engage in her educational programming due to frustration and loss of consistency. Tr. 194-5. However, Ms. Newman has not observed the Student in an educational setting in the last two years. *Id.* at 201.

93. Initially, the Student attended Seaview fourth-grade class Zoom videoconference sessions, but she did not attend many toward the end of the school year. Tr. 783. Ms. Fike did not observe the Student to be experiencing anxiety with remote learning; she heard about it from the Parents. *Id.* at 803. Generally, throughout the school year, Ms. Fike did not observe the Student to be unusually stressed. *Id.* at 803-04. Approximately seven of Ms. Fike’s students had difficulty adjusting to the remote learning environment. *Id.* at 807.

94. The Student also attended her SDI with Ms. Accettullo remotely, but her attendance decreased as time went on. The District continued to offer 30 minutes of SDI per day. Ms.

Accettullo estimates the Student attended about half of the sessions as of June, and sometimes she did not stay for the full 30 minutes. Tr. 869.

95. On June 2, 2020, the Parents notified the District by email that the Student had undergone a neuropsychological evaluation by Dr. Philip Dunbar-Mayer. A summary of Dr. Dunbar-Mayer's report, as well as some of the underlying testing he administered and the results, were provided to the District at that time. J8 p.1. Dr. Dunbar-Mayer's 29-page final report was provided to the District by the Parents on October 2, 2020. J12 p.1. Dr. Dunbar-Mayer has never been employed in a public school setting and does not have experience as a teacher. Tr. 66. He has not observed the Student in an educational setting. *Id.* at 68.

96. Dr. Dunbar-Mayer performed a neuropsychological evaluation of the Student at the request of the Parents. The evaluation was performed in person, in May of 2020, when the Student was ten years old and in the fourth grade. J8 p.3. Her Parents wanted a better understanding of the Student's functioning and abilities, as well as diagnostic clarification and treatment options. J12 p.3; Tr. 41. As part of the evaluation, Dr. Dunbar-Mayer administered a variety of tests to the Student. J12 p.3.

97. Dr. Dunbar-Mayer administered the WISC-V assessment to the Student. The WISC-V provides a measure of cognitive ability. From that assessment, Dr. Dunbar-Mayer determined the Student's Full-Scale Intelligence Quotient (FSIQ) is 118, which is in the high average range at the 88<sup>th</sup> percentile. J12 p.11. Her General Ability Index (GAI) is 123, which is in the superior range at the 94<sup>th</sup> percentile. *Id.* Dr. Dunbar-Mayer used professional judgment in deciding to use the Student's GAI, rather than her FSIQ, in order to determine whether a discrepancy existed between the Student's intellectual ability and her academic achievement for purposes of diagnosing an SLD.<sup>26</sup> Tr. 96-97. Ms. Falleroni opined that the GAI is not considered an IQ score under the SLD measure, and that use of the FSIQ is required in the WAC discrepancy model. *Id.* at 674. The discrepancy table and instructions for its use were not entered into evidence at the hearing and the ALJ was not asked to take official notice of the document.

98. Dr. Dunbar-Mayer also gave the Behavior Assessment System for Children – Third Edition (BASC-3) questionnaire to the Student, Ms. Fike, Ms. Tamte, and the Parents. Ms. Fike reported numerous areas of concern on the BASC-3, including clinically significant levels of anxiety, depression, somatization, attention problems, learning problems, typicality, withdrawal, adaptability, leadership, study skills, and functional communication. J8 p.7.

99. Dr. Dunbar-Mayer also administered the Behavior Rating Inventory of Executive Function (BRIEF), the Gray Oral Reading Test – 5<sup>th</sup> Edition (GORT-5), the Woodcock-Johnson Tests of Academic Achievement – 4<sup>th</sup> Edition, the Beery-Buktenica Developmental Test of Visual-Motor Integration- 6<sup>th</sup> Edition, and numerous other assessments. J12 pp.4-5. Based on this testing, Dr.

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<sup>26</sup> The terms "specific learning *disorder*" and "specific learning *disability*" were both used by Dr. Dunbar-Mayer. According to Dr. Dunbar-Mayer, the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5), which is used by psychologists when making diagnoses, employs the term "specific learning disorder." "Specific Learning Disorder in Reading" and "Specific Learning Disorder in Written Expression" come directly from the DSM-5. The WAC uses the term "specific learning disability." Dr. Dunbar-Mayer opined that the terms are interchangeable. Tr. 98-99.

Dunbar-Mayer diagnosed the Student as having multiple conditions according to the criteria of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5):

Disruptive Mood Dysregulation Disorder (DMMD)

Generalized Anxiety Disorder (GAD)

Attention Deficit/Hyperactivity Disorder (ADHD, Combined Type, moderate severity)

Language-Based Learning Disability (also known as dyslexia), including Specific Learning Disorder in Reading (moderate severity) and Specific Learning Disorder in Written Expression (moderate severity)<sup>27</sup>

Developmental Coordination Disorder (fine motor, also known as dysgraphia)

Specific Learning Disorder in Mathematics (also known as dyscalculia, moderate severity)

J12 p.23. Dyslexia is a specific learning disability in reading. Tr. 49. DMMD is a diagnosis made based on observation and questionnaires, including the BASC-3, and is indicated by the presence of severe emotional/behavioral dysregulation, aggressive tendencies, and oppositional and argumentative behaviors. *Id.* at 50. ADHD is a neurological condition that presents executive functioning challenges, such as decreased focus and attention, and impulsivity. *Id.* at 51.

100. Dr. Dunbar-Mayer concluded that the Student does not have autism. Tr. 111; J8 pp.3-4. He recommended that her special education eligibility category be changed and that her IEP be “immediately modified.” J8 p.6.

101. Dr. Dunbar-Mayer made several recommendations for the Student, based on his evaluation. He recommended that she receive 30 minutes of SDI in “literacy and reading comprehension” five times per week, to be delivered by a special education teacher or a paraeducator certified in Wired for Reading. He recommended this SDI consist of a phonologically-based curriculum such as Wired for Reading or Slingerland. Tr. 54-55; J12 p.26. He does not know what curriculum is used by the District for reading SDI. Tr. 81.

102. Dr. Dunbar-Mayer also recommended that the Student receive SDI in written expression for 45 minutes, five times weekly, to be delivered by a special education teacher. He further recommended SDI in math five times per week for thirty minutes. J12 pp.26-27. Other recommendations included: a functional behavior assessment and development of a behavior intervention plan, occupational therapy and assistive technology evaluations, weekly parent/teacher consultations, and IEP accommodations such as additional time on tests and frequent teacher check-ins. *Id.* at 28.

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<sup>27</sup> The DSM-5 does not provide for a diagnosis of “dyslexia.” In Dr. Dunbar-Mayer’s opinion, diagnoses of “Specific Learning Disorder in Reading” and “Specific Learning Disorder in Written Expression” characterize dyslexia in that dyslexia is a “language based learning disability.” Tr. 98-99.

103. In Dr. Dunbar-Mayer's opinion, remote learning would be almost impossible for the Student given her behavioral challenges and her issues with attention and concentration. Tr. 59. He noted that the Student "is at considerable risk for increasing academic difficulties and behavior/emotional/social struggles without appropriate services and supports." J8 p.5. He further noted that the Student has demonstrated significant learning issues despite intensive support, and that "if [Student's] ongoing educational struggles and diminished rate of progress were to continue or worsen or if insufficient levels of support were to be offered to her at present, one would expect the discrepancies between her superior range intellectual abilities and academic skills to deteriorate further and to have an additional negative impact on [Student's] emotional well-being." J8 p.5.

104. Dr. Dunbar-Mayer's report's "Recommendations" section notes, "It may be helpful to bring an educational attorney to the IEP team meeting to speak on [Student's] behalf" and goes on to recommend Cedar Law as a resource.<sup>28</sup> J12 p.28. The report also recommends that the Student continue to work with Ms. Tamte. Dr. Dunbar-Mayer has never met Ms. Tamte. *Id.* at 29.

105. On June 11, 2020, an IEP meeting was held to initiate a new IEP for the Student, review Dr. Dunbar-Mayer's report, discuss the Student's annual goals, and review her instructional needs. J9 pp.1, 15. In attendance at the meeting were Ms. Accettullo, the Mother, Heather Pickar (administrator designee), Tim Garberich (District representative), Ms. Fike, and Ms. Tamte. The meeting was held via videoconference. The "team considerations" in that meeting included the fact that the Student sometimes had behaviors that impeded her learning during the remote continuous learning. *Id.* at 6. The Parents informed the team that remote learning was not working for the Student. She would at times close her laptop or turn off her camera. The Parents had previously informed Ms. Fike and Ms. Accettullo that the remote format was not successful. Tr. 491.

106. Ms. Accettullo noted at the meeting that the Student had deficits in her written language skills that adversely impacted her educational program. Specifically, she continued to exhibit run-on sentences, sentence fragments, spelling issues, and incorrect capitalization. J9 p.9.

107. The IEP team decided to conduct a reevaluation of the Student in the fall of 2020 due to the new data from Dr. Dunbar-Mayer's report and the Parents' concerns about the Student's performance in reading and math. The team added some accommodations to the IEP and "considered" adding reading and math SDI to the IEP but did not do so. J9 p.15. According to the PWN issued on June 11, 2020, "The team cannot add reading and math SDI to [Student's] IEP without her qualifying in those areas." The PWN states, "A neuropsychological report was written for [Student] from a doctor outside of the school district. The report's findings could not be used in the IEP. However, the team members read the report and considered it in deciding to schedule a reevaluation for [Student]." *Id.* No evidence as to why the District could not use Dr. Dunbar-Mayer's "findings" for purposes of the IEP was presented.

108. The Mother recalls the District team members stating at the meeting that the District had to do its own evaluation before the Student could qualify for additional areas of SDI. Tr. 489. The Parents signed a consent for a reevaluation on June 24, 2020. J13 p. 2. The District provided a

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<sup>28</sup> Ms. Hruska and Ms. Hill are attorneys at Cedar Law.

schedule for completing the reevaluation in September of 2020 and holding an IEP meeting in mid-October. They did not offer an expedited schedule. Tr. 490. The Parents requested that “reading, math and fine motor” be considered during the reevaluation. J13 p.2.

109. The Student’s fourth grade report card was completed by Ms. Fike. The Student received grades of 2 and 3 in literacy for first semester (as well as one 4, which denotes “exceeding expectations,” in communication-effort). J18 p.6. The Student received 2s in mathematics for first semester, and 2s, 3s and 4s in lifelong learning skills. *Id.* at 7-8. Approximately 30 percent of the students receive 2s on their report cards according to Ms. Fike. Tr. 784. The first semester comments note the Student is a talented oral reader, and that she gains mastery of math skills with “lots of practice and repetition.” *Id.* The comments also note that the small push-in group in math had been very helpful to the Student.

110. Grades for second semester of fourth grade were provided to the Parents via an online report card. J18 p. 9. Those grades were not entered into evidence in the due process hearing.

111. The 2019-20 school year ended for students in the District on or about June 18, 2020.<sup>29</sup> D4 p.2.

112. In July of 2020, Ms. Newman stopped holding sessions with the Student because the online therapy was more stressful than helpful. P16 pp.4-5. After observing depressive symptoms beyond what should have been an adjustment period, Ms. Newman diagnosed the Student with “Major Depressive Disorder, single episode, mild” on July 15, 2020. P16 p.3.

113. The Student participated in an in-person day camp at Aspiring Youth over the summer of 2020. The program benefitted the Student immensely and her Parents noted a vast improvement to her mood and their family dynamics. Tr. 492-93. Ms. Newman, who had referred the family to Aspiring Youth, opined that it is beneficial for the Student to continue at Aspiring Youth in person in order to have social and emotional support from, and interaction with, peers. Tr. 196, 199.

114. Gabriela Indivero<sup>30</sup> was the Student’s group facilitator at Aspiring Youth over the summer of 2020, and in the afternoon group in the fall of 2020. Tr. 278. Ms. Indivero has observed the Student to exhibit challenges with fine motor skills, such as building LEGOs. *Id.* at 279-80. Ms. Indivero has also observed the Student to be easily frustrated and to withdraw or walk away when an activity is frustrating to her. *Id.* at 284.

### THE 2020-2021 SCHOOL YEAR

115. The current school year, 2020-21, is the Student’s fifth grade year. On September 4, 2020, the Parents notified the District of their intent to homeschool the Student. The Parents stated in their emailed notice, “Because [Student] needs in-person learning and is unable to access her education in this remote only offering, we will be homeschooling, and intend to seek

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<sup>29</sup> No evidence was presented that there were “snow days” during the school year that altered the schedule published by the District as set forth in exhibit D4.

<sup>30</sup> Ms. Indivero has a Bachelor of Arts degree in psychology. She has worked at Aspiring Youth for three and a half years. Tr. 277.

reimbursement and compensatory funds.” J10 p.1. The Parents asked the Student about remote learning and she said, “Yeah, I can’t do this, this doesn’t work for me...I rage quit. I just get so angry.” Tr. 495. The Parents felt they had been successful during the time when there had been no District instruction and the Parents had homeschooled the Student. They also felt they were losing time to address the dyslexia. *Id.* at 494-95.

116. According to the Mother:

Once the announcement was made in August that the school was going to be fully remote and that the hybrid wasn’t even an option, we just knew that this wasn’t going to work for us and we knew from the data we had with the Student from March, you know, through the end of June that it was really tough and that we just knew this kid is not going to be able to access this, especially when we were reading there is a new online platform the kids need to learn. So, you know, she had already kind of gotten adjusted to the Google Classroom and now the District was saying okay, for this grade level, the kids now have to learn this program called Canvas. And we just knew that the reaction that the Student was having to online learning – it was anger, depression, anxiety, you name it and we were done having that in the household, so we came to that decision of we did best in that first three weeks where we weren’t involved with the school, when we were just doing our own homeschooling.

Tr. 494-95.

117. The Student agreed to try homeschooling, though she would have preferred to attend Hamlin Robinson.<sup>31</sup> Tr. 495.

118. No District classes or ancillary services were kept in place for the Student after the decision to homeschool was made. J10 p.2. On September 4, 2020, the District issued a PWN proposing to discontinue the Student’s IEP due to her withdrawal from the District. J11.

119. On September 11, 2020, Ms. Falleroni emailed the Parents and asked whether they wanted to proceed with the reevaluation. The Parents replied that they did, and they wanted an updated IEP in place for when school was able to resume in person. D3 pp.12-13.

120. On September 18, 2020, the Parents filed the Complaint in this due process action.

121. On September 30, 2020, Ms. Falleroni emailed Dr. Dunbar-Mayer asking for “all protocols that were used in the evaluation you completed in May of 2020.” J12 p. 1. On October 2, 2020, the Mother provided Dr. Dunbar-Mayer’s final report to the District. *Id.*

122. The District completed a reevaluation (2020 Reevaluation) of the Student in the fall of 2020. A reevaluation meeting was scheduled for October 21, 2020. The purpose of the 2020 Reevaluation was to determine three things: whether the Student continued to be eligible to receive special education and continued to need special education and related services; her

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<sup>31</sup> The Student referred to Hamlin Robinson as “Slinger-land” and called it her “learning home.” Tr. 316-17, 495.

present levels of performance and educational needs; and whether any additions or modifications to the special education and related services were needed to enable the Student to meet her annual goals and to participate in the general education curriculum. J13 p. 3.

123. The District's assessments included in the 2020 Reevaluation were conducted virtually or online. J13 p.4. The Student was evaluated in the areas of medical/physical, vision, executive functioning, fine motor, cognitive, and academic. *Id.* The medical/physical evaluation was performed by the school nurse, Kaitlin Catlin, who gathered information from a conversation with the Parents on October 2, 2020, as well as from the District computer system and staff and medical reports. The Student's vision and hearing were not screened as part of the medical/physical portion of the evaluation. *Id.* at 7. Ms. Catlin noted, under vision diagnoses, that the Student had passed a District vision test in November of 2018. She also noted:

An alteration in normal vision function may limit [Student's] ability to learn from the environment around her in regards to both receiving and processing information. The presence of visual impairments may impact her learning sequence in terms of social, motor, language, and cognitive development areas. We may also see a lowered motivation to initiate learning and social interactions. This can affect all academic areas.

*Id.* at 8.

124. Ms. Catlin also noted, with regard to the Student's other diagnoses, that they pose a risk of "self-directed violence," as well as frustration, self-doubt, and discouragement, among many other potential adverse impacts on educational performance. J13 p.8.

125. Sheri Harrison, District Teacher for Students with Visual Impairment, assessed the Student in the area of vision. The assessment was based on reports from Dr. Hash of Alderwood. J13 p.18. The assessment notes the Student's glasses work well and she has no visual complaints, and that the Student has mild intermittent blurry vision that is improved with glasses. She has moderate difficulty with tracking when using "smaller or dense print." Her vision is stable. The assessment states, "In her report dated 8/26/2020, Dr. Hash recommended monitoring [Student's] vision and noted that, when the family is ready to continue vision therapy, [Student's] eye-teaming, tracking and focusing can be built to support easier near-vision for reading, writing and screen time." *Id.* With her glasses, the Student's visual acuity (both eyes together) is 20/20 for both distance and near vision. The assessment notes that Dr. Hash has diagnosed the Student with convergence insufficiency, suppressed binocular vision, saccadic eye movement, amblyopia in the right eye, farsightedness, and astigmatism. *Id.*

126. Much of the 2020 Reevaluation consisted of a review of existing data, including Dr. Dunbar-Mayer's evaluation. However, the i-Ready, a web-based diagnostic assessment used by the District, was administered to the Student, and the overall score on the reading portion of that assessment placed the her at the early fifth grade level. Ms. Falleroni noted that this should be interpreted "with some caution given that [Student] needed accommodations [assistance from her Parent] to complete it" and exhibited a high frustration level, and therefore the results may not be a reliable indication of her true reading skills. J13 pp.14-16. The overall score on the i-Ready math evaluation placed the Student at a second grade level. *Id.* at 14-15. She performed at a

second grade level on numbers and operations, algebra and algebraic thinking, measurement and data, and geometry. *Id.*

127. “Significant findings” of the 2020 Reevaluation included the fact that the Student’s reading skills, particularly accuracy and comprehension, are below the expected level for a student her age, and that she skips words at times, which affects her comprehension. J13 p.15. Significant findings as to math included inconsistent calculation skills, and second-grade level skills in several areas. *Id.* Significant findings as to writing included the Student’s ability to use correct word form, grammar, semantics, and mechanics were below the expected age level. *Id.*

128. On the fine motor portion of the reevaluation, conducted remotely by occupational therapist Mackenzie Hess,<sup>32</sup> the Student scored in the low end of the average range for motor coordination and visual motor integration. J13 p.16. In written expression, the Student demonstrated lack of automaticity when writing her letters as well as hand fatigue. *Id.* at 17. Ms. Hess concluded that occupational therapy (OT) should be provided to the Student as a supplementary service. *Id.*

129. Ms. Hess explained that the Student has trouble getting her ideas on paper, gets fatigued when she writes, and consequently avoids writing tasks. Tr. 892. Ms. Hess recommends the Student learn tools to modify and adapt written expression tasks, through aids such as speech to text software, and grammar and spell checks. Ms. Hess noted the dysgraphia will be part of the Student’s life going forward and it is best if she learns compensatory mechanisms. Tr. 893-98.

130. The 2020 Reevaluation determined that the Student met eligibility criteria for special education in the area of “Other Health Impairment.” J13 p.4. The eligibility category was changed due to the diagnoses made by Dr. Dunbar-Mayer and their adverse impact on the Student’s educational performance and progress. Ms. Falleroni recommended the Student receive SDI in written language, math, reading, and learning strategies/organizational skills, and that she receive an OT consultation. *Id.*

131. The Student qualified for services in reading based on Dr. Dunbar-Mayer’s testing results on the GORT-5, her performance on the i-Ready and the fact that she needed her Mother’s assistance to perform that assessment, comments from her fourth-grade teacher, and concerns expressed by her Parents who are her teachers while she is being homeschooled. Tr. 659-62. She qualified in math based on the score on the Woodcock-Johnson testing performed by Dr. Dunbar-Mayer and the i-Ready. Tr. 666.

132. Dr. Dunbar-Mayer’s diagnoses of dyslexia, dysgraphia, and dyscalculia contributed to the Student qualifying for SDI in additional areas, but the Student still could have qualified for services in new areas without those diagnoses. Dr. Dunbar-Mayer is able to use diagnostic impressions and the DSM-5, which are different criteria than those used by school psychologists, to identify specific learning disorders, which he equates with SLDs. Tr. 703-04.

133. The Student had not been evaluated in executive functioning by the District prior to the 2020 Reevaluation. According to Ms. Falleroni, not all students with ADHD require an evaluation

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<sup>32</sup> Ms. Hess has a bachelor’s degree in cognitive biopsychology and neuroscience, and a master’s degree in occupational therapy. She is a national board certified occupational therapist. Tr. 887-88.



in executive functioning and no significant concerns were raised regarding the Student that would have pointed to the need for an earlier evaluation in that area. Tr. 656-57.

134. The 2020 Reevaluation provided a “summary of qualifications and functioning” that includes:

Executive Functioning-Rating scales highlighted areas of difficulty in the areas of self-monitoring, initiation and organization. SDI is recommended in Learning Strategies/Organizational Skills.

Student’s difficulty with handwriting adversely impacts her ability to complete written expression tasks; OT as a supplementary service to consult with staff regarding task modifications when completing written work is recommended.

Overall and comprehensively, it is recommended that Student receive SDI targeting areas of weakness in all academic areas.

The Teacher of the Visually Impaired will collaborate with teachers as requested when vision problem solving is needed.

J13 p.4.

135. Based on the 2020 Reevaluation, SDI was recommended in learning strategies/organizational skills, reading, math, and written language. J13 p.5.

136. An IEP meeting was held via videoconference on November 6, 2020, to review the Student’s IEP. The Parents, Ms. Larsen, Ms. Hess, Ms. Harrison, Ms. Winkelman, and Ms. Hruska, among others, attended the meeting. J14 pp.3 & 20. Ms. Larsen is the Student’s case manager for the 2020-21 school year and she drafted the November 2020 IEP. Tr. 721. At the meeting, the Parents reported concerns about writing and math, the need for evidence-based reading interventions, and how the Student’s vision issues affect her ability to learn and process information. The Parents reported “strange” behavior by the Student at home, such as babbling and disorganized speech. They further reported self-harming behaviors and the Student verbalizing that she is “a failure with learning.” J14 pp.3, 5.

137. The IEP developed by the team includes three goals for learning strategies/organizational skills, three math goals, two reading goals, and two written language goals. J14 pp. 7-11. It also includes the following service matrix:

**Services 11/16/2020 - 11/15/2021**

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
<b>Special Education</b>							
No	Written Language	Paraeducator	Special Education Teacher	30 Minutes / 5 Times Weekly	Special Education	11/16/2020	11/15/2021
No	Reading	Paraeducator	Special Education Teacher	30 Minutes / 5 Times Weekly	Special Education	11/16/2020	11/15/2021
No	Math	Paraeducator	Special Education Teacher	30 Minutes / 5 Times Weekly	Special Education	11/16/2020	11/15/2021
No	Learning Strategies/Or ganizational Skills	Paraeducator	Special Education Teacher	30 Minutes / 1 Times Weekly	Special Education	11/16/2020	11/15/2021

**Total minutes per week student spends in school:** 1800 minutes per week  
**Total minutes per week student is served in a special education setting:** 480 minutes per week  
**Percent of time in general education setting:** 73.33% in General Education Setting

**Supplementary Aids and Services:**

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
No	OT Consultation	Occupational Therapist	Occupational Therapist	15 Minutes / 6 Times Annually	Special Education	11/16/2020	11/15/2021

138. The PWN issued on November 6, 2020, notes that the Parents requested an increase in the Student’s writing SDI from 30 to 45 minutes five times weekly. The team rejected this because the Student made progress previously with 30 minutes five times weekly, and the Student struggles to maintain stamina for longer than 30 minutes. J14 p.19. The team also rejected the Parents’ request that the reading SDI be delivered by a provider trained in the Wired for Reading curriculum. The Parents requested that the District contract with Ms. Tamte to deliver the Student’s reading SDI; this option was considered but rejected. *Id.* The PWN notes that the District has appropriately qualified personnel who can deliver SDI to the Student, and that the District team members do not believe the Student requires use of the Wired for Reading curriculum. It states, “The District will provide SDI that addresses [Student’s] individual reading needs using a variety of curricula, teacher strategies, teacher training, and instructional resources. The District believes it is important for [Student’s] providers to be able to use their professional discretion to determine the appropriate curricula and instructional strategies to use with [Student], based on her individual needs.” *Id.* Moreover, District team members did not believe the Student required a special education teacher to deliver all of her SDI in order for her to make progress. The PWN notes that a special education teacher will design and supervise the provision of SDI, will monitor and evaluate the Student’s progress, and may deliver the SDI at times. *Id.*

139. Ms. Larsen has experience working with students with dyslexia. She is familiar with the Wired for Reading curriculum and uses elements of it in SDI. Elements of Wired for Reading are found in numerous other curricula, as well. Tr. 725-27. The District uses evidence-based, multisensory strategies when delivering reading SDI. *Id.* at 736.

140. The November 6, 2020 PWN goes on to state that services are being delivered via online instruction from teachers via Zoom for synchronous learning, and through assignments and projects to be completed independently by asynchronous learning. J14 p.20. No in-person instructional options were offered by the District. Tr. 503.

141. The Parents are satisfied with the service matrix and the amount of SDI that is provided in this IEP. However, they feel the services must be delivered in person. Tr. 535.

142. Ms. Indivero has observed the Student's mental health to decline over the fall of 2020 and the Student appears to be focused on her own anxiety. Tr. 281. On November 9, 2020, the Student showed Ms. Indivero some cuts on her fingers. She stated that some of the cuts were accidental, but others were intentional, stating, "I felt bad, so I cut them." *Id.* at 286.

143. On November 14, 2020, Ms. Newman met with the Student in person. The Student disclosed self-injurious behavior and discussed "feeling bad at school." P16 p.6.

144. In December of 2020, the Parents enrolled the Student in the District part time so she could access special education services. The Student began accessing the special education services, remotely, on January 4, 2021. J16 p.1. The Mother does not think the online learning is going well. She has observed the Student cry and state that she is a failure at learning. Tr. 507.

145. The District began returning "vulnerable" students to in-person instruction in November or December of 2020. Deaf and visually impaired students returned first. Other students returned on January 4, 2021, and more are returning in phases. Tr. 828-29.

146. The Parents are seeking to recover thousands of dollars from the District in out-of-pocket expenses.<sup>33</sup> P7. This figure includes the cost for homeschooling supplies such as audio books, a reading program, math games, and a multiplication chart, among other items. Tr. 508-34; P7 pp.1-2. Other items for which they seek reimbursement include "muting headphones" which help the Student avoid sensory overload when riding the bus to and from school, and no-tie shoelaces because the Student lacks the skill to tie her shoes. *Id.* The Parents seek \$3,244.88 for Ms. Newman's therapy from 2018-2020, and \$467.20 for Heather McDonald's services. They also seek \$1,859.40 for the Hamlin Robinson summer school during the summer of 2019, which included classes in math, art, drama, and movement. Tr. 527-28. The Parents also seek \$10,297.36 for the Aspiring Youth programs from 2018-2020, including afternoon groups during the school year. *Id.* at 529. The Parents also seek \$9,103.91 for vision therapy the Student has completed, and vision exams. *Id.* at 531-32. They also seek \$3,378.89 for Ms. Tamte's services. The Parents also seek \$3,467.72 for Dr. Dunbar-Mayer's evaluation and mileage to and from his clinic. P7 pp.1-2.

147. The Parents did not ask the District whether some of the items they purchased could be provided by the District (for example, headphones and "fidgets"). Rather, the Parents knew these items worked and were part of the Student's "toolkit" for school, and provided them. Tr. 571-72. The District was able to provide audio books but the Parents did not feel the collection was sufficiently extensive. *Id.* at 570.

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<sup>33</sup> An exact figure was not provided. Exhibit P7 indicates a total dollar figure of \$41,178.72, but that amount includes several large expenditures, including medical costs, for which the Parents are not seeking reimbursement.

148. An additional expense the Parents seek to recover is for a Chromebook laptop they purchased for the Student at the start of the COVID-19 pandemic. At the time, they were told by the District that there might not be enough laptops for every student to have one at home, and they wanted to be sure they got one for the Student “before everything shut down.” They purchased a Chromebook because that is what the Student had been using in school. Tr. 519. However, when the District began remote learning in the spring of 2020, Seaview students were permitted to take their Chromebooks home with them. *Id.* at 749-50, 782. They returned the Chromebooks at the end of the school year and received new ones at the start of the 2020-21 school year. *Id.*

149. The Parents are also seeking in-person SDI to commence immediately. They would like Ms. Tamte to provide the SDI while the District buildings are closed because she is willing to provide the services, with the exception of math, which she is not qualified to teach, in person. Tr. 535-36. They would like the District to find an agency that is willing to instruct the Student in math in person while the school buildings are closed. *Id.*

150. The Parents additionally seek an order that the District must use an evidence-based reading curriculum such as Orton-Gillingham, Slingerland, or Wired for Reading.<sup>34</sup> Tr. 536-37.

151. The Parents are seeking in-person compensatory education for SDI for the time of the building closures due to COVID-19. Tr. 537. The Mother estimates the Student attended approximately half of the SDI sessions during the March through June of 2020 time period. *Id.* at 538. They are also seeking 360 hours of SDI in reading, 180 hours in math, and 72 hours in organizational skills, to “catch the Student up” with what they feel she missed, starting in the 2018-19 school year. *Id.* at 538-540.

152. Finally, the Parents are seeking nine months of future vision therapy for the Student, which costs \$154 per week, for a total cost of approximately \$6,000. Tr. 541-42.

## 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,

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<sup>34</sup> All three of these curricula use structured, sequential, multisensory approaches to teach reading skills. Tr. 416.

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:

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

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

Whether the District failed to provide the Student with a FAPE since March 2019 by violating its obligations under Child Find by failing to identify and evaluate the Student for special education in March of 2019 when the teacher and Parent both raised concerns regarding a suspected disability and the need for special education services

7. 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).

8. 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). 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. 822 F.3d at 1121.

9. In the present case, the Student was already eligible for special education in March of 2019 and was receiving SDI in social skills. Her general education teacher expressed concern about the Student's progress in reading, writing, and math; the Parents shared those concerns and also suspected the Student may have dyslexia. In response to these concerns, the District initiated a thorough reevaluation of the Student, and assessed her in numerous areas, including

reading, writing, math and social skills. This clearly met the District's duty under Child Find to assess the Student for suspected disabilities.

10. The crux of the Parents' Child Find complaint seems to be that the Student was not found to be eligible for services in math and reading following the 2019 Reevaluation. This is not a Child Find issue. Rather, it is addressed below in the Conclusions of Law that analyze the appropriateness of the 2019 Reevaluation and the Student's IEPs.

11. The Parents have not met their burden to prove a Child Find violation on the part of the District.

Whether the District inhibited meaningful participation by the Parents in March 2019 thereby denying the Student a FAPE by providing affirmative misinformation to the Parents about the District's obligations under Child Find

12. The Parents contend the District misrepresented its Child Find obligations to the Parents in March of 2019. While the basis of this contention is not entirely clear, the Parents appear to assert that the District led them to believe the Student would not receive necessary special education services without a private evaluation indicating a diagnosis of dyslexia, and that they were instructed to obtain a private evaluation. Parents' Post-Hearing Memorandum (Parents' Memorandum) at 15. As found above, these assertions are not supported by the evidence. Moreover, as discussed above, the Student was already eligible for special education at the time the alleged misrepresentations occurred.

13. For these reasons, it is concluded that the Parents have not met their burden to show that the District denied the Student a FAPE by providing affirmative misinformation to the Parents about the District's obligations under Child Find.

Whether the District inhibited meaningful participation by the Parents in March 2019 thereby denying the Student a FAPE by providing affirmative misinformation to the Parents regarding special education eligibility for children with dyslexia

14. The Parents contend the District told them they needed to get an outside evaluation that diagnosed the Student with dyslexia in order for her to receive SDI to address learning issues associated with dyslexia. They also contend the District told them the Student would have to be two grade levels behind in order to get such SDI. They contend these misrepresentations deprived the Student of FAPE because, but for these misrepresentations, they would have been much more likely to express dissent at the evaluation meetings at which they were told the Student's scores were not low enough to qualify her for services in reading and math. Parents' Memorandum at 17.

15. As discussed in the Findings of Fact, above, the evidence does not support the Parents' contentions. The Parents erroneously believed certain services would be "triggered" for the Student if she were diagnosed with dyslexia. District personnel appropriately told the Parents that the District psychologist is not able to diagnose dyslexia. This did not mean, however, the District could not evaluate the Student's potential need for SDI in reading, writing, and math. The

Mother understood this and the Parents asked the District to perform an evaluation, which the District subsequently performed.

16. The Parents have not met their burden to demonstrate that the District provided misinformation to the Parents regarding special education eligibility for children with dyslexia, or that the Student was denied FAPE as a result of such misrepresentation.

Whether the District inhibited meaningful participation by the Parents in March 2019 thereby denying the Student a FAPE by failing to provide PWN to the Parents documenting the District's decision not to conduct a special education evaluation to address dyslexia concerns and failing to provide the Parents with procedural safeguards.

17. The Parents contend the District should have issued a PWN documenting its refusal to initiate a special education evaluation to address dyslexia concerns following the March 2019 parent-teacher conference, 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.

18. According to the Parents, the District “refused” to initiate an evaluation for dyslexia at the parent-teacher conference in March of 2019 and, consequently, a PWN documenting this refusal was required. This contention is inaccurate. As described above, the District cannot diagnose dyslexia. However, it can and did assess the Student for the need for SDI that may be the result of dyslexia or other diagnoses.<sup>35</sup> PWN of that proposed reevaluation was provided to the Parents; they provided their consent and asked that specific areas be assessed.

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<sup>35</sup> A student who is eligible for special education means, in part, a student who has been evaluated and determined to need special education because of having a disability in one of 13 eligibility categories. One of those 13 eligibility categories is the “specific learning disability” category. WAC 392-172A-01035(1)(a); 34 CFR §300.8(a)(1). 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(2)(k)(i); 34 CFR §300.8(c)(10) (emphasis added). Therefore, the law recognizes that dyslexia is *one example of a larger group* of SLDs, although dyslexia is not its own separate eligibility category.



19. Thus, the District was not required to evaluate the Student for dyslexia, and its refusal to do so did not require issuance of a PWN or result in a denial of FAPE. The Parents have not met their burden to demonstrate the District denied the Student FAPE as to this issue.

20. The Parents further contend the District should have provided the Parents with procedural safeguards in March of 2019. 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. This WAC, on its face, does not apply to the present situation.<sup>36</sup> The Parents have not established that any of the enumerated situations existed at the March 2019 parent-teacher conference. Therefore, it is concluded that the District was not required to provide the Parents with procedural safeguards at or after the March 2019 parent-teacher conference. The Parents have not met their burden of proving a violation of the IDEA as to this issue.

Whether the District failed to conduct an appropriate evaluation in May 2019, specifically by failing to properly evaluate the Student in all areas of suspected need, mainly, by failing to appropriately assess needs in occupational therapy, reading, writing, math, social/emotional, behavior, and vision; and whether the District failed to conduct an appropriate evaluation by failing to appropriately qualify the Student in all areas of need (reading and math) when the Student was displaying a severe discrepancy between intellectual functioning and academic achievement.

22. The Parents first contend the District's 2019 Reevaluation was not appropriate because it failed to properly evaluate the Student in all areas of suspected disability. As set forth above, a disability is "suspected" when a school district "has notice that the child has displayed symptoms of that disability." *Timothy O.*, 822 F.3d 1119. School districts "must ensure that...[t]he student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." WAC 392-172A-03020(3)(e). Further, a district must ensure that "the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified." *Id.* at 3(g).

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<sup>36</sup> A statement of the IDEA's requirements that is perhaps more clear is provided in *Oman v. Portland Pub. Schs.*, 2005 U.S. Dist. LEXIS 45612 \*33 n. 6 (D. Or. 2005) ("Under the IDEA, the state educational agency is required to provide procedural safeguards notices to parents once a year, and upon initial referral or parental request for evaluation, and upon the first occurrence of the filing of a complaint, and upon request by a parent. 20 U.S.C. § 1415(d)(1)(A)").

23. In *Avila v. Spokane Sch. Dist. 81*, 69 IDELR 204 (9th Cir. 2017), the parents of the student at issue argued that the Spokane School District had violated the IDEA and had not assessed the student in all areas of suspected disability when it failed to assess their child for dyslexia and dysgraphia. However, the Ninth Circuit concluded the district had, in fact, assessed the student in all areas of suspected disability “when it tested him for reading and writing inefficiencies” and included an assessment of reading fluency. *Id.* The court noted that the district did not refer to specific reading and writing disorders as dyslexia or dysgraphia, but it evaluated students for SLDs, which include reading disorders such as dyslexia as well as writing disabilities, as set forth in 34 C.F.R. § 300.8(10)(i).<sup>37</sup> See *L.C. on behalf of A.S. v. Issaquah School Dist.*, 119 LRP 18751, 2019 U.S. Dist. LEXIS 77834 \*52 (W.D. Wash. 2019) (evaluation was appropriate where district did not specifically assess student for dyslexia but evaluated student to determine if she had an SLD in reading, writing, or math, “be it dyslexia or some other type of SLD”).

24. In the present case, prior to the 2019 Reevaluation, the Parents requested the following areas be evaluated: learning disability, reading comprehension, spelling, and common characteristics of dyslexia. The 2019 Reevaluation examined the following areas: academic (which includes reading, math, and written language), cognitive, and social/emotional. Thus, reading, writing, math, and social/emotional were all evaluated in the 2019 Reevaluation.

25. The Parents contend the social/emotional portion of the 2019 Reevaluation was inappropriate. They incorrectly assert in their post-hearing brief that the District gathered information only from the Student’s general education teacher for this portion of the Reevaluation. Parents’ Memorandum at 20. It is clear that the District *and* the Mother both provided input for the assessment. Although the input indicated some areas of difficulty in the home environment, at school the Student fell in the “average” range and social/emotional issues were determined to have no adverse impact on the Student’s educational performance. The Parents’ contention regarding this portion of the 2019 Reevaluation is not supported by the evidence and is not persuasive.

26. Visual processing was measured as part of the 2019 Reevaluation; “vision” was not assessed. WAC 392-172A-01035(2)(n) defines “visual impairment,” stating, “Visual impairment including blindness means an impairment in vision that, even with correction, adversely affects a student’s educational performance. The term includes both partial sight and blindness.”

27. There is no evidence that the Parents requested the Student’s vision be assessed as part of the 2019 Reevaluation. Moreover, to the extent there is evidence that vision was or should have been an area of suspected disability at the time, that evidence does not constitute a preponderance. Since September 20, 2018, the Student had received vision accommodations/modifications recommended by Alderwood (large print during testing and use of an incline board when reading) but there is little to no evidence that she was displaying symptoms of a visual disability that should have led the District to suspect a visual impairment. The treatment notes from Alderwood as of December 2018 show the Student had made considerable improvement with tracking and her vision measured 20/20. These records do not give rise to a suspected disability in vision.

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<sup>37</sup> WAC 392-172A-01035(2) (k)(i) is almost identical to this federal provision.

28. Similarly, there is no evidence that behavior, or disabilities that would be addressed by occupational therapy, were areas of suspected disability that should have been evaluated at the time of the 2019 Reevaluation.

29. The Parents also contend in their post-hearing brief that the District should have evaluated the Student in the area of executive functioning as part of the 2019 Reevaluation. Parents' Memorandum at 22. There is no evidence that the Parents requested the Student's executive functioning be assessed as part of the 2019 Reevaluation. Although the Parents had concerns about the Student losing her glasses and having a messy backpack, this does not demonstrate that executive functioning was or should have been an area of suspected disability at the time. The arguments advanced for this contention are not persuasive.

30. For these reasons, it is concluded that the Parents have not met their burden of proving the District *overlooked* an area of suspected disability when conducting the 2019 Reevaluation, to the extent that is part of their claim. That is not to say that the 2019 Reevaluation was appropriate in all other respects.

31. The Parents contend the District should have identified the Student as having SLDs in reading and math based on the discrepancy model, and should have qualified her for SDI in those areas as part of the 2019 Reevaluation.<sup>38</sup> The IDEA mandates that additional evaluation procedures, beyond those specified in WAC 392-172A-03020, must be followed when determining whether a student has an SLD. WAC 392-172A-03045. Districts must "develop procedures for the identification of students with specific learning disabilities which may include the use of: (1) a severe discrepancy between intellectual ability and achievement; or (2) a process based on the student's response to scientific, research-based intervention; or (3) a combination of both within a school district..." *Id.* The evaluation team may determine a student has an SLD if she does not achieve adequately for her age or meet grade level standards when provided with appropriate learning experiences and instruction. WAC 392-172A-03055. An SLD can be found in several areas, including written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. *Id.* The evaluation team must also determine that the student's lack of progress is not primarily due to other factors, including lack of appropriate instruction in reading or math. *Id.*

32. The IDEA also mandates how a severe discrepancy is to be documented via WAC 392-172A-03070:

**Method for documenting severe discrepancy.**

(1) For the purposes of applying the severe discrepancy tables, the following scores shall be used:

(a) A total or full scale intellectual ability score;

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<sup>38</sup> The Parents repeatedly assert in their post-hearing brief that the District withheld the learning disability addendum from them, thereby denying them the right to participate in the process. Parents' Memorandum at 30-33. This is inaccurate in that no learning disability addendum was generated by the District software because no learning disability was found by the software to exist.

(b) An academic achievement test score which can be converted into a standard score with a mean of one hundred and a standard deviation of fifteen; and

(c) A severe discrepancy between the student's intellectual ability and academic achievement in one or more of the areas addressed in WAC 392-172A-03055(1) shall be determined by applying the regressed standard score discrepancy method to the obtained intellectual ability and achievement test scores using the tables referenced above.

(2) Where the evaluation results do not appear to accurately represent the student's intellectual ability or where the discrepancy between the student's intellectual ability and academic achievement does not appear to be accurate upon application of the discrepancy tables, the evaluation group, described in WAC 392-172A-03050, may apply professional judgment in order to determine the presence of a specific learning disability. Data obtained from formal assessments, reviewing of existing data, assessments of student progress, observation of the student, and information gathered from all other evaluation processes for students being identified for a specific learning disability must be used when applying professional judgment to determine if a severe discrepancy exists. When applying professional judgment, the group shall document in a written narrative an explanation as to why the student has a severe discrepancy, including a description of all data used to make the determination through the use of professional judgment.

33. Additionally, when conducting an evaluation, the group must use “technically sound instruments that may assess the relative contribution” of cognitive, behavioral, physical, and developmental factors. WAC 392-172A-03020.

34. In the present case, a conclusion generated by the District’s software, when the method by which such a conclusion was reached is not documented and is not subject to examination if no SLD is found to exist, does not constitute adequate documentation that an SLD in math and/or reading did or did not exist. Moreover, it cannot be determined by this tribunal whether the software was “technically sound.” The District’s assertion that it essentially “trusted the software,” when it is not clear what exactly the software did, is far from compelling. There is no way to tell what IQ score, or other score(s), was used by the software. There is no way to confirm the software accurately employed and interpreted the discrepancy table because its findings cannot be examined. There is no way to determine if the software and/or Ms. Falleroni complied with WAC 392-172A-03070.

35. Additionally, WAC 392-172A-03080 sets out a specific method by which the eligibility determination of students suspected of having SLDs must be documented. It provides, in part:

**Specific documentation for the eligibility determination of students suspected of having specific learning disabilities.**

(1) In addition to the requirements for evaluation reports under WAC 392-172A-03035, for a student suspected of having a specific learning disability, the documentation of the determination of eligibility must contain a statement of:

(a) Whether the student has a specific learning disability;

- (b) The basis for making the determination, including an assurance that the determination has been made in accordance with WAC 392-172A-03040;
- (c) The relevant behavior, if any, noted during the observation of the student and the relationship of that behavior to the student's academic functioning;
- (d) Any educationally relevant medical findings;
- (e) Whether:
  - (i) The student does not achieve adequately for the student's age or meet state grade level standards in one or more of the areas described in WAC 392-172A-03055(1); and
  - (ii)(A) The student does not make sufficient progress to meet age or state grade level standards when using a process based on the student's response to scientific research-based interventions consistent with WAC 392-172A-03060; or
  - (B) The student meets eligibility through a severe discrepancy model consistent with WAC 392-172A-03070.

In the present case, the Student was already eligible for special education under the category of autism, so the determination as to whether she had an SLD did not dictate her overall eligibility for special education services. However, the Ninth Circuit has held that a child can qualify for special education under more than one category. *E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 758 F.3d 1162, 1174 (9<sup>th</sup> Cir. 2014) (“Children with disabilities will be disadvantaged if they have to select one category [of eligibility] to the exclusion of any other category.”) Consequently, it is reasonable to expect that the existence or nonexistence of an SLD in a student who is already eligible for special education pursuant to another category would be documented in a fashion substantially similar to what is required by WAC 392-172A-03080. Parents must be able to understand, examine, and, if appropriate, question the eligibility decision that has been made regarding their child.

36. By mandating such detailed procedures for identifying and documenting the existence of SLDs, the IDEA clearly contemplates that parents will be able to examine the data and method used by a district to conclude whether or not their student has an SLD. In *M.M. v. Lafayette Sch. Dist.*, 767 F.3d 842 (9<sup>th</sup> Cir. 2014), the school district failed to share over a year's worth of Response to Intervention (RTI) data with the parents of the student at issue. The Ninth Circuit determined that this was a procedural violation of the IDEA in that the RTI data was “existing data” that the IEP team was required to review. The court stated, “The District violated the IDEA by failing to ensure that the RTI data was documented and carefully considered by the entire IEP team and failing to furnish the parent with the data, thereby making the parents unable to give informed consent for ... the special education services [the student] received.” 767 F.3d at 853. The court went on to hold that this procedural violation constituted a denial of FAPE because, without the data, the parents were “struggling to decipher [the student's] unique deficits,” were “unable to properly advocate for changes to his IEP,” and were thereby prevented from meaningfully participating in the IEP process. 767 F.3d at 856.

37. Similarly, in *Laura A. v. Limestone County Bd. of Educ.*, 2014 U.S. Dist. LEXIS 185882 \*59 (N.D. Ala. 2014), the court devoted an entire section of its decision to analyzing the “Accuracy of the Board's Severe Discrepancy Calculations.” The court examined whether the IEP team correctly applied the severe discrepancy model by determining whether the correct scores were

used, and plugging the scores into the discrepancy table to double check whether the required degree of discrepancy existed.

38. The Parents in the present case were not able to conduct an analysis such as was conducted in *Laura A. v. Limestone*, and were not provided with highly relevant data, i.e. the Student's IQ score, that was in the District's possession within its software. It is concluded that the District's failure to document any specific information as to the methodology and scores used to determine that the Student did not have an SLD in reading or math was a procedural violation the IDEA.

39. As set forth above, not all procedural violations constitute a denial of FAPE. Here, however, the District's procedural violation seriously infringed on the Parents' opportunity to participate in the IEP formulation process. Had the Parents known how the SLD determinations had actually been made, they could have participated much more fully and effectively. They could have sought a determination that the Student had an SLD via the application of professional judgment as set forth in WAC 392-172A-03070(2); they could have challenged the accuracy of the application of the discrepancy table; they could have advocated for changes to the proposed IEP; and/or they could have obtained evidence through which to challenge the District's determination and filed a due process complaint.

40. The Parents have the burden of proof on this issue, and they have met that burden. A preponderance of the evidence supports a conclusion that the District violated the IDEA and denied the Student FAPE when it failed to conduct and document an appropriate reevaluation when determining whether the Student had an SLD.<sup>39</sup>

Whether the District failed to conduct an appropriate evaluation in May 2019, specifically by failing to consider the private services the Student was receiving in development and consideration of the District evaluation.

41. The Parents contend the District's failure to consider private services the Student was receiving at the time of the 2019 Reevaluation, including vision therapy, Aspiring Youth summer camp, and play therapy with Ms. Newman, rendered the 2019 Reevaluation inappropriate. The Parents argue as follows:

The District did not mention any of these programs in their evaluation, nor did they speak with the providers/Parents as to what [Student] was working on outside of school. This lack of information could have easily lead [sic] to a wrongful determination of ineligibility in Social/Emotional and Reading services in the May 2019 evaluation. Without speaking to the Parents/providers regarding outside services, the District had no way of knowing whether [Student's] success in the area of Social/Emotional were [sic] due to school-based interventions or the generalization of skills from outside providers.

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<sup>39</sup> The Parents also argue that the 2019 Reevaluation was inappropriate because the District failed to conduct a classroom observation of the Student when determining whether she had an SLD. Parents' Memorandum at 33-34. This issue need not be reached because the District's determination as to whether an SLD existed has already been determined to be inappropriate and resulted in a denial of FAPE.

Parents' Memorandum at 24.

42. The case cited by the Parents in support of this argument is not at all analogous to the present case. In *Los Angeles Unified Sch. Dist.*, 65 IDELR 246 (SEA CA 2015), *rev'd in part, M.S. v. Los Angeles Unified Sch. Dist.*, 68 IDELR 162 (C.D. Cal. 2016), *aff'd*, 119 LRP 1749 (9<sup>th</sup> Cir. 2019), the school district failed to consider a very thorough neuropsychological assessment of a student who had a long history of serious psychological and behavioral problems. The ALJ deciding the issue determined this failure constituted a procedural violation of the IDEA and denied the student FAPE. Clearly, failure to consider a neuropsychological assessment of a child with severe issues is not analogous to the present case in which the District did not directly obtain information about the Student from a summer camp, her play therapist, or her vision therapist.

43. The fact that a student requires significant outside support in order to succeed in school can be a factor that indicates the *need* for an evaluation as mandated by Child Find. See, e.g., *Cincinnati City Schools*, 115 LRP 26069 (SEA OH 2015) (a student's need for "significant support and private tutoring" can indicate the need for an evaluation). However, that, too, is not analogous to the present case.

44. To be appropriate, a school district's reevaluation must be sufficiently comprehensive to identify all of the student's special education and related service needs. WAC 392-172A-03020. When a school district conducts a special education evaluation, a "group of qualified professionals selected by the school district" must use a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent . . . ." *Id.* The group cannot use "any single measure or assessment as the sole criterion" for determining eligibility or educational programming. *Id.* Additionally, "[r]evaluations must review existing evaluation data on the student and, on the basis of that review and input from the parents, identify what additional data, if any, are needed to ensure the child receives a FAPE." *Smith v. Tacoma Sch. Dist.*, 2020 U.S. Dist. LEXIS 138830 \*27 (W.D. Wash. Aug. 3, 2020) (internal quotation marks omitted).

45. The speculative arguments advanced by the Parents do not equate to a showing that the 2019 Reevaluation was not sufficiently comprehensive or that it overlooked existing data. It is therefore concluded the Parents have not met their burden of proof as to this issue.

Whether the District failed to conduct an appropriate evaluation in May 2019, specifically by failing to consider and incorporate Parent and teacher concerns regarding educational impact and performance of the Student in the District evaluation

46. The Parents contend the District "failed to consider Parent and teacher concerns regarding [Student's] adverse educational impact when determining if she qualified in the areas of reading and math." Parents' Memorandum at 25. The Parents and Ms. Cavallon were all members of the evaluation team. Information was obtained from Ms. Cavallon and the Mother as part of the evaluation.

47. The arguments advanced by the Parents are not persuasive and the Parents have not met their burden of proof as to this issue.

Whether the District failed to educate the Student in her least restrictive environment by failing to consider the availability of push-in services from June 2019 to September 18, 2020.

48. As of June 2019, the Student was receiving SDI in written language for 30 minutes, five times per week, in the special education setting.<sup>40</sup> The Parents contend this was not the Student's least restrict environment (LRE) because the option of using push-in services for this SDI was not considered.

49. WAC 392-172A-02050 pertains to least restrictive environment and provides as follows:

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.

50. The Ninth Circuit has adopted a four-part test to determine whether a student's placement is her LRE. *Ms. S. v. Vashon Island*, 337 F.3d 1115, 1136-37 (9<sup>th</sup> Cir. 2003). Factors to be considered include the academic benefits of placement of the student in a mainstream setting, the non-academic benefits of a mainstream placement, any negative effects the student's presence may have on the general education classroom, and the cost of educating the student in a mainstream environment. *Id.* "The LRE inquiry is individualized and fact-specific, and must be balanced with the primary objective of providing an appropriate education." *D.M. v. Seattle Sch. Dist.*, 2016 WL 4721802 (W.D. Wash. Sept. 9, 2016) (internal citations omitted). "While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals." *City of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9<sup>th</sup> Cir. 1996).

51. An IEP team's decision where to place a student on the LRE continuum is reviewed using the "snapshot" analysis to determine the appropriateness of an IEP; that is to say, a team's LRE decision is analyzed in light of what the team knew or reasonably should have known at the time the team made the placement decision. *Baquerizo v. Garden Grove Unified Sch. Dist.*, 826 F.3d 1179 (9<sup>th</sup> Cir. 2016); *Adams v. Oregon*, 195 F.3d 1141 (9<sup>th</sup> Cir. 1999).

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<sup>40</sup> As of March 15, 2020, the District buildings were closed. Instruction resumed remotely and remained remote through September 18, 2020, and beyond. No evidence was presented at the due process hearing as to whether push-in services were a possibility in the remote environment and, if so, how push-in would work on a Zoom conference with multiple participants, including the general education teacher and other classmates. The ALJ declines to speculate regarding whether push-in services were available and/or possible after March 15, 2020, so the analysis and conclusions in this section are limited to the time period of June 2019 - March 15, 2020.



52. In the present case, the relevant inquiry for analysis of this issue is whether the placement that was decided upon and implemented was the Student's LRE. There is no evidence that the Parents requested push-in SDI at the IEP meeting for the June 2019 IEP or that push-in was discussed as an option. The Parents asked in January of 2020 whether the Student could receive her SDI as a push-in in the general education setting as opposed to a special education setting. The IEP team decided the SDI should be provided in the special education setting because that setting is smaller and allows the instructor to work more closely with the Student. There is no reason to conclude the IEP team would have decided any differently in June of 2019 if the option of push-in SDI had been discussed at the IEP meeting. Moreover, the evidence supports the conclusion that the Student's SDI in writing, which focused on skills that require sustained concentration, such as drafting and editing multi-sentence paragraphs, was best delivered in a smaller and less distracting setting than her general education classroom.

53. The Parents have not met their burden to demonstrate that the District failed to educate the Student in her LRE by failing to consider the availability of push-in services commencing in June of 2019.

Whether the District inhibited meaningful participation by the Parents, thereby denying the Student a FAPE in June of 2019, by providing affirmative misinformation about the availability of push-in services.

54. As stated in the Findings of Fact, above, the evidence does not support the Parents' contention that they were informed by the District that the District does not provide push-in services. There is no evidence that any other "affirmative misinformation" regarding the availability of push-in services was provided to the Parents by the District.

55. For these reasons, the Parents have not met their burden to demonstrate that the District inhibited their meaningful participation, thereby denying the Student a FAPE in June of 2019, by providing affirmative misinformation about the availability of push-in services.

Whether the District inhibited meaningful participation by the Parents, thereby denying the Student a FAPE in June of 2019, by predetermining the decision to decline the Parents' request for push-in services.

56. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. App'x 342, 344 (9<sup>th</sup> Cir. 2002). Predetermination of a student's placement is a procedural violation that can deprive a student of FAPE. According to the Ninth Circuit, a school district violates IDEA procedures "if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon*, 337 F.3d at 1131.

57. A school district is required to come to the IEP table with an "open mind" but not a "blank mind;" the district may come with a draft IEP for discussion but must not have finalized a Student's placement prior to the meeting. *D.M. v. Seattle Sch. Dist.*, 2016 U.S. Dist. LEXIS 122519 (W.D. WA 2016)(citing *Doyle v. Arlington County Sch. Bd.*, 806 F. Supp. 1253, 1263 (E.D. Va. 1992)).

58. In the present case, there is no evidence the Parents asked that push-in services to be provided to the Student in June of 2019. The Parents testified that they discussed the issue with Ms. Fike and Ms. Falleroni. Ms. Fike was the Student's fourth-grade teacher and would not have been someone with whom the Parents discussed the Student until the fall of 2019 when the Student started fourth grade.

59. Similarly, there is no evidence that the Student's placement in the June 2019 IEP was predetermined by the District. The Parents have not met their burden of proof as to this issue.

Whether the District inhibited meaningful participation by the Parents, thereby denying the Student a FAPE, in June of 2019, by providing affirmative misinformation regarding the District's obligations to consider private evaluations; and whether the District failed to timely consider the independent neuropsychological evaluation performed by Dr. Dunbar-Mayer and provided to the District in early June 2020.

60. The Parents contend the District failed to consider Dr. Dunbar-Mayer's neuropsychological evaluation of the Student in a timely manner. A summary of the evaluation was provided to the District on June 2, 2020. WAC 392-172A-05005(5)(a) provides that when a parent obtains an independent educational evaluation at public or private expense, the results of the evaluation must be considered by the school district, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the student.

61. Review of existing data, including evaluations provided to a school district by the parents of a student, is also addressed in WAC 392-172A-03025, which provides:

**Review of existing data for evaluations and reevaluations.**

As part of an initial evaluation, if appropriate, and as part of any reevaluation, the IEP team and other qualified professionals, as appropriate, must:

- (1) Review existing evaluation data on the student, including:
  - (a) Evaluations and information provided by the parents of the student;
  - (b) Current classroom-based, local, or state assessments, and classroom-based observations; and
  - (c) Observations by teachers and related services providers.
- (2)(a) On the basis of that review, and input from the student's parents, identify what additional data, if any, are needed to determine:
  - (i) Whether the student is eligible for special education services, and what special education and related services the student needs; or
  - (ii) In case of a reevaluation, whether the student continues to meet eligibility, and whether the educational needs of the student including any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general education curriculum; and

(b) The present levels of academic achievement and related developmental needs of the student.

(3) The group described in this section may conduct its review without a meeting.

(4) The school district must administer such assessments and other evaluation measures as may be needed to produce the data identified in subsection (2) of this section.

(5)(a) If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the student continues to be a student eligible for special education services, and to determine the student's educational needs, the school district must notify the student's parents of:

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the student continues to be a student eligible for special education, and to determine the student's educational needs.

(b) The school district is not required to conduct the assessment described in this subsection (5) unless requested to do so by the student's parents.

62. On June 11, 2020, the Student's IEP team met and considered Dr. Dunbar-Mayer's evaluation summary. At that meeting, the District informed the Parents that SDI in reading and math could not be added to the Student's IEP without her qualifying in those areas. The IEP team decided to conduct a reevaluation of the Student, presumably to determine if she qualified for services in additional areas. WAC 392-172A-03025 provides that a reevaluation can consist solely of a review of existing data. Additional data from new assessments is only required if the IEP team determines that a need for such additional data exists.

63. No evidence was presented as to whether the IEP team determined that additional data was needed in June of 2020. However, to the extent an OT evaluation and/or other information not contained in Dr. Dunbar-Mayer's report was determined by the team to be necessary, the District was required to perform additional assessments to obtain that data. Notably, Dr. Dunbar-Mayer's report recommends additional assessments be conducted, including an OT evaluation, an assistive technology evaluation, and a functional behavior assessment. Moreover, the Parents requested that a fine motor assessment of the Student be performed as part the reevaluation.

64. The Parents provided written consent for the reevaluation on June 24, 2020, but the reevaluation was not conducted until school resumed in the fall. The timing of the reevaluation did not constitute a violation of the IDEA in that the District had 35 school days from the date written consent was provided by the Parents to complete the reevaluation. WAC 392-172A-03015. The Parents do not contend, and the evidence does not indicate, that the District failed to complete the reevaluation within the mandated timeframe.

65. The Parents contend that they were provided "affirmative misinformation" by the District regarding the District's obligation to consider private evaluations. They contend this inhibited their meaningful participation in the IEP process and denied the Student FAPE. However, the Parents have not made a showing as to what "misinformation" they were provided, or how such

misinformation denied them meaningful participation in the IEP process. The Parents have therefore not met their burden to prove that the District's provision of misinformation regarding the District's obligation to consider private evaluations denied the Student FAPE.

Whether the District failed to offer IEPs reasonably calculated to allow the Student to make adequate academic progress from September 2018 to September 2020, that included (a) SDI in all areas of need including math, reading, social/emotional, behavior, fine motor, and vision; (b) all related services the Student needs, mainly, occupational therapy, behavior consultation, and vision services; and appropriate personnel to deliver services.

66. The Parents contend the IEPs dated September of 2018, June of 2019, February of 2020, and June of 2020 were all not reasonably calculated to allow the Student to make adequate academic progress, for varying reasons.

67. 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.

68. The determination of an IEP's reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F. 3d at 1149.

69. 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).

70. It is clear in the Ninth Circuit that a student is not denied a FAPE simply because the district's proposed educational plan provides less educational benefit than what a student's parent might prefer. See *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1095-96 (9th Cir. 2013). Instead, the test for whether a FAPE is substantively appropriate under the IDEA is whether the "individualized educational program developed through the Act's procedures [is] reasonably calculated to enable the child to receive educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 947 (9th Cir. 2010) (quoting *Rowley*, 458 U.S. at 206-07); see also *R.P. ex rel. C.P. v. Prescott Unified School Dist.*, 631 F.3d 1117, 1122 (9th Cir. 2011).

71. "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).

*The September 2018 IEP*

72. There is no evidence to support the assertion that the IEP of September 2018 was not reasonably calculated to enable the Student to receive educational benefits and make appropriate progress in light of her circumstances, as is required by *Endrew F.* That IEP provided SDI in social skills, and there is no evidence that the Student required special education and/or related services beyond what was provided. She had graduated from the LAP program and there were no concerns about her reading ability at that point. Although the Student was receiving outside vision therapy, there is little to no evidence that such therapy was required as a related service at the time.

*The June 2019 IEP*

73. The IEP that was developed in June of 2019, following the 2019 Reevaluation, no longer provided SDI in social skills. It provided SDI in written language, as well as a number of accommodations and modifications.

74. As set forth above, the 2019 Reevaluation was not appropriate under the IDEA and the Parents were denied meaningful participation in the development of the June 2019 IEP. However, a preponderance of the evidence does not support a finding that this IEP was inappropriate. While there is evidence that the Student was struggling to some degree in reading and math, it cannot be concluded that she should have been found eligible for special education services in either area at the time this IEP was developed. The provision of SDI in written language, and the enumerated accommodations and modifications, made this IEP reasonably calculated to enable the Student to make academic progress.

75. The Parents have not met their burden of proof as to the inadequacy of this IEP.

*The February 2020 IEP*

76. As set forth in the Findings of Fact, above, the District's administration of the KTEA-III assessments to the Student less than one year apart invalidated the January 2020 Assessment Revision testing results. Because the District software examined scoring patterns in the Assessment Revision for the presence of an SLD, it incorporated invalid testing data and its conclusions regarding the presence or lack of an SLD(s) are also invalid. Moreover, the District's use of software to determine the existence or nonexistence of SLDs suffered from the same flaws as set forth above in relation to the 2019 Reevaluation. For all these reasons, it is concluded that the February 2020 IEP is based on an inappropriate evaluation.<sup>41</sup>

77. The evidence is clear that the information considered by the evaluation team and the IEP team as to whether the Student required SDI in reading and math as of January and February of

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<sup>41</sup> The Parents also argue that Ms. Accettullo's unexcused absence from the January 9, 2020 evaluation team meeting violated the IDEA and denied the Student FAPE because a special education provider is a required member of an IEP team under WAC 392-172A-03095. Parents' Memorandum at 37-40. This issue need not be reached because the Assessment Revision has already been determined to be invalid for other reasons.

2020 was not determinative. Ms. Fike recalls the Student being “right on the cusp” of needing special education in reading and math. The Mother recalls “being on the fence” and at a “tipping point” as to whether provision of SDI in additional areas was in the Student’s best interest. While the information the team considered may have left them “on the fence,” the fact that the data on which they based their decision was invalid puts the decision into sharper focus. The District’s conclusion that the Student did not have SLDs in reading and/or math was not valid and Dr. Dunbar-Mayer diagnosed the Student with specific learning disorders in both areas a mere few months later. Based on the evidence, it is concluded that the evaluation team and the IEP team erred when they determined the Student’s reading and math skills did not adversely impact her education in February of 2020. It is clear she was struggling mightily in both areas and had been for quite some time.

78. Because the February 2020 IEP did not include SDI in reading or math, it was not reasonably calculated to allow the Student to receive an educational benefit and make appropriate progress in light of her circumstances. The Parents have met their burden of proof on this issue. The Student should have been receiving SDI in reading and math as of the implementation of the February 2020 IEP.

79. The Parents have not established that SDI was needed in other areas, such as social/emotional or behavior, and the evidence does not support a conclusion that related services in OT or behavior were necessary as of February of 2020.

80. However, once the Student qualified for special education services in reading, vision therapy became a necessary related service for her. An IEP must include a statement of the special education and related services that are to be provided to a student to enable the student to advance appropriately toward attaining annual goals, to be involved in and make progress in the general education curriculum, to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students, including nondisabled students. WAC 392-172A-03090(1)(d); 34 CFR §300.320.

81. “Related services” is defined in WAC 392-172A-01155(1), in pertinent part, as follows:

Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in students, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

82. There is no mention of vision therapy in the IDEA. WAC 392-172A-01155(1) and the comparable federal regulation<sup>42</sup> identify a number of specific related services, but that listing is

<sup>42</sup> 20 U.S.C. §1401(26)(A) provides: The term “related services” means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and

not exhaustive. *Maine School Administrative Dist. #72*, 53 IDELR 207 (SEA ME 2009) (citing *J. T. v. Missouri State Board of Education*, 2009 U.S. Dist. LEXIS 7864 \*20, 51 IDELR 270 (E.D. Mo. 2009), citing *Cedar Rapids Community School District v. Garrett*, 526 U.S. 66, 119 S. Ct. 992 (1999)).<sup>43</sup> Rather, the definition of related services “broadly encompasses those supportive services that may be required to assist a child with a disability to benefit from special education.” *Cedar Rapids*, 526 U.S. at 73 (holding that the school district was financially responsible under the IDEA for the provision of continuous one-to-one nursing services during the school day to a paralyzed student). Services not enumerated on the list may be considered related services if they are necessary for a child to benefit from special education.<sup>44</sup> *Letter to McDowell*, 72 IDELR 252 (OSEP 2018) (the list of related services in the IDEA is not meant to be exhaustive and may include other developmental, corrective, or supportive services if they are required to assist a child with a disability to benefit from special education).

83. In *Maine Dist. #72*, the administrative officer ruled that the district violated the IDEA and related Maine regulations by failing to provide vision therapy as a related service to a student with an SLD. In that case, the parent of the student at issue had been told by various school districts that the student would never learn to read, that he had a behavior disorder, that he was “lazy,” and that he was a “reluctant reader.” The student was eventually diagnosed with “general binocular vision dysfunction” which can lead to eye fatigue and a short attention span. His optometrist prescribed vision therapy and visual exercises. During four months of vision therapy, the Student’s reading ability improved by three grade levels. His writing and spelling skills also improved, he stopped having headaches, and his level of frustration with schoolwork decreased. The administrative officer noted that the Maine Department of Education concluded in 2000 that “developmental vision services” are available as a related service where necessary for a child to benefit from special education. The administrative officer went on to cite literature pertaining to developmental optometry, as well as peer-reviewed articles from various publications, and concluded that “vision therapy is sufficiently research-based to be ordered, in an appropriate case, as a related service for a child with a disability.” *Id.*

84. Cases from other jurisdictions have also concluded that vision therapy can be a related service under the IDEA. In *In re: Student with a Disability*, 24 IDELR 612, 24 LRP 3894 (SEA VT 1996), the hearing officer concluded that the school district erred when it repeatedly omitted vision therapy from the student’s IEP on the grounds that vision therapy is a medical service. According to the hearing officer:

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audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

<sup>43</sup> In *J. T.*, the court declined to rule as a matter of law, on a motion to dismiss, that installation of audiovisual surveillance in the public areas of a school was not a related service.

<sup>44</sup> The District argues that, because vision therapy is not identified as a related service in the IDEA, it cannot be deemed a related service. District’s Post-Hearing Brief at 47. This argument is not persuasive.

[V]ision therapy seems to fit in with the types of services listed in the federal regulation. The proper inquiry should have been whether such services were required in order to assist Student benefit [sic] from special education. Given the importance of vision to the learning process, it seems quite likely that vision therapy was so required and should have been provided. The District never reached the issue, however, because of its erroneous insistence that vision therapy was a medical service.

*Id.* See *Wilson Area School Dist.*, 110 LRP 17537 (SEA PA 2010) (finding that vision therapy is a research-based treatment for convergence insufficiency, and that vision therapy was necessary for the student to benefit from educational programming); *DeKalb County Sch. Dist. v. M.T.V.*, 164 Fed. Appx. 900 (11<sup>th</sup> Cir. 2006) (affirming lower court's order that the district reimburse the parents for student's vision therapy, where the lower court found "overwhelming evidence" that the student's visual problems affected his ability to read, at 413 F. Supp. 2d 1322, 1328 (N.D. GA 2005)); *Z.J. v. Bd. of Educ. of the City of Chicago, Dist. No. 299*, 344 F. Supp. 3d 988 (N.D. IL 2018) (concluding the student would benefit from vision therapy and ordering such therapy be provided by the district for 36 weeks).

85. The above analysis illustrates that the determination of related services that are required for a student with a disability, including vision therapy, depends on the unique circumstances of the child. In the present case, the evidence that the Student has required, and continues to require, vision therapy in order to access her education is persuasive and uncontroverted. Ms. Fike noticed the Student's vision issues in fourth grade, observing the Student would skip words when reading and not go back to self-correct. Dr. Torgerson's explanation of the detrimental effects of the Student's "tracking" and "stereopsis" issues is highly compelling. The Student has been experiencing fatigue, frustration, and difficulty reading, all of which can result from vision problems, since at least February of 2020. It is therefore concluded that vision therapy should have been a related service in the February 2020 IEP.

86. The Parents have met their burden of proof as to the inappropriateness of this IEP and are entitled to remedies as set forth in the Remedies section, below.<sup>45</sup>

#### *The June 2020 IEP*

87. The IEP developed in June of 2020 added accommodations to the February 2020 IEP, but did not change the Student's SDI or related services. At this point, the IEP team had received Dr. Dunbar-Mayer's evaluation summary and recommendations. The team "considered" adding reading and math SDI to the IEP but did not do so. The PWN issued by the District stated Dr. Dunbar-Mayer's findings could not be used in the IEP. Instead, the team decided to schedule a reevaluation for the Student, which was not done until the fall of 2020.

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<sup>45</sup> The March 6, 2020 IEP, developed in order to correct two clerical errors in the previous IEP, has the same deficiencies as the February 2020 IEP.



88. The June 2020 IEP therefore contained the same deficiencies as the February 2020 IEP. The Parents have met their burden of proof as to the inadequacy of this IEP and are entitled to remedies as set forth in the Remedies section, below.

Whether the District failed to comply with the procedural requirements of the IDEA and in turn failed to provide the Student with FAPE since March 13, 2020, by materially and substantially changing the Student's educational placement to one that is not designed to ensure that she will be able to make meaningful educational progress or meet her unique needs.

89. It is undisputed that the District closed its school buildings on March 15, 2020, due to the COVID-19 pandemic. Commencing on March 28, 2020, the Student received all of her general education and special education remotely via Zoom videoconference. The Parents contend this constituted a material change in the Student's placement in violation of the procedural requirements of the IDEA.

90. The District was ordered to stop all in-person educational programs on March 12, 2020, by proclamation from the Governor of Washington State. Governor Proclamation 20-08, 20-09.1. The U.S. Department of Education (DOE) issued guidance that same day stating:

If an LEA closes its schools to slow or stop the spread of COVID-19, and does not provide any educational services to the general student population, then an LEA would not be required to provide services to students with disabilities during that same period of time. Once school resumes, the LEA must make every effort to provide special education and related services to the child in accordance with the child's individualized education program (IEP) ....

U.S. Dep't of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020) at 2. On March 21, 2020, DOE's Office of Special Education and Rehabilitative Services (OSERS) issued a "Supplemental Fact Sheet" which states, "The Department understands that, during this national emergency, schools may not be able to provide all services in the same manner they are typically provided." OSERS, Supplemental Fact Sheet Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020) at 2. The Supplemental Fact Sheet goes on to provide, "Many disability-related modifications and services may be effectively provided online." *Id.*

91. OSPI also issued guidance, stating, "There remains an expectation that individualized education program (IEP) services will be delivered to the maximum extent possible during the pandemic *while adjusting delivery methods* to comply with state and local health/safety restrictions." OSPI, Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in Summer and Fall 2020 (released 3/24/20, last updated 8/26/20) (italics added). This guidance further provides:

[T]here is not an expectation that IEP services would be delivered exactly as the IEP states during the COVID-19 school facility closures. IEP amendments are not required if an optional Continuous Learning Plan, or similar document, is used.

*Id.* at 2. The guidance recognizes, however, that there have been no changes made to the IDEA or its implementing regulations, thus, school districts are not relieved of their obligation to comply with said laws. *Id.*

92. OSPI has reiterated in several publications that:

In situations where all students in a school district are participating in a distance learning model, the student's home is the setting from which all students are accessing their instruction. Therefore, generally, *the student's home is considered the general education setting.*

Special Education Reopening Guidance: Least Restrictive Environment (LRE) Case Studies (September 2020) at 1 (*italics added*). See OSPI's Guidance for Families on Special Education Services During COVID-19 (August 27, 2020) at 13.

93. It is clear from the DOE guidance that the District was required to provide special education services to the Student during the time in which the District was providing educational services to other students. In this case, that was from March 28, 2020, through June 18, 2020. The District provided special education services to the Student for most, although not all, of that time period.<sup>46</sup> The question is whether the special education services being delivered via Zoom videoconference constituted a change in placement.

94. "Educational placement" is not defined in the IDEA. WAC 392-172A-02060 pertains to placements, and provides, in part:

(1) When determining the educational placement of a student eligible for special education including a preschool student, the placement decision shall be determined annually and made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options.

(2) The selection of the appropriate placement for each student shall be based upon:

(a) The student's IEP;

(b) The least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070, including this section;

(c) The placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and

(d) A consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

The Ninth Circuit has examined the terms "educational placement" and "change in educational placement" and has concluded, "[E]ducational placement means the general educational program of the student." *N.D. v. State Dep't of Educ.*, 600 F.3d 1104, 1116 (9<sup>th</sup> Cir. 2010). In *N.D.*, the Court concluded that a "change in educational placement" occurs when a student is moved from one type of program to another type, and can also result when there is a significant change in the

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<sup>46</sup> As determined above, the Student missed seven days of SDI when remote instruction first commenced for general education students.

student's program even if the student remains in the same setting. *Id.* The court held that Hawaii's reduction in the length of the school year via furlough days did not constitute a change of placement for a student receiving special education services because the furloughs affected all students alike and did not single out disabled students. *Id.*

95. A change in the location in which a student's special education services are provided does not necessarily constitute a change of placement. *R.M. v. Gilbert Unified Sch. Dist.*, 768 Fed. Appx. 720 (9<sup>th</sup> Cir. 2019) (change in elementary school a student attends does not constitute a change in placement). However, the determination as to whether a change in placement has occurred must be made on a case-by-case basis. If the change "substantially or materially alters" the educational program and services provided to the student, then a change in placement occurs. *Letter to Fischer*, 21 IDELR 992 (OSEP 1994).

96. In *L.V. on behalf of J.V.2 v. New York City Dep't of Educ.*, 76 IDELR 279, 120 LRP 20667 (S.D.N.Y. 2020), the IEP of the five-year-old autistic child at issue provided for OT, physical therapy, and speech/language therapy, among other services. When his school building closed due to the COVID-19 pandemic, the student was provided with a tablet through which to access his services. His home did not have adequate space for learning or reliable WiFi. The hearing officer noted that the department of education failed to explain "how certain services that appear inherently subject to in-person delivery, such as physical therapy, could be appropriately and remotely delivered" to the student. The court ordered the department to locate providers willing to provide in-person services, if possible.

97. In the present case, the preponderance of the evidence supports a conclusion that the shift to remote learning did not substantially or materially alter the educational program and services provided to the Student. She received the same amount of SDI in written language as called for in her IEP, although the remote Zoom method of delivery was different from the in-person instruction she had been receiving prior to the building closures. While the evidence is clear that the Student became less able and/or willing to access the SDI as the school year progressed, that does not equate to remote learning constituting a material alteration in her educational program.

98. The Parents have therefore not met their burden of proof as to this claim.

99. The Parents' Memorandum argues that the shift to remote learning gave rise to a failure to implement the Student's IEP on the part of the District, in addition to constituting a change in placement. The Parents contend, "[T]he District materially failed to implement [Student's] IEP in violation of the IDEA" during remote learning. Parents' Memorandum at 58. They further contend that the analysis set forth in *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9<sup>th</sup> Cir. 2007), pertaining to what constitutes a material failure to implement an IEP, is applicable in the present case, and that such analysis demonstrates a material failure on the part of the District to implement the Student's IEP. *Id.* at 59-60. However, as the District points out in its post-hearing brief, the Parents did not raise any issues related to the implementation of IEPs in their hearing request, and no issues related to implementation of the IEP were set forth in the statement of issues for the due process hearing. District's Post-Hearing Brief at 59.

100. A party requesting a due process hearing is not permitted to raise issues during a due process hearing that were not raised in the complaint unless the other party agrees. WAC 392-172A-05100(3); 20 U.S.C. § 1415(f)(3)(B). “Administrative and judicial review in IDEA cases is specifically limited to the issues raised in the due process complaint, unless the parties agree otherwise.” *L.C. v. Issaquah Sch. Dist.*, \*34-35 (upholding ALJ’s refusal to address claims raised for the first time in post-hearing brief where the parent cited no evidence that the parties agreed to expand the scope of the due process hearing). This is consistent with Washington administrative law requiring that a notice of hearing include a statement of the issues (RCW 34.05.434) and that prehearing orders identify all issues and provide an opportunity to object. WAC 10-80-130. An exception to this rule is when an issue was actually tried by the parties at an administrative hearing. *M.C. v. Antelope Valley Union High School Dist.*, 858 F.3d 1189, 1196 (9<sup>th</sup> Cir. 2017); *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS 37815 \*15-19 (E.D. Cal. Mar. 7, 2019), *aff’d*, 810 Fed. Appx. 588 (9<sup>th</sup> Cir. 2020); *see also L.C. v. Issaquah Sch. Dist.* at \*37 (holding that parent failed to show that any claims not considered by ALJ were tried by consent, contrasting with *Antelope Valley*: “[b]oth sides in *Antelope Valley* ‘presented extensive evidence,’ including witness testimony, regarding the omitted claim”).

101. In the present case, the Parents have not shown that an exception applies, or that the District agreed to expand the issue statement. Although evidence was presented at the hearing that the Student had difficulty participating in her SDI remotely, that evidence is relevant to other issues properly raised in the case. For example, it is relevant to the relief the Parents request, which includes an IEP for the remainder of the 2020-21 school year that mandates in-person instruction. The fact that such evidence was elicited does not equate to the District explicitly or implicitly agreeing to expand the issues to include implementation of the IEP. Likewise, it and does not equate to the issue of implementation being tried.

102. The Parents have not provided any argument as to why the claim that the District failed to implement the Student’s IEP during remote learning should be considered despite not having been raised. Accordingly, this claim is not considered.

Whether the services and evaluations provided by the Parents from September 2018 to September 18, 2020, were appropriate.

103. This issue needs to be reached and decided only to the extent that services and evaluations are appropriately considered for reimbursement to the Parents. The Parents seek reimbursement for a very lengthy list of items, services, and evaluations. The appropriateness of the relevant items, services, and evaluations is addressed below.

Whether the Parents are entitled to remedies.

104. Administrative Law Judges have broad latitude to grant relief and fashion equitable remedies appropriate for the denial of a FAPE. *School Committee of Burlington, Mass. v. Dept. of Education*, 471 U.S. 359, 370, 105 S. Ct. 1996 (1985); *Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489, 1496 (9<sup>th</sup> Cir. 1994); *Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 129 S. Ct. 2484, 2494 n. 11 (2009). To remedy a FAPE denial, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3). The purpose of the IDEA is to provide students with disabilities a FAPE which

emphasizes special education and related services to meet their unique needs. *Burlington*, 471 U.S. at 374. The award must be fact-specific and reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place. *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

### *Compensatory Education*

105. “Compensatory education is an equitable remedy that seeks to make up for ‘educational services the child should have received in the first place,’ and ‘aim[s] to place disabled children in the same position they would have occupied but for the school district’s violations of the IDEA.” *Prescott*, 631 F.3d at 1125 (quoting *Reid v. Dist. of Columbia*, 401 F.3d at 518). “Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Student W. v. Puyallup.*, 31 F.3d at 1497. “There is no obligation to provide a day-for-day compensation for time missed.” *Id.*

106. In the present case, the Student should have received SDI in reading and math from February 15 through June 18, 2020. This represents 17 school days prior to the building closures, and 52 school days after instruction resumed remotely, for a total of 69 missed days of SDI.<sup>47</sup> Thirty minutes, five times weekly in each subject area was deemed to be appropriate by the Student’s IEP team in November of 2020. This amount is adopted to determine the appropriate amount of compensatory education the Student should receive. Because children generally progress more rapidly with one-on-one instruction as opposed to instruction in a classroom, even in a small group, an hour-for-hour award is not always appropriate. However, in this case, there was no evidence presented as to the details of the setting in which the Student’s SDI was delivered prior to the building closures. During remote instruction, the SDI delivery appeared to be 1:1. An hour-for-hour award is warranted in this Student’s circumstances. The Student should receive **34.5 hours of compensatory education in reading and 34.5 hours in math.**

107. Additionally, the Student missed seven days of SDI in writing during the time period when general education resumed remotely but she not receive SDI. She is therefore entitled to receive, as compensatory education, **3.5 hours of compensatory education in writing.**

108. The Student is not entitled to compensatory education for the period of September through December of 2020, as this is the period during which she was not enrolled in the District. The District had no obligation to provide the Student with special education and related services once she disenrolled. WAC 392-172A-03105(1) (“[E]ach school district must have an IEP in effect for each student eligible for special education that it is serving through enrollment in the district”). See *Hooks v. Clark County Sch. Dist.*, 228 F.3d 1036, 1039 (9<sup>th</sup> Cir. 2000) (“The IDEA and accompanying regulations provide for special services for three categories of children: (1) students in public schools; (2) children placed in private schools by a public agency; and (3) children placed unilaterally in private schools by their parents.”)

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<sup>47</sup> See exhibit D4. The ALJ assumes special education services would be provided on “early release” days.

109. The above-ordered hours of compensatory education shall be provided to the Student in person and shall be completed within 16 months of the date of this order unless otherwise agreed by the parties, at the duration and frequency determined appropriate by the District.

110. The compensatory education shall be provided as follows: A special education teacher will design and supervise the provision of all compensatory education and will monitor and evaluate the Student's progress. The instructor for the compensatory education shall be a special education teacher(s) and/or a paraeducator who is overseen by a special education teacher. The District shall choose the curriculum and content of the compensatory education, and no particular curriculum is required. The instruction shall be provided at the school building the Student attends (or would attend, if she were to disenroll). The instruction time shall be determined by the District, except the instruction may be delivered during the Student's normal school hours only if agreed by the Parents. Once the schedule is set, the Parents shall, except in an emergency, give notice 24 hours in advance of a scheduled session if the Student needs to reschedule. Without such notice and in the absence of an emergency, that missed session will count toward the compensatory education award. The instruction may be provided on weekends and/or school holidays/vacation days if the Parents and District agree, but the District is not required to provide the instruction on weekends or school holidays/vacation days.

111. Some or all of the instruction may be delivered by a provider who is not an employee of the District, at the discretion and expense of the District.

112. The parties are free to change any aspects of this order of compensatory education by mutual agreement.

#### *Vision Therapy*

113. The Parents seek reimbursement for the vision therapy the Student received in 2018-19, as well as additional vision therapy going forward, as recommended by Dr. Torgerson. The evidence does not support a conclusion that vision therapy was a necessary related service as of 2018-19. At the time, the Student did not qualify for special education in reading. Moreover, the Parents have not shown by a preponderance of the evidence that they presented the District with adequate information to put the District on notice that the Student needed vision therapy in order to access her education as of April of 2018, if that had been the case.

114. However, it was proven by a preponderance of the evidence that vision therapy was a necessary related service as of February 2020. Consequently, the District is ORDERED to add vision therapy to the Student's current IEP as a related service. The District shall fund six months of weekly vision therapy at Alderwood for the Student, as well as any associated assessments/examinations that are necessary for the provision of vision therapy. Such therapy is to begin within 30 calendar days of entry of this order unless agreed otherwise by the parties. After six months, the District shall fund an assessment by Alderwood as to the progress the Student has made and whether additional vision therapy is needed. The Student's IEP team shall review and consider the assessment and recommendations, and shall determine whether additional vision therapy is required by the Student. Any additional therapy determined to be necessary as a related service by the IEP team shall be paid for by the District. Vision therapy

and the assessment may be provided by a therapist other than Alderwood if agreed upon by the parties.

115. The District is further ORDERED to reimburse the Parents for the vision examinations the Student underwent at Alderwood on March 12, 2020, and August 26, 2020, as well as any other vision assessments or vision therapy she has received since February 6, 2020. The District is not required to reimburse the Parents for vision examination expenses that relate solely to the Student's glasses and is not required to reimburse the Parents for the cost of glasses. The Parents shall provide documentation of the reimbursable vision expenses to the District, as well as proof of the amount they paid, within 30 days of entry of this order. (Any amount paid by medical insurance shall not be reimbursed by the District.) The District shall reimburse the Parents within 30 days of the provision of the above-mentioned documentation.

#### *Homeschooling expenses*

116. The Parents seek reimbursement for numerous items they purchased for the purpose of homeschooling the Student, including a Chromebook they bought at the beginning of the pandemic in March of 2020. It is clear that the Parents disenrolled the Student and chose to homeschool her because all instruction, including general education, was going to be provided virtually for the fall 2020 semester. The District had no ongoing obligation to provide general or special educational services to the Student after she disenrolled. As such, there is no basis to award reimbursement for such expenses to the Parents.

117. Moreover, the District would have supplied a Chromebook to the Student during remote learning, as was done for all the other students at Seaview, so there is no basis for the District to reimburse the Parents for the Chromebook. Additionally, many of the items for which the Parents seek reimbursement were items the District might have provided had the Parents asked, and/or have not been shown by the Parents to be education-related, such as noise cancelling headphones and no-tie shoelaces.

#### *Dr. Dunbar-Mayer's evaluation*

118. The Parents also request reimbursement for Dr. Dunbar-Mayer's evaluation of the Student, and mileage to and from his clinic, in the amount of \$3,467.72. Had the District provided the Student FAPE as of February 2020, the Parents may very well have determined Dr. Dunbar-Mayer's evaluation was unnecessary. However, his evaluation was the first appropriate evaluation the Student had received in well over a year, and it is what ultimately led to a recognition that the Student needed SDI in several areas aside from written language. In sum, the evaluation was a turning point that allowed the Student to begin receiving FAPE.

119. The District is ORDERED to reimburse the Parents in the amount of \$3,467.72. The reimbursement shall be made to the Parents within 30 days of entry of this order.

#### *Ms. Tamte, Hamlin Robinson, Aspiring Youth, and Ms. Newman*

120. Compensatory education has been ordered to make up for SDI and related services the Student should have received. Private services for which the Parents seek reimbursement

because of the District's failure to provide appropriate SDI will therefore not be reimbursed, as the Parents are not entitled to a double recovery.

*Current IEP - In-person instruction*

121. It is ORDERED that the Student's current IEP shall be modified within ten calendar days of entry of this order to provide that all of the Student's SDI shall be delivered in person. If the District is unable to provide in-person instruction, it is directed to select and fund an outside instructor(s) who will provide the SDI in person. If such an instructor cannot be located, the District will provide the SDI to the Student at a future date, but within six months of entry of this order, once in-person instruction is available from either the District or an outside instructor.

122. 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 Edmonds School District violated the IDEA and denied the Student FAPE as set forth in the Conclusions of Law, above.
2. The District is ORDERED to reimburse the Parents for Dr. Dunbar-Mayer's evaluation in the amount of \$3,467.72 within 30 calendar days of entry of this order.
3. The District is ordered to provide compensatory education, vision therapy, vision examination expense reimbursement, and in-person SDI as set forth in Conclusions of Law paragraphs 106-121.
4. All other remedies and relief requested by the Parents have been considered and, based on the IDEA violations that have been established, are DENIED.

Served on the date of mailing.



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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

[REDACTED]

Dr. Hayley Etnier  
Edmonds School District  
20420 68<sup>th</sup> Avenue West  
Lynnwood, WA 98036

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

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

Dated April 7, 2021, at Seattle, Washington.

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Representative  
Office of Administrative Hearings  
600 University Street, Suite 1500  
Seattle, WA 98101-3126

cc: Administrative Resource Services, OSPI