

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

IN THE MATTER OF:

MERCER ISLAND SCHOOL DISTRICT

OSPI CAUSE NO. 2021-SE-0003

OAH DOCKET NO. 01-2021-OSPI-01238

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

Administrative Law Judge (ALJ) Matthew D. Wacker held a due process hearing in the above matter via remote video conference over six days on September 13-17 and 21, 2021. The Parents of the Student whose education is at issue¹ appeared and were represented by Katherine A. George and Scot Johnston, attorneys at law. The Mercer Island School District (the District) was represented by Carlos Chavez, attorney at law. Also present for the District was Sue Anne Bube, director of special services. A certified court reporter was present at each day of the due process hearing.

STATEMENT OF THE CASE

*Procedural History*²

The Parents filed a Due Process Hearing Request (the Complaint) on January 5, 2021. A Scheduling Notice was entered January 6, 2021, assigning the Complaint to ALJ Matthew D. Wacker. The District filed its Response to the Complaint on February 8, 2021. The First Prehearing Order (PHO) was entered on March 15, 2021, setting a due process hearing for May 10-14, 2021. On April 21, 2021, the Parents filed a motion to continue the due process hearing to no earlier than June 14, 2021. The District did not object to the Parents' motion, and the motion was granted in the Second PHO entered May 13, 2021. On May 14, 2021, the Parents filed a motion to amend the Parents' Complaint. The Third PHO was entered May 19, 2021, granting the Parents' amendment, and setting a due process hearing for September 13-17, 2021. The District filed its Amended Response on May 24, 2021. On September 9, 2021, the Parents' filed a Motion in Limine. The Parents' Motion in Limine was addressed in the Fourth PHO, entered September 10, 2021.

The due process hearing was held via remote video conference on September 13-17 and 21, 2021. At the conclusion of the hearing, parties' counsel agreed that closing briefs would be due October 29, 2021, in order for counsel to receive the hearing transcript and prepare their

¹ In the interest of preserving the family's privacy, this decision does not use the actual names of the parents or the student. Instead, they are identified as the "Mother," "Father," or "Parents," and the "Student."

² This procedural history is not intended to detail every event or decision. Rather, it is intended to provide a brief history of the most relevant matters for the reader.

closing briefs. On October 27, 2021, the Parents filed an agreed motion to extend the due date for closing briefs by one week. A Post-Hearing Order was entered the same day, granting the agreed extension. Accordingly, closing briefs were due November 5, 2021. The parties timely filed their closing briefs on November 5, 2021.

Due Date for Written Decision

The due date for a written decision in the above matter is the close of record plus forty-five (45) calendar days. See Third PHO. The record of the hearing closed with the filing of closing briefs on November 5, 2021. Forty-five calendar days from November 5, 2021, is December 20, 2021. Therefore, the due date for a written decision in the above matter is **December 20, 2021**.

EVIDENCE RELIED UPON

Proposed Exhibit S76

The Parents offered proposed Exhibit S76 at the due process hearing. The District objected. The offer was taken under advisement, and counsel were informed that its admissibility would be ruled on in this Final Order. Proposed Exhibit S76 is a report authored by the Washington State Department of Health dated July 30, 2021. The report is entitled “COVID-19 Outbreaks in Washington State K-12 Schools.” The report describes COVID-19 outbreaks in K-12 schools between August 1, 2020 and June 30, 2021 that were reported to the Washington State Department of Health. While this report contains important information, it is not information the Parents or the District could have considered, relied upon, or used to make informed decisions before July 30, 2021. By that time, the Parents had already made the decision to return the Student to the Allan Cott School and a residential placement at Glenwood Autism and Behavioral Health Center (Glenwood), a private, nonprofit organization in Alabama that educates and treats individuals diagnosed with autism, behavioral health disorders, and mental illnesses. S1p2.³ To admit proposed Exhibit S76 as evidence to support or defend decisions by the Parents or the District prior to July 30, 2021 would be a retrospective and improper application of the evidence. Accordingly, the District’s objection is sustained, and Exhibit S76 is excluded.

The following exhibits were admitted into evidence:

Student Exhibits: S1-S5, S7-S13, S15-S32, S34-S74, S77-S81.

District Exhibits: D1-D25.

The following witnesses testified under oath or affirmation. They are listed in order of their first appearance:

Dustin Woodside, District paraeducator (2019-2020 school year);

³ Citation to the exhibits are to **S**tudent and **D**istrict and page number. For example, citation to “S1p2” is a citation to **S**tudent Exhibit 1 at page 2.

Lionel Enns, PhD, BCBA-D, NCSP;
Madison Dykes, MS, BCBA, LBA, Glenwood (2016-2020);
Lauren Nordberg, BCBA, LBA, Glenwood;
Kerry Hillier, M.Ed., BCBA, LBA, Regional Director – Kyo (formerly Gateway Learning Group);
Julie Riccio, M.Ed., BCBA, District BCBA and instructional coach (2007-2021);
Judith Habeeb, M.D.;
Ashley Watkins, Glenwood special education coordinator/teacher;
Madeleine Tessier, District special education teacher;
Rebecca Partridge, M.D.;
Elaine McClellan, M.Ed., District school psychologist;
Amanda Collins, District paraeducator;
Sue Anne Bube, Ed.D., District director of special services;
Nicki Winder, M.Ed., BCBA, District special education instructional coach;
Christine Kenyon, District special education teacher;
Kyle O'Malley, District paraeducator;
Yaniz Padilla, PhD, BCBA-D;
Karen Wilke, PhD, District school psychologist;
Vanessa Tucker, PhD, BCBA-D, LBA;
The Mother of the Student;
The Father of the Student, M.D.

ISSUES AND REMEDIES

The statement of the issues and requested remedies for the due process hearing is whether:

The district denied [the Student] a free and appropriate public education and violated the IDEA through the following actions and inactions, individually and cumulatively, over the last two years by:

1. Failing to provide services comparable to those provided to [the Student] in Alabama from January 14, 2019, when he transferred to Mercer Island, until a new IEP took effect on April 18, 2019;
2. Conducting an inadequate evaluation in March 2019 and again in March 2021;
3. Failing to address [the Student's] functional academic needs before April 2021;
4. Confining [the Student] to a small room, separate from peers, most of the time at Mercer Island Middle School from January to December 2019 and at Mercer Island High School from January to March 2020;
5. Failing to provide an effective behavior intervention program from January through December 2019;
6. Failing to ensure that [the Student's] education was appropriately ambitious;
7. Excluding the Parents from a placement decision in December 2019;
8. Failing to complete a Functional Behavior Assessment within 35 school days of the Parents' February 13, 2020 consent;

9. Failing to complete a reevaluation within 35 school days of the Parents' September 4, 2020 consent;
10. Failing to offer a safe and accessible education to [the Student] during the 2020-21 school year;
11. Disenrolling [the Student] based on COVID-related absences instead of accommodating his health condition;
12. Failing to promptly comply with the Parents' request for [the Student's] education records;
13. Deciding on a new program on February 2, 2021 without an IEP meeting;
14. Failing to implement the February 2 Prior Written Notice in a safe and timely manner;
15. Failing to provide an opportunity for Parent participation in development of the April 2021 behavior intervention plan;
16. Failing to offer an appropriate behavior intervention plan at any time in the 2020-21 school year; and,

Whether the Parents are entitled to their requested remedy: An order finding that Glenwood School is appropriate and requiring the District to pay for a residential placement there.

See Parents' May 14, 2021 Motion to Amend Complaint, pp8-9.

FINDINGS OF FACT

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

General Background

1. The Student was first evaluated and determined eligible to receive early childhood special education services through the [REDACTED] in Birmingham, Alabama, during the summer of 2009 when he was approximately [REDACTED]. D20p16.

2. The Student has received diagnoses including Down syndrome and autism. S2p1. He [REDACTED] *Id.* The Student has been diagnosed with an intellectual impairment, and has "extremely low" intellectual, adaptive, and communicative functioning. *Id.* p22; ENNS T447-T448. He has been diagnosed with an Unspecified Disruptive Impulse Control and Conduct Disorder and an Anxiety Disorder. S36p1, S37p22.

The Allan Cott School at Glenwood

3. After being home-schooled by the Parents starting in fall 2013, the Student began attending the Allan Cott School at Glenwood in October 2015. S2p1, S37p4. Allan Cott School is a non-public, certified special education program that serves Glenwood residents and community day students, ages 6-21, diagnosed with autism and intellectual disabilities. S1p1. The school is located on the main campus of Glenwood in Birmingham, Alabama. *Id.* p8. Criteria for admission to Allan Cott School includes a primary diagnosis of autism. *Id.* p1. Allan Cott School serves no general education students. S3p5. Allan Cott School provides year-round services. S1p2.

4. Among many other services, Allan Cott School offers Applied Behavior Analysis (ABA) services and Behavioral Intervention Plans (BIPs).⁴ S1p2. ABA is a type of intensive therapy that focuses on the principles and techniques of learning theory and behaviorism to help improve social behavior. *Id.* p3; DYKES T170.⁵ Prior to starting therapy, all students receive a comprehensive evaluation of their skills and deficits, followed by a written report with formal recommendations. *Id.* Then Board Certified Behavior Analysts (BCBAs) work with parents to create individualized treatment plans. *Id.*

5. Allan Cott School also provides Functional Behavior Assessments (FBAs) to discover the reasons that a child may engage in problematic behavior. *Id.* p4. An FBA is typically conducted within 3 months of admission to Allan Cott School. *Id.* p5; DYKES T205. Allan Cott School uses the Verbal Behavior approach to develop communication skills using methods of Discrete Trial Training (DTT) or naturalistic teaching strategies. *Id.* pp4-5.

6. Throughout his time attending Allan Cott School, the Student was a community-day student, returning home to his family after the school day ended. S2p1; DYKES T222-T223. The Student was not a “residential student,” who would stay overnight and weekends at Glenwood. DYKES T223.

7. At the time he was admitted to Allan Cott School, the Student was engaging “in behaviors which were a barrier to the educational process and attending school, such as difficulty with transitions, elopement, dropping to the floor and refusing to move, pulling down/knocking down items off of walls, throwing objects, and some mild aggressive behavior such as pushing.” S2p1.

⁴ The terms “Behavior(al) Intervention Plan,” “Behavior(al) Improvement Plan,” and “Behavior(al) Support Plan” were used interchangeably throughout the exhibits and by the witnesses at hearing. For ease of reference, they are all collectively identified in this Final Order as a “BIP” or “BIPs” unless otherwise specified.

⁵ Citation to the testimony of a witness is by last name and page number of the Transcript. The exceptions to this are citations to the testimony of the Mother and Father, who are identified as such in order to help preserve the privacy of the family. For example, citation to “DYKES T170” is a citation to the testimony of the Madison Dykes at page 170 of the transcript.

8. In September 2017, the Student moved into a classroom at Allan Cott School that was one of two classrooms supported by Madison Dykes. DYKES, T173, T213. The Student remained in the classroom supported by Ms. Dykes until he left Allan Cott School and Glenwood in 2018. *Id.* T173.

9. Ms. Dykes holds a Master's of science degree in psychology, is a BCBA, and a Licensed Behavior Analyst (LBA) in Alabama. S72p1. She was employed as a BCBA at Glenwood from 2016-2020. *Id.*

10. As a BCBA, Ms. Dykes' primary job duty is to help identify challenging behaviors an individual may exhibit, and help to address behavioral excesses and deficits associated with a variety of diagnoses, including autism. DYKES T168-T169. Her goal is to decrease challenging behaviors by teaching more functional replacement skills or replacement behaviors to help individuals interact more appropriately with other people around them in their environments. *Id.* T169.

11. Although she was the BCBA supporting the Student's classroom, Ms. Dykes did not work directly with the Student on a frequent basis. *Id.* T175. She was primarily responsible for overseeing the development and implementation of the Student's FBAs and BIPs by the behavioral teaching assistants in the classroom. *Id.* T173, T175. The behavioral teaching assistants were the staff primarily responsible for implementing the Student's day-to-day instruction. *Id.* T207-T208. Some of the behavioral teaching assistants were Registered Behavior Technicians (RBTs), but some were not. *Id.* T174. The Student's special education classroom teacher was also an RBT. *Id.* The classroom teacher would rotate between all the students in the classroom. *Id.* T208.

12. The Student's classroom supported by Ms. Dykes had four other students, for a total of five students, and between 2 to 5 teaching assistants. *Id.* T176. The Student had a dedicated 1:1 teaching assistant throughout the school day to support him in the classroom. *Id.* The Student's classroom was a "self-contained" classroom because there were no general education students at Allan Cott School. *Id.* T228. The Student spent virtually the entire school day in his classroom with the other students. *Id.* T177. Part of the Student's day included "group instruction" with the other students. *Id.* T207.

13. Exercising her professional judgment as a BCBA, Ms. Dykes did not conduct a new FBA of the Student in September 2017. *Id.* T214. Despite moving into a new classroom, Ms. Dykes did not conduct a new FBA because observation of the Student indicated that his "target behaviors" were decreasing. *Id.*

14. In April 2018, there was a "spike" in the Student's aggression. S2p3. Despite this spike in aggression, Ms. Dykes did not conduct a new FBA because she was, "able to identify some potential hypothesized reasons for those behaviors, and we elected to wait to see. And the next month we saw them decrease again and did not update a new FBA." DYKES T214.

15. At Glenwood, FBAs for all students are conducted at least annually. DYKES T196. In July 2018, Ms. Dykes conducted an "Annual Review and Functional Behavior Assessment" of the Student. S2; DYKES T190. The FBA identified three target behaviors: Aggression; Elopement;

and Refusal to Transition. S2p2. The FBA removed a prior target behavior, self-injury, due to low rates of occurrence of that behavior. *Id.* p4.

16. The FBA included a “Summary of Behavioral Contingencies.” *Id.* In part, the summary noted that when staff would block the Student from eloping it “typically leads to either aggression or flopping and refusal to transition.” *Id.* With respect specifically to aggression, the FBA noted:

Aggression most frequently occurs when [the Student] is blocked from leaving a non-preferred area...or activity...[The Student’s] aggression primarily consists of ‘bulldozing’ staff by leaning against them to use his body weight to push them out of the way, but may also include shoving or pushing with his hands, or headbutting (sic). Staff typically attempt to stand with their feet firmly planted to prevent [the Student] pushing them out of the way, and instruct him to return to his desk; however, this is not always successful and [the Student] is occasionally able to push staff members out of the way. Unsuccessful attempts at pushing staff out of the way are typically followed by [the Student] dropping to the floor and refusing to return to the previous activity. Aggression is typically mild in severity, and episodes may end in fewer than five minutes if staff are successful in blocking [the Student]; however if [the Student] is intermittently able to push staff off balance, episodes may last for an hour or more.

Id.

17. The FBA added strategies to respond to the Student’s “destructive behavior (e.g., dumping containers, swiping items).” *Id.* However, Ms. Dykes’ FBA does not include any behavioral contingencies or hypothesis statement regarding property destruction. DYKES T223. As a BCBA, Ms. Dykes would expect to see a hypothesis statement for each target behavior and some discussion of any behavioral contingencies in an FBA. DYKES T216.

18. The antecedent, behavior, and consequence data (ABC data) upon which this FBA is based is not recorded or graphically represented in the FBA. *Id.* T215-T216. It is, however, “summarized” in the Summary of Behavioral Contingencies section. S2p4; DYKES T216.

19. Based upon her FBA, Ms. Dykes also developed a new BIP for the Student in July 2018. D1pp16-18; DYKES T179. Her BIP noted, “[The Student] may throw breakable items including his iPad or glasses,” and that he had a separate toileting protocol provided by his parents. D1p16. The BIP defines the same three target behaviors as the FBA: Aggression; Elopement; and Refusal to Transition, and includes a “Hypothesized Function” for each behavior. D1p17. The BIP also identifies property destruction as a target behavior, but does not include a hypothesized function for that target behavior. *Id.* pp17-18.

20. The BIP called for staff to “Physically place yourself between [the Student] and preferred areas that are not available...to prevent elopement.” *Id.* p17. Or, “Quickly follow after [the Student]. Position yourself between [the Student] and the area he was trying to access to prevent further elopement.” *Id.* p18. Finally, “If physically possible, do not allow [the Student] to push past you (request assistance from others if necessary),” and “Be prepared to block additional attempts at property destruction.” *Id.* The Student typically did not exhibit physical aggression towards his peers. DYKES T201. “Most of his aggression was directed toward his classroom staff.” *Id.*

21. Allan Cott School developed a new annual Individualized Education Program (IEP) for the Student in August 2018. S3. More specifically, the IEP was developed by Ms. Dykes and the Student's special education teacher, with the teacher actually drafting the IEP. DYKES T178, T227.

22. The IEP noted that, "Recently, parents and classroom staff have also reported the occasional instance of self-injury (hitting himself with open or closed fist or banging head against walls, objects, or floor)." S3p3.

23. The IEP did not include any concurrent standardized academic assessments of the Student. See *generally* S3.

24. There is no IEP goal regarding the Student's toileting, despite the fact that toileting "was a priority for [the Student] to work on" at Glenwood, and was "addressed during the school day." DYKES T222. Indeed, staff at Glenwood saw "a lot of refusal" when it came to Student's toileting. *Id.* T195. Ms. Dykes was responsible for implementation of the Student's toileting protocol that was provided, at least in part, by the Mother. *Id.* T228, T229. Ms. Dykes does not know why a toileting goal was not included in the Student's IEP. *Id.* T222. Ms. Dykes was present at the team meeting for this IEP. *Id.* T217; S3p15.

25. The IEP includes goals identified as science, mathematics, language arts/receptive language, writing, reading, communication, and behavior goals. S3pp6-12. These goals were adaptations of Alabama State educational standards to make the goals "functional and meaningful" for the Student. DYKES T186. These goals are best characterized as functional or pre-academic goals. *Id.* T189. Ms. Dykes is unaware of any particular "science curriculum" that was used to instruct the Student during the 2018-2019 school year. *Id.* T220.

26. The IEP provided the Student with services that included the following:

- 1:1 instruction and/or small group instruction in science, mathematics, language arts/receptive language, writing, reading, and communication;
- Discrete trial training for his IEP goals, including communication by using his augmentative communication device;
- 30 minutes of BCBA consultation four times a month to assist his teacher and staff with "Reviewing the data, making changes to the behavior plan as needed, and review changes to the behavior plan with staff."

S3p13. The IEP also provided the Student with Extended School Year (ESY) services. *Id.* p15.

The Student and his Family Relocate to Mercer Island, Washington, and Begin Residing in the District

27. The Parents purchased a home on Mercer Island in Washington State on or about December 11, 2018. FATHER T1331.

28. The Father recalls a meeting with "the entire team" on December 13, 2018, at the District's Islander Middle School (IMS). FATHER T1331. He recalls this was their first exposure to the

team. T1352. The Father recalls the Parents brought the Student with them to the meeting to introduce him to the team. *Id.* The Father recalls the team emphasized that Julie Riccio was a “behaviorist.” T1331. The Mother provided no specific testimony about this alleged meeting. There is no evidence supporting a meeting between both of the Parents, the Student, and a team at IMS on December 13, 2018 apart from the Father’s recollection.

29. Julie Riccio has been a National Board Certified special education teacher for over ten years, and is a BCBA. RICCIO T508. She holds a Master’s degree in severe and profound disabilities, with a focus on deaf/blindness. *Id.* She was employed by the District during the 2018-2019 school year at IMS as an instructional coach and BCBA. RICCIO T375.

30. Ms. Riccio was part of the Student’s “intake process” in December 2018. *Id.* 379. She first met with the Mother as part of the team to learn about the Student’s needs. *Id.* T382. She recalls the Student attended a meeting. *Id.* After the meeting, the Mother toured IMS with the Student. *Id.*

31. After considering the testimony of the Father and Ms. Riccio, it is found more likely than not that Ms. Riccio’s recollection of this initial meeting is more accurate. Had the Father attended a meeting on December 13, 2018 along with the Mother and the Student, whom Ms. Riccio clearly recalls, it is highly unlikely Ms. Riccio would not recall the Father also being present. The reliability and accuracy of the Father’s recollection is also compromised by his testimony regarding his attendance at a reevaluation team meeting held on March 21, 2019. See S3. The Father testified regarding how long the meeting lasted, what was or was not discussed at the meeting, and then asserted that “My concerns kind of peaked at the March 2019 reevaluation meeting.” FATHER T1333, T1353. However, later on cross-examination the Father confirmed he did not sign as attending the meeting along with the other attendees, including the Mother (D3p8), and admitted he could not recall if he actually attended the meeting. *Id.* T1353. It is found as fact that on a date uncertain in December 2018, the Mother and the Student met with a team of District staff including Ms. Riccio at IMS, and then toured IMS.

32. Ms. Riccio was also part of a subsequent “intake interview” with the Mother, Ms. Dykes, and another teacher from Glenwood on December 19, 2018. RICCIO T379; S73p2.^{6,7}

⁶ Ms. Dykes testified she does not recall participating in any telephone conversation with the Mother and District staff regarding preparations for the Student’s arrival in the District. DYKES T224. However, Ms. Dykes did not affirmatively deny she ever participated in such a telephone conversation. And given Ms. Dykes emailed Ms. Riccio “Behavior Documents and Data” regarding the Student the same day (See S20pp1-10), it is found as fact that although she does not recall it, Ms. Dykes did in fact participate in a telephone call or intake interview with Ms. Riccio and the Mother on December 19, 2018.

⁷ The specific date of December 19, 2018 is supported by one of the District’s responses to the Parents’ interrogatories during discovery. See S73p2. S73 was offered by the Parents without limitation and admitted without objection at the due process hearing. Accordingly, it is concluded S73 is proper evidence to support a Finding of Fact herein. The fact that the meeting was held on December 19, 2018 is also supported by Ms. Dykes’ email to Ms. Riccio that same day which included the Student’s July 2018 FBA and BIP. S20.

33. During the intake interview, one of the strong recommendations from the staff at Glenwood was that the Student needed to have success in his setting immediately. RICCIO T382. They recommended the District create a learning space that was clutter-free and with not many distractions because the Student had a history of eloping towards many items. *Id.* T382-T383. Glenwood staff confirmed the Student had caused tens of thousands of dollars' worth of technology destruction during the time he attended Allan Cott. *Id.* T383.

34. On December 19, 2018, Ms. Riccio received "Behavior Documents and Data" regarding the Student via email from Ms. Dykes. S20p1. Attached to Ms. Dykes' email were the Student's July 2018 Annual Review and Behavior Assessment and the Student's July 2018 Behavior Support Plan. S20pp3-10.

35. After purchasing their new residence on Mercer Island in December 2018, the Student's family relocated and began residing on Mercer Island in January 2019. S59p5.

36. On January 8, 2019, Ms. Riccio forwarded the Behavior Documents and Data she received from Ms. Dykes to Elaine McClellan and Madeleine Tessier. S20p1.

37. Elaine McClellan is a District school psychologist at IMS. McCLELLAN T673-T674. She held the same position during the Student's attendance at IMS. *Id.* T674. She holds a Master's degree in educational psychology from the University of Washington. *Id.* T692. She has practiced as a school psychologist for the District for 32 years. *Id.* T693.

38. Madeleine Tessier is a special education teacher certificated in Washington State. TESSIER T748. Ms. Tessier was the Student's special education teacher and IEP case manager from his entry into IMS in January 2019 until he moved to Mercer Island High School (MIHS) in January 2020. *Id.* T751-T752, RICCIO T375. The 2018-2019 school year was Ms. Tessier's first year as a special education teacher. TESSIER T748. Ms. Riccio was her instructional coach and "mentor." RICCIO T375, TESSIER T753.

The Student's "Office" in the Personalized Learning Program at IMS

39. Ms. Tessier's special education classroom was part of the Personalized Learning Program (PLP) at IMS. The PLP is a self-contained program serving only students eligible for special education. McCLELLAN T677.

40. The PLP program utilized two classrooms at IMS: Rooms 403 and 405. RICCIO T387-T388. Portions of the two classrooms were designed as five "individual learning spaces," also referred to as "offices." *Id.* In addition to the two classrooms, the PLP program included a kitchen, sensory room and bathroom solely for the use of the PLP students. *Id.*

41. Consistent with the recommendations from Glenwood for a clutter-free and low-distraction environment, the Student's team determined to place the Student in one of the offices in Ms. Tessier's PLP classroom. *Id.* T391; S5 (Photo of Student's office at IMS). The Mother was present when this decision was made. RICCIO T391.

42. There was conflicting testimony about the size of the Student's office. The Mother was shown the Student's office when she took him to IMS for his first day. MOTHER T1202-T1203. She estimated the office was the size of a walk-in closet. *Id.* T1204. Amanda Collins, a full-time paraeducator in Ms. Tessier's PLP classroom who regularly worked 1:1 with the Student in his office, estimated it was approximately 10' x 10'. COLLINS T710, T721. There was a door from Ms. Tessier's classroom into the Student's office. S5. The door was always kept open, although there were times when the Student would close the door. *Id.* T719, T721.

43. The Mother testified that the Student's office included a desk. MOTHER T1203. The Mother testified she had a discussion with an unidentified District staff person about the desk. *Id.* T1203. She testified she was concerned about the Student being "resistant" and possibly turning over the desk. *Id.* The Mother testified she was assured that the desk would not somehow tip or turn over because it was attached to the wall. *Id.* She testified she asked to see the desk, and continued to be concerned that the desk might collapse if the Student climbed on it. *Id.* The Mother testified that she "didn't make a bigger deal out of it" because it was the Student's first day at IMS. *Id.* T1203-T1204. For the following reasons, it is found that the Mother's testimony regarding this event is not reliable.

44. Dustin Woodside was employed as a paraeducator with the District for only the 2019-2020 school year. WOODSIDE T39-T40. He met the Student at the beginning of the school year. *Id.* T41. The 2019-2020 school year started on September 4, 2019. S23p2. Mr. Woodside worked sporadically with the Student at IMS and was familiar with the Student's office. *Id.* T65. He was with the Student in November 2019 when the desk in the Student's office collapsed, injuring the Student's foot. *Id.* T90; S13. Mr. Woodside described the desk as one that "we recently constructed...that was connected to the wall." WOODSIDE T90-T91. On further direct examination by Parents' counsel, Mr. Woodside confirmed the Student's desk was "newly constructed," and bolted to the wall. *Id.* T91.

45. The Mother's testimony that she observed the desk attached to the wall in the Student's office in January 2019 is not possible. Mr. Woodside did not begin his employment with the District until the start of the 2019-2020 school year, many months later. He confirmed the desk that was bolted to the wall in the Student's office that collapsed in November 2019 was newly constructed. There is no evidence to find that Mr. Woodside could have known when the desk was constructed unless the desk was constructed after the start of the 2019-2020 school year, many months after the Mother asserted she saw it in January 2019. Furthermore, the Mother's testimony that she remained concerned about the safety of the desk after first seeing it in January 2019 but never raised it as an issue is not persuasive. The evidence is replete with occasions when the Parents were strong, vocal advocates for the Student and his safety. It is found as fact that the Mother's testimony about seeing the desk in the Student's office and being concerned for the Student's safety in January 2019 is not reliable.

The Student Begins Attending IMS

46. The Student began attending IMS on or about January 14, 2019. RICCIO T383; S73p4. The Mother accompanied the Student on his first day at IMS, and stayed for about half the day. MOTHER T1202, T1206. She was shown the Student's office. *Id.* T1202-T1203; TESSIER T752.

47. Including the Student, Ms. Tessier had 10 or 11 students in her PLP classroom. TESSIER T751. Ms. Riccio provided her some training in ABA. *Id.* T626.

48. Ms. Riccio was involved with setting up the Student's learning space. RICCIO T383. Then she spent about 10 hours during the Student's first week at IMS making sure his program was "up and running." *Id.* Ms. Riccio remained involved continually through the remainder of that IEP on a weekly, if not more than once-a-week working with [the Student] and the team. *Id.* T384; See e.g. S73pp4-5.

49. The Student's team at IMS employed ABA principles to instruct the Student. RICCIO T510. The team used Discrete Trial Training as their main form of instruction for the Student. *Id.* T51.

50. The Mother and/or the Father visited the Student's PLP classroom and office multiple times during the school year. MOTHER T1216-T1217, RICCIO T511-T512, TESSIER T753. Ms. Tessier spent "ample time together" with the Mother and the Student. TESSIER T753.

51. From January to March 2019, the Student spent the majority of the school day in his office with his 1:1 paraeducators, but he also spent time exploring the whole PLP classroom. *Id.* T750. The Student enjoyed "hanging out" with the other students in the PLP classroom when he d/*Id.* COLLINS T712. Sometimes he did not want to interact with his classmates. *Id.* Other students were in his office three to four periods a day. *Id.* T721. There were "peer mentors," general education students, who came into the PLP to work 1:1 with the PLP students. *Id.* T713.

52. Sometimes the Student would follow his schedule, other times not. Collins T712. His 1:1 paraeducators would not allow him to interact with the other students in the PLP classroom when he would not follow his schedule or was throwing things. *Id.* The Student's aggression was not "specifically geared towards other students." *Id.* T723. He was aggressive towards staff. *Id.* He would hit or try to throw things. *Id.* The Student "would try to gag himself, and it was usually when we were asking him to do work, and he was in a refusal state." *Id.* T723-T724. Ms. Collins could not recall now frequently this occurred. *Id.* T724.

53. A Transfer Review meeting was held at IMS on January 30, 2019. D2pp3-7. The Mother, Ms. Tessier, Ms. McClellan, acting as an administrative designee, and a District speech-language pathologist participated. *Id.* pp3-4; McCLELLAN T675. Ms. McClellan drafted the Transfer Review document. McCLELLAN T675.

54. The team determined the Student would continue to receive the instruction and services in his current IEP from Allan Cott School with three exceptions. *Id.* p3. First, the Student would not attend a separate day school; he would attend a public middle school (IMS). *Id.* Second, the Student was not participating in adaptive physical education (PE), but that would be the first area addressed when increasing the Student's access to other areas of the school building. *Id.* Finally, the Student now required special transportation to and from IMS. *Id.*

55. The team also determined the Student would be evaluated to determine the extent to which he could participate with the larger school community at IMS, as well as to determine his current educational needs. *Id.* p5.

56. In drafting the Transfer Review document, Ms. McClellan considered that the Student:

(C)ame to us from a self-contained school, so we had to proceed in a very cautious approach to really make sure that...Student (could) come to the middle school and really be successful there and have access to the general education. And so during that whole evaluation period, we were looking at building in opportunities for him to see if he could indeed engage with other kids.

MCLELLAN T677.

57. The Mother signed the consent for the District to evaluate the Student the same day. D3p4; Mother T1199, T1200. The scope of the evaluation did not include any assessment of academics. D3p3. The Parents did not raise any objection about the areas proposed for the Student's evaluation, or request that other areas for evaluation be added. McCLELLAN T695-T696.

58. The Mother also raised her concern that the Student was gagging himself. *Id.* T1201. The Father recalls an incident where the Student self-gagged himself when the Mother tried to get him to enter IMS about three weeks after he started attending school. FATHER T1273. The Father believes this became a "frequent behavior" for the Student. *Id.* T1332. However, the Father offered no other evidence to establish the frequency or severity of the Student self-gagging at IMS. Ms. Collins acknowledged the Student would try to gag himself at school, but could not recall how frequently this occurred. COLLINS T724. There is no other evidence to support a finding that this behavior was "frequent" at IMS, and no such finding is made.

59. In response to the Mother's concern, Ms. Riccio developed a "self-gagging protocol" and presented it at the IEP team meeting on April 4, 2019. FATHER T1366. The first time the Parents saw the protocol was sometime between the March 21, 2019 evaluation meeting and the April 4, 2019 IEP meeting. *Id.* T1332. There is not sufficient evidence to find that the Student continued to gag himself at IMS after the protocol was developed.

60. Ms. McClellan drafted a Prior Written Notice (PWN) dated January 30, 2019 regarding the decisions of the Transfer Review Team. D2p8. That PWN stated in part that, "An evaluation will be started to determine the extent to which [the Student] can participate within the larger school community, as well as this current educational needs." *Id.*

*Student's March 21, 2019 Evaluation and Team Meeting*⁸

⁸ The terms "evaluation" and "reevaluation" both appear in the record associated with this assessment of the Student and this meeting. This assessment of the Student was the first assessment by the District and apparently the first assessment of the Student in Washington State for IDEA purposes. As such, from a purely legal perspective this is an *initial evaluation* of the Student, not a reevaluation. However, with respect to this assessment and meeting, the terms "evaluation" and "reevaluation" are used interchangeably.

61. The Student's evaluation team met on March 21, 2019 to review the reevaluation report. S3pp5-24. The Mother attended and signed the Evaluation Summary. *Id.* p8. The evaluation report was drafted by Ms. McClellan, who was the evaluation case manager. *Id.* p5.

62. The Father gave testimony regarding the substance of this evaluation meeting. See e.g., FATHER T1333, T1351, T1353. The Father's signature does not appear on the Evaluation Summary along with the other individuals who participated in the meeting. See, S3p8. On cross-examination, the Father could not recall if he actually attended this meeting. FATHER T1355-T1356. Accordingly, the Father's testimony regarding what may or may not have occurred at this meeting is not considered.

63. The evaluation was completed due to a change in placement for the Student from a separate day school to a public school setting. S3p5. The Student was determined eligible to receive special education and related services under the Multiple Disabilities eligibility category. *Id.* p6.

64. The evaluation recommended specially designed instruction (SDI) in the areas of adaptive, communication, social/emotional, and behavioral domains. *Id.* It recommended Occupational Therapy (OT) and speech/language services as related services, and Physical Therapy (PT) as a supplementary aid and service. *Id.* pp6-7.

65. The evaluation described the purpose of SDI in the adaptive domain as services to "Increase functional skills such as, but not limited to, community use, prevocational skills, personal health and safety, hygiene and toileting, as well as basic home and life skills." *Id.* p7. The reference to prevocational skills is "a way of saying we need to get him ready to be as independent as he possibly can in life." McCLELLAN T697-T698.

66. The evaluation noted that:

[The Student's] exposure to other students is quite limited. In accordance with his IEP from Alabama, he spends his time primarily in the Personalized Learning Program (PLP), in an office space. As part of this reevaluation, [the Student] is also systematically and intentionally being exposed to other students in the PLP, including peer mentors who help out in this program, as well as the larger school community.

D3p10. Ms. Riccio clarified that the reference to the Student's exposure to other students being quite limited is a reference to the Student's exposure to general education students because the Student was in Ms. Tessier's self-contained PLP classroom. RICCIO T401. The Student had interactions throughout his school day with the other students in the PLP. *Id.* T405.

67. The assessment of the Student's social and emotional skills included a review of his last evaluation at Glenwood in 2016, and administration of two standardized assessment tools. D3p10. The assessment noted that while the Student had thrown things, pushed his body into adults, and pulled adults' hair, the Student "has started to develop some friendships and relationships with others in the PLP." *Id.* p11.

68. The assessment of the Student in the adaptive domain included a review of records, observations, and standardized assessment tools. *Id.* p11. It concluded that the Student continued to function “within the Extremely Low range across the board.” *Id.* p12. It concluded that the “focus of [the Student’s] individualized planning should be on maximizing his future independence.” *Id.* But it also concluded that the Student “continues to be fairly independent in toileting once he is in the restroom, but still needs an adult present and has regular accidents.” *Id.* p13.

69. The assessment of the Student’s behavior included review his last IEP from Glenwood, information from standardized ratings scales (Behavior Assessment System for Children-Third Edition (BASC-3)), current staff observations, and recommendations from staff at Allan Cott School. *Id.* pp13-14. The assessment noted that:

Recommendations from the previous school team includes the need for “a small, primarily quiet setting in order to be successful behaviorally.” The team further recommended that, “if he transitions into a school with typically developing peers, his time with typical peers should be carefully planned.”

Id. p14. The behavior assessment concluded that:

In accordance with recommendations from his previous school, [the Student’s] access to other students is currently still very limited. He has his own smaller, ‘office’ space where he typically works with his 1:1 on learning and choice activities, but is now starting to explore more of the school through carefully guided rides around the school on an adapted trike.

Id. The evaluation did not include a new FBA. RICCIO T399, McClellan T700-T701.

70. The assessment of the Student’s academic domain included a review of records, and current observations from Ms. Tessier and other school staff. D3p14. It included use of the Becker Work Adjustment Profile to assess the Student’s cognitive domain and provide information regarding the level of the Student’s pre-academic-based skills. D3pp12-13, 14-15; RICCIO T501-T502. It noted the Student continued to receive instruction to support the goals in his current IEP from Alabama (S3), and individual work activities included things like matching colors, completing puzzles, putting things of various sizes on different boards, as well as some tracing and weaving. D3p15. The academic assessment concluded that:

Based on [the Student’s] multiple disabilities and rate of learning, it is now recommended that he needs a very functional approach to instruction. Whenever possible, learning activities should be based on real life applications of the skills being taught and instruction should be delivered in the context in which the skills will be needed. Ideally this would be done using the same tools and materials that would be available for maximal generalization.

Id.

71. Ms. McClellan does not recall any discussion at the meeting about whether to have academics as a stand-alone area for SDI. McCLELLAN T697-T698. She does not recall the Parents asking for academics to be considered or added to the reevaluation. *Id.* T698.

72. The assessment of the Student's communication included a review of records, use of a standardized assessment tool, completion of a Communication Matrix, skilled observation, and teacher interviews. D3p15.

73. The communication assessment concluded in part that:

[The Student] continues to demonstrate a severe-profound delay in the area of receptive and expressive communication skills. [The Student's] primary level, or highest level of mastery within communication is Intentional Behavior. In this level of communication behavior is under the individual's control, but it is not yet used to communicate intentionally. Caregivers interpret the individual's needs and desires.

Id. p19. In typically developing children, the Intentional-Behavior level of mastery occurs between three and eight months of age. *Id.* p16.

74. As part of the Student's evaluation, Ms. McClellan observed the Student multiple times. McCLELLAN T688; D3p24. She observed the Student in his office working with his 1:1 paraprofessional during instruction, outside in an enclosed playground area, and in the larger school environment riding a modified trike, always accompanied by multiple adults. D3p24.

75. Ms. McClellan's significant findings concluded:

Observations of [the Student] in his current setting (100% self contained) suggest that he is ready for gradual exposure to the larger school environment and community. He currently spends most of his day in a smaller office space completing rote learning tasks or engaging in choice activities accompanied by an adult paraprofessional. [The Student] rarely has any direct contact with the other students in his class, although several do sit at tables not far from his office. He has never acted aggressively toward other students, but does seem curious.

Id. Ms. McClellan's reference to the Student rarely having any direct contact with the other students in his PLP classroom goes to her observation that the Student was "curious about the other kids but not engaging with them or wanting to spend time with them." McCLELLAN T691.

76. A District Transfer IEP Progress Report was completed on March 29, 2019 by Ms. Tessier. D4. This report reflected the Student's progress on the goals from his August 2018 IEP that was first implemented at Allan Cott School, and then continued when the Student transferred into IMS. TESSIER T756.

77. By March 29, 2019, the Student had mastered his behavior goal, and was making sufficient progress on his math goal to achieve the goal by the end of the IEP. The Student was making insufficient progress on his language arts, writing, reading, and communication goals to achieve the goals by the end of the IEP. See D4p1.

Student's April 4, 2019 IEP and Team Meeting

78. An IEP team meeting was held on April 4, 2019 to develop the first District IEP for the Student. D5pp3-28. The Father, Ms Riccio, and Ms. Tessier attended, along with a general

education teacher, administrative designee, an OT, a PT, and a Speech-Language Pathologist (SLP). D5p3.

79. The Father raised the Parents' concern for the Student's self-gagging. *Id.* p5. Ms. Riccio presented the protocol she had developed to address this behavior. *Id.*; FATHER T1366.

80. The IEP team determined that:

[The Student] does exhibit behaviors that impede his learning or that of others. These behaviors requires (sic) the implementation of a behavior intervention plan and strategies including but not limited to; quiet, personal work space, clutter free work space (including technology, clocks, fake plants), first-then board, verbal activity specific praise, access to preferred items once work is complete....minimized staff response to behaviors and access to communication tools at all times.

D5p5. However, the IEP team noted that the rate or frequency of the Student's challenging behaviors (Elopement, Refusal to Transition, Aggression) had all decreased since arriving at IMS from Allan Cott School. *Id.* pp9, 32. The team planned to continue to address these challenging behaviors by increasing the Student's functional communication. *Id.* p9. Ms. Tessier also recalls that the Student's "behaviors may have been higher when he first transitioned to the school, and then decreased as we were able to accommodate for him and knowing him better." TESSIER T629.

81. The IEP team also determined that:

[The Student] can access some of the opportunities provided in the larger setting and his general education peers. This process will begin slowly with [the Student] joining general education PE for 100 minutes per week with the close supervision of a paraprofessional trained in his behavior intervention plan strategies. In addition, [the Student] will have access to general education peers that enter his special education program as mentors.

D5p7.

82. The IEP provides goals in the areas of social/emotional behavior, adaptive, and communication. *Id.* pp14-22. It continued to provide 1:1 support for the Student, and provided Extended School Year (ESY) services. *Id.* pp27-28. It also placed the Student in an adapted general-education physical education class. *Id.* p27.

83. The IEP did not include any goals in the area of functional academics. However, the Student continued to receive pre-academic instruction, in part utilizing the Shoebox curriculum. RICCIO T500-T501; S19.

84. The Shoebox curriculum is based upon TEACCH, which is a research-based tool for use with individuals who have autism or autism spectrum disorder (ASD), and/or intellectual disabilities. RICCIO T500-T501. The Shoebox curriculum used with the Student is intended to be used with children who abilities range within the12-30 month developmental level. S19p1. The Student's abilities were at a pre-academic level. RICCIO T501.

85. Ms. Riccio and Ms. Tessier contributed to drafting the Student's IEP. RICCIO T407, TESSIER T626. Ms. Riccio considers ABA an "instructional tool." RICCIO T408. As such, she typically does not designate or include ABA in an IEP because "instructional decisions can change throughout the course of an IEP." *Id.* T408-T409. While Ms. Riccio agrees that an ABA program requires BCBA oversight, the Student's team was "using the strategies of ABA" in a school setting, and the team determined it did not need BCBA oversight at that time. *Id.* T409-T410.

86. As his special education teacher for the entire time he attended IMS, Ms. Tessier was clearly in a unique position to interact with and observe the Student on a daily basis. The Student interacted with his peers in her PLP classroom "every period of the day." TESSIER T632.

87. Lionel Enns is a Licensed Clinical Child Psychologist. S72p4; ENNS T103-T104. Dr. Enns also holds a doctorate-level BCBA credential, and is a Nationally Certified School Psychologist. *Id.* In February 2020, the Parents contacted Dr. Enns because they "wanted an objective opinion about whether or not Student was being placed in a...program that was meeting his needs." *Id.* T444. Dr. Enns would eventually complete his Psychological Assessment Report of the Student on August 27, 2020. S37.

88. In Dr. Enns' opinion, when the District did not continue BCBA support and did not require the Student's 1:1 paraeducators to be qualified as behavior technicians in this IEP, staff at IMS "had no way of controlling his behaviors. So with the reduced support, it actually required [the Student] to be in a...more restrictive environment." Enns T436-T437. The environment was more restrictive in terms of the Student having less exposure to his peers and the District's assignment of two 1:1 staff for the Student. *Id.*

89. Members of the IEP team, including the Parents, also developed a BIP for the Student on April 4, 2019. D5pp32-35. The BIP was based upon information from the Student's July 2018 FBA at Glenwood. *Id.* p32. Data indicated that the results of the Glenwood FBA were still relevant and consistent. *Id.*; RICCIO T513. The BIP considered behavior data that compared the frequency of the Student's challenging behaviors at Glenwood to the frequency of the same behaviors at IMS. *Id.* The frequency of all three challenging behaviors had decreased since the Student began attending IMS. *Id.*; RICCIO T513-T514, PADILLA T1089-T1090, TESSIER T629. The team at IMS "used the same data sheets that Allan Cott had, which allowed us to...compare apples to apples. And so we were able to take the information from their programming all the way through to December, right when he left, and then compare it to where we were and our timelines were all going down." RICCIO T513

90. Yaniz Padilla is a psychologist licensed in Washington State, and a Licensed Clinical Psychologist in Virginia. *Id.* T1075; S72p26. Dr. Padilla holds a PhD in School Psychology, and a doctorate-level BCBA credential. S72pp24-26. She specializes in the assessment and treatment of challenging behavior using an applied behavior analytic approach. *Id.*

91. Dr. Padilla first saw the Student in December 2019. PADILLA T1033. She conducted an FBA of the Student over the course of seeing him twice a week for 12 weeks, and then weekly for a total of 34 visits for assessment and treatment. S36p1; PADILLA T1034. Dr. Padilla completed the report of her FBA in August 2020. S36.

92. The IEP team also developed an ESY plan on April 4, 2019. D6pp3. It includes goals in the adaptive and social/emotional domains, and provides the Student a 1:1 paraeducator. *Id.* The period of ESY was two weeks during July 2019. *Id.*

93. Via email on April 18, 2019, Ms. Tessier informed Chuck Milsap, a physical education teacher at IMS, that the Student would start coming to his general education PE class the following week. S9p1. Ms. Tessier also provided Mr. Milsap with the Student's IEP and BIP. *Id.* pp1-2.

94. By June 21, 2019, the Student was making sufficient progress on all the IEP goals in his April 2019 IEP to achieve the goals within the duration of his IEP. D7; TESSIER T761

95. Christine Kenyon was the Student's special education teacher for ESY in July 2019. S73p8; KENYON T1114. The Father believes that ESY was "challenging for the Student." FATHER T1334. The Father attributed nightly "episodes of anxiety" to the Student attending ESY. *Id.*

96. The Father first noticed changes in the Student's behavior in August 2019. S37p6. During a plane trip in August the Student experienced what the Parents characterized as a "psychotic break." *Id.* p2. This "went on for hours and hours and hours." FATHER T1334. It is unknown if the Parents informed the District about the incident on the airplane.

97. After the plane trip, the Father felt the Student was more difficult, and at one point the Student "attacked" the Mother. S37p2. It is unknown if the Parents informed the District about this incident.

The 2019-2020 School Year at IMS

98. The 2019-2020 school year at IMS began on September 4, 2019. D23p2.

99. Dustin Woodside was a paraeducator in Ms. Tessier's PLP classroom. WOODSIDE T40-T41. He worked with the Student only sporadically until the Student transferred to MIHS.⁹ *Id.* T41.

100. Mr. Woodside observed a "considerable difference" in the Student's behavior between September and December 2019. *Id.* T95. "(I)n the beginning, things were going okay." *Id.* T95. However:

Towards the end, before he went to the high school, his behaviors started to escalate, like a lot...he couldn't really do much as far as completing tasks. And a lot of times he would take off his clothes and use the bathroom on the floor. I think there was a time where he tried to eat his own excrement, and we kind of stopped him from doing that a couple of times.

⁹ Mr. Woodside would follow the Student to MIHS and begin working with the Student essentially the entire school day. *Id.* T41.

Id. T92. Mr. Woodside observed that the Student:

(W)ould just be completely in a room in that classroom because he was either pushing, being aggressive, taking off his clothes, using the bathroom on the floor, and that sort of thing. So we kind of had to clear that area, like, shut the doors and all that and keep the students away for their safety.

Id. T94-T95.

101. Ms. Collins observed that after the Student returned to IMS from the summer break, he initially exhibited more “refusal” behavior, but that later resolved. It was not until the Student returned from winter break that his behavior became “more aggressive.” COLLINS T726.

102. Ms. Riccio was also aware the Student’s behavioral needs were increasing when he returned from Thanksgiving break. RICCIO T414.

103. Starting in Mid-October 2019, the Parents observed an “increasing escalation in [the Student’s] behavior.” FATHER T1334. Although the Parents reported to IMS staff that they were observing more aggression at home, staff at IMS were not seeing those behaviors at school. RICCIO T517.

The Student is Hospitalized at Seattle Children’s Hospital-PBMU

104. On October 16, 2019, the Student was admitted to the Psychiatric and Behavioral Medicine Unit (PBMU) at Seattle Children’s Hospital for nine days due to “psychotic episodes.” S37p2. The Student was discharged from the PBMU on October 25, 2019. FATHER T1335.

105. Via email on October 25, 2019 to Ms. Tessier and other District staff, the Father requested a brief meeting the following Monday, when the Student was expected to return to IMS. S11. In his email, the Father stated that:

This inpatient admission has allowed [the Student’s] doctors to significantly change his medication regiment in a manner more appropriate for an adolescent with [the Student’s] unique set of conditions. Because of these changes they have asked that we monitor and record [the Student’s] episodes of aggression or frustration and document their cause/duration/frequency. This will allow them to make further changes as needed.

Id.

106. The Parents met with District staff on October 28, 2019. FATHER T1335. They informed staff about the Student’s hospitalization, requested more “behaviorist time,” that more data be exchanged with them at home, and more “transparency.” *Id.*

107. Via email on November 8, 2019, Ms. Tessier informed the Parents that the Student “became frustrated this afternoon and threw his iPad which resulted in a shattered screen. Later he proceeded to pull the thermostat from the wall.” S12. The Parents had earlier shared with Ms. Tessier that in previous schools the Student had broken “tens of thousands of dollars of electronics, so we were aware that the iPad was something that could be thrown or broken.”

TESSIER T738. This was the Student's only incident at IMS involving destruction of electronics. *Id.* T738-T739.

108. On November 12, 2019, the Student was injured in his office at IMS when a table or desk that was attached to the wall collapsed after the Student sat on it. S13p1. The accident occurred at 2:30 pm. *Id.* Mr. Woodside was with the Student when the desk collapsed, the Student fell to the floor, and injured his foot. S13p1; WOODSIDE T90. Ms. Tessier was alerted and wheeled the Student to the nurse's office for evaluation. S13p2. Then Ms. Tessier and the nurse called and spoke with the Father at approximately 2:45 pm. *Id.* The Student's Father trained as an emergency room physician, although he no longer practices medicine. S13p2. The nurse informed the Father that the Student would not bear weight on his right foot. S13p2. The Father said he would evaluate the Student when he returned home. *Id.*

109. The following day, the Father informed Ms. Tessier that the Student has several broken bones in his foot, but did not require a cast and they expected him to return to school the next day. S13p3.

110. By November 27, 2019, the Student had mastered his restroom goal, and was making sufficient progress to achieve all of his other goals but one within the duration of his April 2019 IEP. D7

111. In December 2019, the Parents took the Student back to the emergency department at Seattle Children's Hospital at least two times due to escalating challenging behavior, but the Student was not admitted. S36p2; FATHER T1246. The Parents were assigned to Dr. Padilla. FATHER T1246. The family was referred to Children's Crisis Outreach Response Services (CCORS) for approximately eight weeks for services to help the Student and his family stabilize. S36p1, S57p25.

112. On December 18, 2019, the Student was restrained by Ms. Tessier in an incident that was described in an Incident Report Form as follows:

Student had been given choice time and preferred choice was not available. Student disrobed, was sitting on the floor and began to defecate on the floor. Student picked up the feces, attempted to throw it at staff, then touched his face. Staff prompted him to move to the restroom, which he *d/d*. Once in the restroom, student continue to defecate into the toilet. Student then used his hands to splash in the toilet water and attempted to grab feces. Staff flushed the toilet and student continued to splash in the toilet bowl. Staff guided his hands away from the toilet bowl. Student moved to the floor of the restroom and attempted to drink water from the floor. Staff used tactile and verbal prompting to redirect the student out of the bathroom and into the classroom.

Student had moved from the bathroom into the classroom. Student seated himself onto the classroom floor, and moved his face toward feces on the floor. Classroom teacher crouched down, placing her arms in front of the student and used her arms to impede the student's motion toward the feces. Student redirected and sat back upright. The feces was cleared as soon as the student was safe.

S15pp2-3. Ms. Tessier's restraint of the Student lasted less than ten seconds. S15p1. The Mother was notified of the incident. *Id.*; TESSIER T760-T761. Ms. Collins, who was present when Ms. Tessier restrained the Student, described the restraint as Ms. Tessier just touching the Student's shoulders and pulling him away from the feces. COLLINS T729. This occurred in the PLP classroom, not in the Student's office. *Id.* T729-T730.

113. The Mother came to IMS to pick up the Student. *Id.* T761. "Upon arrival, we explained to her and I kind of mimicked and showed Mom what had transpired. She seemed rather relieved and gave me a hug." TESSIER T761. Ms. Collins was also present when the Mother arrived to pick up the Student, and she described the Mother as showing "remorse for the Student's behavior." COLLINS T733. However, the Parents were "extremely upset" about the restraint incident. FATHER 1339.

114. Sue Ann Bube is the District's Special Services director. BUBE T785. Dr. Bube holds a Master's degree in leadership with special education, and an Educational Doctorate degree. *Id.* T884.

115. Dr. Bube learned of the restraint involving the Student from an IMS assistant principal. *Id.* T794-T795. She called and spoke with the Parents the same day.¹⁰ *Id.* T795; FATHER T1337. The Parents were concerned about the Student's programming, and wanted the Student to have a longer school day, and so they talked about an early transition to MIHS for the Student. *Id.* T796, FATHER T1338. It was her suggestion to move the Student early to MIHS. BUBE T817. That would give the Student a longer school day, and MIHS had clubs and other after-school activities. *Id.* T817-T818. Dr. Bube believed the Parents were "on board" with moving the Student to MIHS. *Id.* T818.

116. The decision to transition or move the Student early to MIHS was made by Dr. Bube and the Parents prior to holding an IEP meeting. *Id.* T819. The Father recalls that, "sometime in the next several days, we were asked, you know, to approve the move to the high school." FATHER T1338. However, the Father believes that he was not able to make an "informed decision" about moving the Student to MIHS. *Id.* T1339.

117. Later the same evening, Dr. Bube sent the Parents an email. S16. In her email, Dr. Bube wrote:

Madeleine (Tessier) will be contacting you to schedule an IEP meeting in January. However, since there have been several 'off-line' conversations about increasing student support with a Behavior Tech and BCBA, we would like to have your permission to proceed temporarily without holding a meeting to start the process of providing additional support for [the Student]. The IEP team will meet the first week of January to decide the scope of work and to work out all the details through the IEP Process. We appreciate your willingness to work as part of a team to provide educational supports for [the Student].

¹⁰ Dr. Bube was uncertain if she called and spoke with the Parents on December 18 or 19. Bube T795. However, when all the evidence is compared and considered, it is found more likely than not that she called and spoke with the Parents on December 18.

S16. Dr. Bube's reference to "off-line" conversations was a reference to conversations she had with her staff and with the Parents about increasing support for the Student. BUBE T798. By this time, the Student's challenging behaviors at school were increasing, he had been hospitalized, and she understood the Parents believed the Student was in crisis. *Id.* T798-T799.

118. The Father replied to Dr. Bube minutes later via email, stating, "Permission granted. Thank you for all you do for [the Student]." S16. This was his permission for Dr. Bube to proceed with her efforts to increase support for the Student without waiting for an IEP meeting. FATHER T1339, T1360.

119. Dr. Bube proceeded to draft a PWN. D8pp3-4. The PWN proposed to change the location and scope of the Student's services. *Id.* p3. Specifically, the PWN proposed to move the Student to MIHS to "provide for student's sensory and movement needs as well as access to more desired activities, such as swimming, band, and after school activities." *Id.* The PWN went on to state:

The nature and scope of activities including increased support will be an IEP Team Decision. The team will schedule an IEP meeting the first week back after winter break. The parents and district mutually agreed to keep [the Student] home until the IEP meeting so that a comprehensive (sic) plan could be developed together. Dr. Sue Ann Bube, (Special Education Director) has agreed to a form of compensatory education. The nature and scope of the compensatory education will be decided once the IEP team meets and student is back in school. The District will also add some services in the home, based upon IEP present levels and goals. The nature and scope of these services will be decided in the IEP meeting.

Id. Although Dr. Bube drafted the PWN on December 18, 2019, she forgot to send it to the Parents until January 8, 2020. See S23.

120. On December 19, 2019, Ms. Riccio and Ms. Tessier drafted a Behavioral Assistance Referral (BAT) form. S17p3; RICCIO T414, TESSIER T740. The purpose of the referral was to add more behavioral support for the Student. *Id.* More specifically:

(O)ur data indicated that ([Student's]) behavioral need was increasing in the time period from around when he returned from Thanksgiving break through December to the point where we determined it would be helpful to have another set of eyes to come in to evaluate him and do the FBA, so that's where we initiated the BAT referral.

RICCIO T414. After this referral, Nicki Winder come in to provide more behavioral support. TESSIER T746.

121. Nicki Winder is a District special education instructional coach and behavior specialist. WINDER T916. She is a certificated special education teacher in Washington State, and has been working in special education for 15 years. *Id.* T937. She also holds a Master's degree in special education, and is a BCBA. *Id.* T937-T938.

122. Ms. Winder became involved with the Student when Dr. Bube contacted her as he was being transitioned to MIHS. *Id.* T937. She became part of the Student's transition team to MIHS.

Id. T917. Ms. Winder worked closely with Christine Kenyon and Shawna Simpson, a BCBA with Connections Behavior Planning & Intervention. *Id.*; S31p5. Ms. Winder facilitated communication between members of the Student's transition team, and assisted Ms. Kenyon, who was the Student's case manager at MIHS. WINDER T918. She also contributed to creating the Student's schedule at MIHS. *Id.*; S4.

123. Ms. Kenyon is a District special education teacher at MIHS. KENYON T947. She is a certificated special education teacher in Washington State with 20 years' teaching experience. *Id.* T1113. She has taught students with ASD and Down syndrome. *Id.* She was the Student's ESY teacher during summer 2019, and his special education teacher and case manager at MIHS. *Id.* T1114, T947-T948.

124. On December 19, 2019, Ms. Riccio had an order placed for additional instructional materials (the Shoebox curriculum) for the Student. S18. The purpose was to replicate the Student's curriculum from IMS at MIHS. RICCIO T419. The Shoebox curriculum was appropriate for the Student based on the District's March 2019 evaluation of the Student, including the results of the Student's assessment using the Becker Work Adjustment Profile. *Id.* T501-T502. The Student was performing at a "pre-academic" developmental level. *Id.*

125. On December 20, 2019, Ms. Riccio emailed Ms. Winder copies of the Student's July 2018 FBA and BIP from Glenwood. S20.

126. Via email to Dr. Bube on January 2, 2020, the Father stated:

Per our discussion before the (winter) break I would like to request as soon as possible 1) written notice of a date and time for [the Student's] IEP revision and 2) written clarification on what changes in [the Student's] school environment, routine, and educators/staff will be implemented starting January 6. We appreciate all of you and your team's efforts on [the Student's] behalf.

S22p2. The Father was asking Dr. Bube for a written description of what she had verbally proposed on December 18, 2019. FATHER T1340.

127. Dr. Bube replied to the Father via email the next day stating, "I am working to solidify supports but the scope of the supports will be decided by the High School IEP team which will include you and your wife. When my staff get back on Monday, we will make it a priority to get an IEP meeting scheduled as soon as possible." S22p1.

128. Then via email later the same day to the Father, Dr. Bube stated in part:

I am still working with 2 outside agencies to put the entire team together as I am working to hire a new staff member and bring on a PhD level consultant...Please allow me a few more days to get everything solidified. We do not want him to start at the High School before we can get the team hired and together for an IEP meeting. We can discuss how to add additional home support as compensatory time to make up for not having a program ready to go on Monday.

S22p1. Dr. Bube's reference to wanting to "bring on a PhD level consultant" was not specific to the Student, but was a reference to augmenting her special education K-12 staffing generally. BUBE T815-T816.

129. Via email on January 8, 2020 to the Father, the Parents' then-attorney, and the District's attorney, Dr. Bube stated:

"We have a plan for [the Student] in the morning that will include tours of the (MIHS) building, a visit to band class, and riding a bike. I have included the IEP meeting invitation as well as the PWN that we forgot to send you after our conversation before break."

S23p1. The PWN referenced by Dr. Bube was the PWN she drafted on December 18, 2019, but forgot to send to the Parents. See D8pp3-4.

The Student's January 9, 2020 IEP Amendment

130. On January 9, 2020, a meeting was held at MIHS to consider amending the Student's IEP. D9p3; FATHER T1340. A total of 18 people signed as participating, including both Parents, Parents' then-attorney, and an attorney for the District. *Id.*; BUBE T886 (Parents had their attorney at the meeting).

131. There is conflicting evidence regarding whether or not the Parents were offered and rejected the option of the District providing in-person services for the Student at the Parents' home. Parents' current counsel asserted much later in September 2020 that the Parents did not reject in-person services at this meeting. See Counsel's September 1, 2020 email (S39p1)(In-person services were not rejected at the January IEP meeting); *But* see Dr. Bube's September 7, 2020 email (S42p1)(The family was offered in-person services after school as part of the discussion in January 2020...I personally had the discussion with the family and legal counsel at the time.) Parents' counsel who wrote the email was not present at the January 9, 2020 IEP meeting. Therefore, counsel's statement could only be based on hearsay. Dr. Bube attended the January 9 IEP meeting. S9p3. Furthermore, Ms. Riccio, who was present at the January 9 IEP meeting (D9p3) recalls talking about having some home-based programming, and recalls the Parents saying they were not ready for in-home services at that time. RICCIO T522. Therefore, it is found as fact that the District offered the Parents in-person services for the Student in their home after school as part of the Student's educational program at the January 9, 2020 IEP meeting, but the Parents declined those services.

132. Dr. Bube and Ms. Kenyon, who also participated in the IEP meeting, do not recall any concerns raised at the meeting regarding the Student's proposed goals in the IEP, or written at IMS. BUBE T886-T887, KENYON T1114.

133. The team made the decision to move the Student to MIHS. KENYON T948-T949. The Parents and their then-counsel did not object to moving the Student to MIHS. FATHER T1360.

134. The Father testified that throughout 2019, the Parents "were very concerned about the office and the Student's isolation, but...we thought it was a work room during that time. FATHER T1343. Mr. Woodside was at the January 9 IEP meeting, caring for the Student during the

meeting because the Student was familiar with him and the Parents had no child care for the Student. FATHER T1344. After the IEP meeting, the Father spoke with Mr. Woodside, during which Mr. Woodside said at IMS the Student would eat lunch in his office. *Id.* “And so, it kind of crystalized for me fears that we had...that the Student was isolated, that (his office) was being used a lot to...isolate him from his peers.” *Id.* T1344. However, the Father did not raise any concern with anyone in the District after speaking with Mr. Woodside. *Id.* T1364. It is found that the Father’s testimony that the Parents were very concerned about the use of the Student’s office at IMS to isolate him from other students throughout 2019 is not credible. It is not logically compelling or persuasive that if the Parents were very concerned about the Student being isolated in his office at IMS, the Father would not have raised or communicated any concern to the District after speaking with Mr. Woodside. It is further found as fact that it is more likely than not that the Parents were not in fact concerned throughout 2019 about the use of the Student’s office at IMS to isolate him from other students.

135. The Student’s IEP as amended ran only through April 3, 2020, the end date of the original April 2019 IEP. D9p3. The amended IEP placed the Student in the PLP at MIHS. “His initial routine will have limited exposure to his general education peers but the team will be working with parents to try to include him in appropriate activities/interests...The IEP will be amended as his schedule changes.” *Id.* p8.

136. During the IEP meeting, “the staff did not discuss changing goals at this time but will convene a new IEP meeting in March 2020 to update goals.” *Id.* p10. Most if not all of the Student’s goals in the IEP are pre-academic goals. BUBE T810. In Washington State, “functional academics” and “pre-academic skills” are equivalent terms. *Id.* T807-T809, T902. From the time he entered IMS until this IEP, the Student was working at a pre-academic level. *Id.* T811.

137. Dr. Bube authored a PWN dated January 12, 2020. S9pp31-32. The PWN confirmed that the IEP team was proposing to increase staffing to include a behavior technician as well as a BCBA to oversee services for the Student. *Id.* p31. It confirmed that the team rejected immediately initiating a new FBA and BIP because the Student was being placed in a new setting, and that a new FBA and BIP would be considered when the team met again. *Id.*

138. Via email to the Parents on January 12, 2020, Dr. Bube stated:

I am attaching our DRAFT IEP. Please review and let us know if you have any updates based on our meeting last week. I am keeping it in DRAFT mode for several days. Our team still has a (sic) more specific behavior data to include as well as updates from OT and PT, but I did want to get it to you today. Remember that this Amendment will end in April. Our hope is to have a new comprehensive IEP including FBA and BIP in March.

S24 (Emphasis in original).

The Student Transitions Early to MIHS

139. The Student began attending MIHS on January 13, 2020. S57p26. The Student initially attended MIHS for four hours per day, and by the end of January was attending the entire school

day at MIHS. *Id.* The Mother was present the first week working with and supporting the team at MIHS, and sharing her experience with the Student. WINDER T927.

140. Christine Kenyon was the Student's special education teacher in the MIHS PLP, and was his special education case manager during his attendance at MIHS. KEYNON T947-T948.

141. Mr. Woodside, who followed the Student from IMS to MIHS, and Kyle O'Malley, an RBT, were assigned to provide the Student's 1:1 support. WOODSIDE T41, O'MALLEY T998-T999, T1000. They were with the Student virtually the entire school day. *Id.* T41, T999.

142. Mr. Woodside and Mr. O'Malley were supported by either Ms. Winder or Ms. Simpson as the BCBA. WOODSIDE T78. They had "frequent" meetings with the BCBA's, and worked in a "collaborative effort" to determine what worked and did not work with the Student. *Id.* T45, T50, T76. Ms. Simpson was present every day or every other day for about two hours a day. *Id.* T50.

143. As at IMS, the Student had his own office at MIHS. KENYON T966, WOODSIDE T51, O'MALLEY T1002.

144. There is conflicting evidence regarding the size of the Student's office off of Ms. Kenyon's PLP classroom at MIHS. The Father testified the Mother saw the Student's office and it was smaller than the Student's office at IMS. FATHER T1346. Mr. Woodside, who worked with the Student at both IMS and MIHS estimated the Student's office at IMS was about half the size of his office at MIHS; that the office at MIHS was larger than the office at IMS. WOODSIDE T65. Given the Father's testimony is based on hearsay from the Mother and Mr. Woodside having the benefit of direct observation of both offices, it is found as fact that the Student's office at MIHS was about the size of a very small apartment bedroom. *Id.* T64. See also KENYON T968.

145. The Student's office had a table or desk, with room for 3-6 chairs. KENYON T968, WOODSIDE 51. There was a whiteboard, cabinet for academic tasks and care-related items, and a "rest space" with bean bags, blankets, and soft pillows. WOODSIDE T62, O'MALLEY T1002. There was a door from the PLP classroom to the Student's office that remained open unless the Student closed it. KENYON T969. The office had two exterior windows. WOODSIDE T64. The Student spent on average 2-3 hours per day in his office. *Id.* T66.

146. Mr. Woodside and Mr. O'Malley worked with the Student in his office on his "table tasks." WOODSIDE T53, O'MALLEY T1004. At least in part, they utilized the Shoebox curriculum. *Id.* T60, T1017. Some of the Shoebox curriculum was "quite difficult" for the Student. O'MALLEY T1017. They worked with the Student on reading and writing. WOODSIDE T89. For math, there were puzzles with numbers on the pieces. *Id.* For writing, they did tracing and coloring. *Id.* T90. They worked on "social skills" with the Student. *Id.* Mr. O'Malley characterized this as "academic" support. O'MALLEY T999.

147. Mr. O'Malley recalls there may have been "some occasions" when other students joined the Student in his office, but that was not a "standard thing." O'MALLEY T1005. His office was "usually...a private place where he could get his work done and focus." *Id.* However, the Student interacted with the other students in his PLP classroom on "daily" basis. *Id.* 1023.

148. Mr. Woodside recalls that, “In the beginning...Student had limited interaction with his peers.” WOODSIDE T51-T52. But as the Student became “more acclimated,” other students would come into his office and do tasks or some sort of sensory activities with the Student. *Id.* T52. This happened 1 or 2 periods a day. *Id.* Sometimes the Student would have a “peer mentor” work with him in his office. KENYON T969, O’MALLEY T1023.

149. Mr. Woodside observed the Student throwing things, shoving into people, hitting, and yelling. WOODSIDE T68. This happened mostly with staff, but sometimes happened with other students. *Id.* T69. “We were very conscious of what was around him at all times.” *Id.* T68. Mr. O’Malley does not recall ever seeing the Student “physically attack or harm another student.” O’MALLEY T1015.

150. The Student had a daily schedule at MIHS. *See e.g.* S4. After reviewing the Student’s schedule, Ms. Dykes concluded that “A lot of the activities seemed comparable” to what they worked on with Student at Glenwood. DYKES T209. “(S)hredding and laundry were both things that we worked on with him...So overall the activities seemed fairly consistent and similar to what we had at Glenwood.” *Id.* T210.

151. Ms. Winder contributed to and helped write the Student’s schedule at MIHS. S4; WINDER T918. They used “broad terms” like “table tasks,” which included “academic tasks” and the Student’s IEP goals. *Id.* T919. “(W)e were organizing his day in blocks of about an hour, because we were finding that the pacing was very important with Student.” *Id.* T918. “So we...built the schedule to help with the pacing through the day.” *Id.* T919. The Student’s schedule “was being updated almost on a weekly basis...as we got to know him better and...we started to see what worked well with him.” T919-T920. Based upon her time spent with the Student, Ms. Winder had no concerns about MIHS being able to meet the Student’s educational needs. *Id.* T942.

152. A meeting was held on January 17, 2020, at MIHS.¹¹ S7p1, WINDER T923. In attendance was Ms. Winder, the Mother, and representatives from the Washington State Developmental Disabilities Administration (DDA).¹² *Id.* Ms. Winder took notes at the meeting. S7. At that time, DDA was half-way through providing 90 days of crisis support services for the Student’s family in their home.¹³ *Id.*

153. In a later, separate meeting the same day involving just the “school team,” Ms. Winder noted that a “New FBA needs to be done ASAP (next IEP team meeting propose this).” S7p1. Ms. Winder believed, “it was important to ascertain how [the Student] was settling into the high school, and if behaviors were occurring, what was the function of those behaviors.” WINDER

¹¹ Ms. Winder confirmed at hearing that she incorrectly dated her notes “1/17/19.” WINDER T922-T923. The correct date of the meeting was January 17, 2020. *Id.*

¹² Ms. Winder’s notes reference the “Team,” but it is unclear who else in addition to herself, the Mother, and the DDA representatives were present.” S7.

¹³ It appears that the reference to crisis support services is a reference to the Children’s Crisis Outreach Response Services (CCORS). *See* S57p25.

T926. This was because the Student had a “history of behaviors” at IMS, and there was a “crisis situation that was happening in the home.” *Id.*

154. The record is not entirely clear regarding a meeting which the Father believes took place on January 28, 2020. There is a Meeting Notice which set a meeting at MIHS for January 29, 2020, and a PWN dated January 29, 2020, written by Ms. Kenyon. D10. The PWN references a matter of what progress-reporting cycle the Student should remain on. *Id.* p3. The Father recalls a meeting on January 28, 2020, that involved only the Parents and Dr. Bube. FATHER T1340, T1341. At that meeting, the Father recalls making a “personal appeal” to Dr. Bube to place the Student in a “specialized center” in Washington State. *Id.* T1341. Apart from the Father’s recollection of this meeting, there is no other evidence to find such a meeting occurred. Given other instances of the Father’s questionable recollection, the gravity of a request for a school district to place a student in a non-public placement, the lack of any corroborating evidence, such as testimony from the Mother or Dr. Bube, or corroborating documentary evidence, it is found that this meeting more likely than not did not take place.

155. On February 13, 2020, the Father signed a consent for the District to conduct an FBA of the Student. D14p4.

156. On March 6, 2020, Dr. Enns observed the Student at MIHS for approximately two hours as part of his psychological assessment of the Student. S37pp12-18. He was accompanied by Ms. Riccio, and briefly spoke with Ms. Simpson. *Id.* p12. After his observation of the Student, Dr. Enns met with Ms. Riccio, Ms. Simpson, Ms. Winder, and the Mother. *Id.* p18. The Mother remarked that the Student’s self-injurious and aggressive problem behaviors were very troubling for the Parents, and that the Student was not going to be institutionalized because of his size. *Id.* p19. In summarizing his observations at MIHS, Dr. Enns opined in part that there “seemed to be no actual academic instruction.” *Id.* p20. But at the meeting with the Mother and District staff, Dr. Enns did not ask whether it could be arranged for him to observe some academic instruction. Enns T455. And during his observation, Dr. Enns raised no concerns about the Student’s program with Ms. Riccio. RICCIO T524.

157. Via email to the Father on March 10, 2020, Ms. Kenyon stated in part:

(W)we do have an IEP coming up for [the Student], due 4/4. I believe you are keeping him home for the time being to see how things play out with COVID-19. Fortunately we have some decent baseline for several of our goal ideas. However, I was hoping to test [the Student] this week into our Styer Fitzgerald Functional Academics curriculum. Would you be interested in my coming to see him at home?

S30p1. The Father replied via email the same day to Ms. Kenyon, stating:

We’ve been trying to do the responsible thing for [the Student] and the community. After the news this weekend we expected schools to close. But after internal and external discussion we will send [the Student] to school tomorrow. He has remained asymptomatic and in good spirits. So you will be able to complete this assessment this week.

Id. However, Ms. Kenyon was never able to complete the testing. KENYON T971. She wanted to do this testing because “we had discussed having academic goals, and I wanted to get a baseline.” *Id.* T972.

The District Closes all Schools due to COVID-19 Pandemic

158. On Friday, March 13, 2020, the District closed all of its schools due to the COVID-19 pandemic. KENYON T959, FATHER T1244; D15p23.

159. By March 19, 2020, the date his progress was reviewed, the Student had mastered both his social/emotional goals, mastered all four of his adaptive goals, and made sufficient progress on two of his communication goals to master the goals within the duration of his April 2019 IEP. The Student was making insufficient progress to master his one remaining communication goal. D13.

160. Via email on March 22, 2020, the District received Ms. Simpson’s report of her FBA of the Student. S31p1.

161. Shawna Simpson is a BCBA and LBA employed by Connections Behavior Planning & Intervention (Connections). Connections is a private company contracted by Dr. Bube to provide services to the District. BUBE T802. Ms. Simpson conducted the Student’s FBA for the District. See S31p5.

162. Ms. Simpson based her FBA in part on her observations of the Student spanning February 11 2020 to March 2, 2020. S31p9. She noted in her FBA that:

Indirect assessments can be beneficial in identifying the events associated with target behaviors. However, indirect assessments cannot be used in isolation to determine the function of a behavior and should always be followed by direct assessment.

...

Direct assessments involve observations of the contingencies of behavior under naturalistic conditions in the absence of manipulation...Data for this assessment was collected from an observation period spanning 02/11/2020 to 03/02/2020.

Id. pp7, 9.

163. The District reached out to the Parents in March 2020 to propose a new annual IEP. D15p23. The Parents declined that request. *Id.*

164. Dr. Bube drafted a PWN dated March 23, 2020, proposing to continue the then-current IEP from April 2019 as amended in January 2020, until the Parents and the District could schedule a mutually agreed upon IEP meeting. D11p3. In her PWN, Dr. Bube stated:

The District did not consider holding the meeting without the parent, as parent participation is essential in the development of an appropriate IEP.

Washington State has recommended social distancing to help prevent the potential spread of the COVID-19. School buildings are closed to school staff, students, and community.

The Mercer Island School District is implementing social distancing procedures per the Governor's office in the best interests of public health and safety which includes holding IEP meetings in a virtual format. *Parent didn't feel like they (sic) could participate with this format at this time.*

Id. (Emphasis added). Dr. Bube's belief was that the Parents did not want a new IEP, even though an annual IEP was due. So the District "honored (P)arents' request not to hold a new IEP meeting and continue the current IEP." BUBE T888. "(W)e were really trying to be collaborative with the family." *Id.*

165. After schools closed in March, Ms. Kenyon and Ms. Winder, along with a District OT, PT, and SLP, continued to consult with the Parents through zoom meetings every two weeks. WINDER T938. They offered themselves as a resource for the Parents. *Id.* T939.

166. On April 3, 2020, Ms. Kenyon completed a Continuity of Learning Plan (CLP) for the Student. D12.

167. Due to the duration of the COVID-19 quarantine, Dr. Enns contacted the Parents on May 28, 2020, to discuss what the Student had been doing over the past three months. S37p21. The Parents reported that "[the Student] had not been engaging in any aggressive, maladaptive behaviors, which had made the three months not only bearable, but enjoyable." *Id.* Dr. Enns opined that:

I think they were excited the Student was doing well...At this point, they were feeling quite good about things. That's my impression...I think they were basically saying, look, this is really exciting that things have stabilized and things look good for Student.

Enns T448.

168. Ms. Winder prepared a PWN dated June 19, 2020.¹⁴ D14p3. The PWN stated in part that:

The district proposes to put a pause on the FBA process and continue once school is back in session within an actual school building...While data has been collected and analyzed on the target behaviors prior to mid-March 2020, new data will be needed once instruction resumes within the school building. In order to put an effective behavior intervention plan in place, strategies must be based on current student data...Therefore, in order to create the most effective FBA and Behavior Intervention Plan, new data will be collected for a period of 2 weeks once school for [the Student] resumes within the buildings.

Id. Ms. Winder never asked the Parents to extend the timeline for completing the FBA. WINDER T933. No one at the District asked the Parents to extend the timeline. BUBE T854. By this time, Dr. Bube did not expect to use Ms. Simpson's FBA when school started again. *Id.* T889.

¹⁴ There is also a Meeting Notice identifying a meeting set for June 19, 2020. D14p1. However, there is no evidence that a meeting actually took place on June 19.

169. With respect to how school Districts could complete FBAs during the COVID school closures, Dr. Enns acknowledged that “COVID left us with this kind of gap where we didn’t know when students would be back. So I don’t know exactly how somebody should approach this, to be honest.”

170. Via email to the Parents and Ms. Kenyon on July 2, 2020, Ms. Winder stated in part that:

I am following up from our last Zoom check-in to get some dates scheduled for us to meet over the summer. At our last meeting it also sounded like you would be interested in starting to explore new IEP goals for [the Student]...Let me know if you are interested in moving forward with this. When we last met I also mentioned about the ongoing FBA process for [the Student], and how the school closure has impacted this process. As you know, the district has been consulting with Shawna Simpson (Connections Behavior) to assist with this. Shawna was finishing up her work on the FBA just as the schools closed, and I am attaching her report here. However, the final step of the FBA process is to begin to develop intervention strategies for a Behavior Intervention Plan (BIP). This is the point we were reaching as the schools closed, hence the need for a pause in the process until we are able to return into the school setting. I am attaching a Prior Written Notice (PWN) which summarizes this intent.

S34p1. Ms. Winder attached Ms. Simpson’s March FBA and the June 19, 2020 PWN to her email. *Id.* pp2-10, pp11-12. After sending this email, Ms. Winder does not recall receiving any response from the Parents. WINDER T940.

171. In a letter to District’s counsel dated October 30, 2020, Parents’ counsel referenced a request from the Parents on August 20, 2020, for all emails related to the Student pursuant to the Family Educational Rights and Privacy Act (FERPA). S47p3. This single exhibit is the only evidence regarding any alleged FERPA violation by the District.

The Student is Hospitalized Again at Seattle Children’s Hospital-PBMU

172. On or about August 15, 2020, the Student was hospitalized again at the PBMU after going four days without sleep. FATHER T1247. He was admitted for seven days and was discharged on or about August 21, 2020. *Id.* This was a “very, very bad experience. At this point, we were worried about, you know, could we keep [the Student] in the home.” *Id.* T1392. In August and September, the Student’s behavior was such that the Father “just can’t communicate...how damaging and dangerous it was, the type of behavior [the Student] was exhibiting at the time. And there was a real concern on my wife and myself that we just couldn’t tolerate that.” *Id.* T1391.

173. Dr. Enns and Dr. Padilla both recommended a residential placement for the Student. *Id.* T1249.

Dr. Padilla’s Functional Behavioral Assessment of the Student

174. O August 24, 2020, Dr. Padilla completed her FBA of the Student. S36. The purpose of the FBA was to guide interventions in the Parents’ home. PADILLA T1099. An FBA should generally be conducted in the same setting where it will guide interventions. *Id.* T1042. “You would have to reevaluate for other contexts. So if we want to apply this to school, there would

have to be an evaluation done at school.” *Id.* “Context is the most important thing for a functional analysis.” *Id.* T1056.

175. Dr. Padilla’s FBA does not include ABC raw data or graphs of the raw data. *Id.* T1081. That is not the practice in the biobehavioral program. *Id.* The raw data and functional analysis are on file at Seattle Children’s Hospital. *Id.* In Dr. Padilla’s opinion, an FBA “probably can’t be done in one day.” *Id.* T1087. It is possible to conduct a “brief functional analysis” in one day, but it is based on “limited data” and is less accurate. *Id.*

176. Dr. Padilla concluded that based on his history, when the Student’s challenging behaviors are better controlled, “he has made more gains in academics and daily living skills when taught in an environment that is consistent and structured.” *Id.* p6. She recommended that the Student’s placement be highly structured and consistent, include 1:1 instruction, be based on ABA “if possible,” combine all therapies under one environment, and utilize in-person instruction. *Id.*

177. Dr. Padilla opined that “it is very challenging to maintain the level of consistent structure in (the Parents’) home environment. This is particularly the case because [the Student] has difficulties sleeping so he and his caregivers are consistently sleep deprived.” *Id.* pp6-7.

178. Dr. Padilla recommended a residential placement for the Student because he “had just been admitted to the PBMU again.” PADILLA T1047. Dr. Padilla opined that, “So at that time, he just needed a placement in order for him to have a better quality education, appropriate education, and quality of life, honestly. And for the family, too.”

179. The District received Dr. Padilla’s FBA on August 27, 2020. D15pp7.

180. On August 24, 2020, an IEP invitation was sent to the Parents, notifying them of an IEP meeting scheduled for August 27, 2020 at MIHS. D15p2.

181. Dr. Enns’ last contact with the Parents was on August 26, 2020. ENNS T449. “The discussion focused on [the Student’s] increasingly violent and unmanageable behaviors at home” since their conversation on May 28, 2020. S37p21. The Parents reported to Dr. Enns that while the Student did well into June, after that his behaviors “really degraded.” *Id.* p3. It became increasingly difficult to manage the Student’s behaviors and engage in necessary activities. *Id.* The Student became increasingly sensitive to disruptions, and they all “paid a price.” *Id.* All this was really affecting the Student’s younger brother, and “this was scary for all of us.” *Id.*

182. Dr. Enns spoke with the Parents for about 30 minutes. Enns T450. The Parents “looked beaten up. They looked haggard. They looked tired. They looked depressed. They looked like they couldn’t deal with this anymore.” *Id.* T450. Dr. Enns believed the family had “hit a wall and now they’re scared. They’re scared for their younger son.” *Id.* T472. “And I know that was a central concern for the parents; they felt that their younger son was also being impacted mentally,

emotionally by the chaos that was within their home.” *Id.* T450. “They’re scared that this prodromal syndrome could be...escalating.”¹⁵ *Id.* T472-T473.

183. Based on this contact with the Parents and the Student’s history of hospitalizations and behaviors, Dr. Enns determined the Student needed a residential placement. *Id.* T451, T471-T472. Dr. Enns completed his Psychological Assessment Report the next day. *Id.* T451.

Dr. Enns’ Psychological Assessment Report of the Student

184. Dr. Enns’ Psychological Assessment Report was completed on August 27, 2020. S37; ENNS T451. The Parents referred the Student to Dr. Enns for a “complete independent educational evaluation.” S37p1. The Parents wanted “an objective opinion about whether or not Student was being placed in a...program that was meeting his needs.” *Id.* Dr. Enns used no standardized assessment tools as part of his assessment. *Id.* Dr. Enns did not believe any standardized assessments were necessary. ENNS T448. His assessment is based on a two-hour observation at MIHS, observations of the Student in his home and community settings, review of the Parents’ home videos, and a review of records. S37p1. During his observations in the Parents’ home he noted that, as had been described by the Parents, “[the Student] appears jealous of parental attention paid to his younger brother.” *Id.* p7.

185. The Mother reported to Dr. Enns that the Student is only angry at school. *Id.* p2. Regarding the Student’s recent hospitalization, the Parents reported that the Student’s:

(V)iolent and manic behaviors had become so extreme that [the Student] required hospitalization; both to ensure his safety and the safety of his family. In particular, (the Parents) were highly concerned at [the Student’s] increasingly aggressive behavior toward his younger brother.

Id. p3. The Parents reported their belief that, “As a result of poor planning and a lack of implementation of appropriate programing (at school)...[the Student] regressed at an alarming rate and demonstrated increasingly challenging behaviors at home as a result.” *Id.* p4.

186. Dr. Enns concluded that:

(I)t is clear that [the Student] requires access to a residential program that can provide appropriate educational, social and adaptive supports. Once [the Student] has been stabilized, and he is able to return to a more normative school/home environment, the more specific issues...can be discussed within the context of a step-down program.

Id. p23. Dr. Enns “strongly recommended that [the Student] be placed in a residential facility...this recommendation takes absolute precedence over more fine-grained supports.” *Id.* p26.

¹⁵ “Prodromal” is a term used to indicate the signs and signals of a potential emerging mental illness. It is often used in the context of psychiatric disorders. ENNS T469.

187. An FBA can be done in one day. ENNS T469.

188. Dr. Enns also wrote a letter dated August 27, 2020 “To [the Student’s] School Team. S37pp29-30. In his letter, Dr. Enns writes in part that:

“(I)t is absolutely critical that the school team have clarity on alarming events that have occurred in the past few weeks. Significantly, while [the Student] had been demonstrating rather stable behaviors at home up until June, increasingly he has been exhibiting aggressive and disordered behaviors. In what appears to be rapid decompensation, [the Student] was hospitalized a week ago for a week-long emergency stay at Seattle Children’s Hospital following a manic episode that lasted three days.

Following an intense escalation of behaviors approximately three weeks ago, in which [the Student] became agitated and violent, [the Student’s] behaviors again escalated and turned violent.

Much to the parents’ alarm, [the Student] was unable to de-escalate at any point during the three-day ordeal prior to hospitalization...Once parents became convinced that [the Student’s] behaviors were placing him and his brother in harm’s way, they had him admitted to Children’s. Parents noted [the Student’s] decompensation had been so severe that hospital staff were unable to calm [the Student] even with the introduction of potent antipsychotic and tranquilizing medications.

[The Student] has returned home and is relatively stable. However, it is clear that currently there are no possible home interventions that could provide him with an appropriate education. **With this in mind, it is clear that [the Student] requires a residential placement to meet this substantial needs.**

S37p29 (Emphasis in original).

189. On August 27, 2020, the Student’s IEP team convened for a meeting.¹⁶ The Parents shared Dr. Padilla’s and Dr. Enns’ reports. D15p6. The “Parents also reported that they received updated information that [the Student] was likely no longer in a high risk category (sic) for life threatening COVID-19 symptoms, and are subsequently now ready for him to receive in person (sic) services again.”¹⁷ *Id.* p7.

190. “At the time of school closure in March 2020, [the Student] had been in the high school setting for approximately (sic) 7 weeks. He was demonstrating improved compliance and purposeful activity...His ability to participate in his schedule without refusal showed signs of improving during that time.” *Id.*

¹⁶ It appears, although it is not entirely clear, that this meeting was held via some remote or distance format.

¹⁷ Only a matter of days later on September 14, 2020, the Father informed Dr. Bube that the Student would not return to in-person services at MIHS. See S44p1.

191. After discussion at the IEP meeting, the team, including the Parents, determined that it was appropriate for the Student to resume in-person attendance at MIHS. BUBE T890.

192. As of this IEP meeting, the only District offer to serve the Student was in-person at MIHS for a full school day. *Id.* T833, T834. Given the recommendations for a residential placement, the IEP team determined that the Student should be reevaluated. *Id.* T827.

193. Ms. Kenyon drafted a PWN dated August 31, 2020, regarding the IEP meeting. D15pp23-24. The PWN confirmed that:

The District proposed to initiate the IEP as written with 1:1 in-person services at the high school for the full school day, including staffing with a para, an RBT, teacher, OT, PT, and BCBA.

The team determined that the Student's IEP Goals could not be met in a remote-learning model.

The District rejected in-person services in the home setting as Parents reported that the home can be a distraction.

The District considered and rejected an out-of-state residential placement for the Student because the district was able to meet the needs of the student and provide in-person services.

Id. p23. The Parents received this PWN. Father T1252.

194. Via email on August 31, 2020, Dr. Bube confirmed that the District stood "ready to serve [the Student] on the first day of school (September 2) with in-person services from 7:45 to 3:15." D15p1. Dr. Bube attached to her email copies of the August 27 IEP, the August 31 PWN, and a consent form for the Student's reevaluation. See D15.

195. The consent form for the Student's reevaluation included an assessment of the Student's academics, and explained that the reevaluation was necessary because the Parents had requested a residential placement for the Student. *Id.* p15.

196. Via email to the District's counsel on September 1, 2020, the Parents' counsel requested an "updated Health Care Plan" for the Student due to the COVID-19 pandemic because the Student's current health care plan was developed for a choking risk. S39p1. Parents' counsel went on to inform District's counsel that the Student "will not wear a mask or maintain social distancing, will be challenged to wash hands frequently, and has been known to lick the floor or other surfaces. Special precautions and accommodations are needed for his health, similar to the choking risk." *Id.*

197. Dr. Bube was forwarded this email on September 2, 2020. S42pp1-2, S39p1. She understood the Parents wanted a Student-specific health or safety plan. BUBE T835. The District never developed a plan. *Id.* T836.

198. Via email on September 1, 2020 to Dr. Bube and others, the Father asked if the Student's reevaluation would be expedited because the Parents were concerned that the FBA was "months

overdue and [the Student] doesn't have protocols for risky behaviors like stripping, self-gagging, and licking the floor." S38p1. The Father also informed Dr. Bube that the Parents wanted to delay a transition assessment and vocational assessment of the Student for at least a year in order to prioritize the Student's "basic needs." *Id.*

199. The Father also asked if the reevaluation would be expedited because the Student had just been discharged from the PBMU, so the reevaluation was very important. FATHER T1272.

200. The Father's reference to "basic needs" in his email was a reference to "basic academic goals," which meant "Reading, writing, basic science as it applies to living skills...communication skills." *Id.* T1275.

201. On September 1, 2020, Dr. Bube signed a contract with the Brooks Powers Group (BPG) to provide the District with "program consultation and classroom support." S74p4. Specifically, BPG would conduct independent evaluations for students with disabilities and provide direct consultation, training, and individual student support to building-level teams. *Id.*

202. While this was not a Student-specific contract, Dr. Bube contemplated that BPG would conduct the Student's pending reevaluation. However, she later determined in November that BPG would not be able to complete the Student's reevaluation in time. BUBE T840-T841, T845. Dr. Bube would later contract with Vanessa Tucker and Karen Wilke to conduct the Student's reevaluation. *Id.* T839-T840.

203. Vanessa Tucker holds a PhD in special education, a doctorate-level BCBA, and is a Licensed Behavior Analyst. D22. She is currently an educational consultant and associate professor on sabbatical at Pacific Lutheran University. *Id.*; TUCKER T1125. She had taught in the areas of ABA and ethics for behavior analysts. *Id.* T1180. Dr. Tucker is also a former special education teacher. D22p3.

204. Karen Wilke holds a PhD in education with a specialty in school psychology. WILKE T1105. Dr. Wilke has worked as a school psychologist for the District since 2004. *Id.*

The 2020-2021 School Year at MIHS

205. The District's 2020-2021 school year started on September 2, 2020. D15p1, D23p3.

206. Dr. Bube had staff in place at MIHS to serve the Student on the first day of school. BUBE T833. However, the Student never returned to MIHS during the 2020-2021 school year. *Id.* T833.

207. The District was prepared and met all Washington State Department of Health (DOH) guidelines for schools reopening. *Id.* T865. This included:

- Updated HVAC systems with MERV-13 filters;
- Independent verification that the filtration system met all COVID recommendations;
- Maintaining filtration systems on highest setting all the time;
- All staff wore KN95 masks.

Id. T865-T866. The District provided additional mitigation measures for individual students based on parental concerns, and whether the District could meet IEP goals in a particular location. *Id.* T869. The District had nurses come in and conduct audits to make sure the District was meeting all safety guidelines, and that no additional mitigation strategies were necessary for particular students “based on their healthcare plan and their doctor’s recommendations.” *Id.* T866.

208. Beginning the second day of school, IEP case managers met with parents of students eligible for special education who wanted their students to return to in-person service at District schools. *Id.* T867, T903. Then teams determined if it was appropriate for individual students to return to school. *Id.* T903-T904.

209. Via email to Dr. Bube and others on September 3, 2020, the Father asked, “Can you tell me who will be with [the Student] throughout the day? If he is the only student in the high school, will staff be limited? Will his Health Plan re: COVID prevention be complete for my review?” S40.

210. Via email to Dr. Bube and others on September 4, 2020, the Father stated, “Please find the signed evaluation consent form attached.” S41p1. The Father signed the consent form the same day. D20p6.

211. Dr. Bube received the Father’s signed consent on September 4, 2020. BUBE 837. The Student’s reevaluation was not completed within 35 school days of the Father’s consent. *Id.* T839. The District never asked the Parents to extend the timeline to complete the Student’s evaluation. *Id.* T848. This was an “oversight.” *Id.* T849. Dr. Bube identified as “mitigating factors” first that District’s highest priority was getting students back in school, and second that she searched for consultants to help with the Student’s reevaluation and eventually brought in Dr. Wilke and Dr. Tucker. *Id.* 839-T840.

212. Via email to the Parents and others on September 7, 2021, Dr. Bube stated in part:

Please let us know if there is any new information as to the choking (sic) risk and care plan that we currently have in place. As for COVID protocols, I am attaching Appendix A that will give you an overview of our health and safety and cleaning protocols. If [the Student] needs something different, then we would need a letter of medical necessity from his primary care doctor.

During the IEP team meeting, the addition of staff with enhanced certifications (such as RBT) was not discussed nor was the need for ABA-trained staff. The District will consider this request as part of the new evaluation.

S42p1. Dr. Bube attached a document entitled “Appendix A: Health and Safety Protocols.” D42pp3-9. It sets out COVID-19 health and safety protocols negotiated as part of the District’s agreement with its unionized employees; the protocols were not developed specifically for the Student. BUBE T859.

213. The Student required a healthcare plan. *Id.* T860. In order to develop a healthcare plan for the Student, the District needed a doctor who knew the Student to give the District “more specifics on what the mitigation strategies needed to be, given what we already had in place.” *Id.* However, the District never received more “specific strategies” for the Student. *Id.* Prior to the

due process hearing, the Father never provided the District with any doctor's note identifying any mitigation measures individualized for the Student. FATHER T1371. Dr. Bube never discussed obtaining a medical statement with the evaluation team. BUBE T873. Dr. Bube never asked for the Parents' permission to speak with any of the Student's doctors. *Id.* T862.

214. The Father reviewed Appendix A. FATHER T1278. Relying on his training as a physician, the Father determined the protocols were not adequate for the Student. *Id.* His concern was that the Student needed to be assisted in the restroom, and needed "to be in very close intimate contact throughout his day." *Id.* T1279. The Father was also concerned that mitigation measures must be "appropriate to the activity that the Student was engaging in, and because the evaluation had not been complete (sic) we had no idea what activities...the Student would be engaged in." *Id.* T1371.

215. Via email to the Parents on September 10, 2020, Ms. Kenyon stated in part:

I am writing to check in about [the Student] returning tomorrow. We have everything ready to go. Autumn (a para he knows from last year) will be meeting the bus at 7:50 to ride with him. Kyle (the RBT from last year) will be here to get ready for [the Student]. We plan to implement the same schedule as last year, which was working out well. We will follow the bathroom protocol with shorter visits as we agreed to last spring. All staff working with [the Student] will be wearing masks, face shields, and gowns. [The Student] works in his own classroom (a full size room) and will be the only student using our kitchen and bathroom. We are following the safety protocol individually as directed by the district. He will ride home on the bus at 3:00 pm (or earlier if you prefer).

S43p1. The Father did not find Ms. Kenyon's email sufficient to resolve his concerns. FATHER T1280. His questions about the Student's health and safety were "larger than masks, face shields, and gowns." *Id.* T1369. However, he did not ask Ms. Kenyon any follow-up questions about protocols. *Id.* T1370.

216. After consulting with the Student's medical team in September and learning from his pulmonologist that the Student's estimated risk for COVID-19 was six times the general public's risk, and considering the Student's behavior and care needs, the Father concluded that returning the Student to MIHS was not "an appropriate risk to take." *Id.* T1283. The Father did not provide the District with any physicians' orders during the fall or winter of 2020 because "it was the consensus of our medical experts that in-person care, before [the Student] was vaccinated was not an option." *Id.* T1377.

217. Via email to Dr. Bube on September 14, 2020, the Father stated in part:

After additional thought, research, and consultation with experts, we have decided [the Student] will not attend in-person services at Mercer Island High School as currently proposed by the District. We understand that all families can choose to remain in remote or online learning for safety reasons (even when the district transitions to hybrid or in-person models.) We are exercising that choice for a few reasons.

We remain open to reconsideration of in person (sic) learning if the district were to provide the detailed Health Care Plan for [the Student] as requested on Sept. 1, and the incidence

of COVID transmission locally is found to remain low after the opening of schools to special needs and general education students.

Please let us know how the district will implement the IEP remotely.

S44p1. Dr. Bube responded via email to the Parents on September 17, 2020, thanking them for letting the District know the Student would not be attending school in-person during COVID. S45p1. Dr. Bube went on to state in part that:

The District remains willing to create a COVID specific health care plan. Health care plans are completed once we have physicians (sic) orders so that we can determine the scope of the plan. We did send you our documentation concerning the health and safety procedures that the District has and will continue to implement.

However, in light of the recent email that you are choosing not to attend in-person services at this time, we will need further clarification on if you will be providing our staff access to the student for testing.

Id. The Father's email was the first notice to the District that the Student would not be returning to MIHS for the school year. BUBE T892. This changed Dr. Bube plans for the Student's reevaluation, which eventually led to her retaining Dr. Wilke and Dr. Tucker. *Id.* T839-T840.

218. The Father replied to Dr. Bube via email on September 22, 2020, stating in part, "We will provide access for testing. Please let us know what you need and when. We're also interested in what you have in mind for home support. Who would provide it, and how would health and safety be protected." S45p1. The Parents never revoked their offer to make the Student available for testing. FATHER T1286. No one from the District ever requested access to the Student for testing. *Id.* T1288.

219. Via email to the Parents and others on October 7, 2020, Dr. Bube stated:

We are continuing to work on hiring the outside evaluation team to support the new evaluation. We will be in touch next week with more specifics.

We continue to stand ready to serve [the Student] in school. If you would like to (sic) the team to consider in-home supports we would need to hold a new IEP meeting to discuss the specifics.

As far as the Health Care Plan, we have shared our current protocols and would need a doctors (sic) note with specific recommendations that would meet [the Student's] needs. Once we have that, our nurse will meet with you and the IEP team to solidify the details of the plan.

[The Student's] classroom will be returning to full-time in-person services toward the end of the month. We would love to have [the Student] attend school. We look forward to hearing from you.

D17p1.

220. On October 30, 2020, the District received a letter from Lisa Herzig, M.D., dated October 16, 2020. S47pp1, 6. Dr. Herzig is the Student's developmental and behavioral pediatrician. *Id.* p6. She had last seen the Student on April 6, 2020. *Id.* Referencing all of the Student's diagnoses, Dr. Herzig recommended that the Student should stay out of in-person school services until there was a vaccine available for him. *Id.* The Father had requested that Dr. Herzig write this letter. FATHER T1380.

221. Via email to the Father on October 29, 2020, Dr. Bube stated in part that:

We continue to want to engage with you to provide services for [the Student]. Since we have not heard from you about an IEP meeting, and the student is not currently engaging in education, we will need to temporarily unenroll [the Student]. We will continue forward with the evaluation...We will be happy to reenroll [the Student] as soon as we can set an IEP meeting to determine in-person services.

We continue to wait for doctors (sic) orders to create a health care plan.

S46. Dr. Bube made the decision to un-enroll the Student. The "Student had not been engaging in any online learning. We weren't doing any parent coaching at the time. And it felt dishonest to have him on our books for the November 1 federal (student) count." BUBE T857-T858. The Parents were going to receive an automatic email about the un-enrollment, and she wanted to warn them. *Id.* T858. Un-enrolling or dis-enrolling the Student had no impact on the Student's opportunity or eligibility to receive services from the District. *Id.* T893.

222. In a letter to District's counsel the next day, Parents' counsel asserted the Student's un-enrollment was "improper," and that the Student's absences must be excused under the Office of Superintendent of Public Instruction (OSPI) emergency rules governing absences during the COVID-19 pandemic. S47p1. Parents' counsel stated the Parents wanted a PWN explaining when the FBA and reevaluation would be done and by whom, and then the Parents wanted to schedule an IEP meeting as soon as the FBA and evaluation were complete. *Id.* p3.

223. Parents' counsel went on to request that the District:

Promptly complete the response to the parents' August 20 request for all email related to [the Student]. The 45-day deadline under the Family Educational Rights and Privacy Act passed weeks ago without any production of emails. The parents understand the request is now being processed by the public records officer as a Public Records Act request. They need the emails to prepare for an IEP meeting.

Id.

224. The letter from Parent's counsel included an article from the European Journal of Human Genetics entitled "COVID-19 and Down's syndrome: are we heading for a disaster." S47pp4-5. The Father does not know how the journal article came to be attached to counsel's letter. FATHER T1378. However, the journal article influenced the Parents' decision to keep the Student out of school. *Id.* T1290.

225. Dr. Bube received and read the journal article, after which she had no reason not to believe that the Student had a heightened risk for COVID-19. BUBE T871.

226. Kerry Hillier is a BCBA and LBA. HILLIER T298; S72p9. She holds a Master's degree in special education and ABA. S72p9. She has been employed by Kyo (formerly Gateway Learning Group) as a regional director since September 2020. *Id.* Kyo is an ABA therapy company that generally serves individuals on the autism spectrum. HILLIER T298.

227. Kyo came to be involved with the Student in late November 2020. *Id.* T301. Initially Ms. Hillier was the Student's primary case manager, and later his supervising BCBA through June 25, 2021, when the Student left for Glenwood. *Id.* Ms. Hillier conducted an initial intake for the Student starting in late November 2020 through mid-January 2021. *Id.* T302. After that, Ms. Hillier trained the "direct technician" who worked with the Student. *Id.* Kyo provided its services to the Student outside the Parents home on their porch or patio.¹⁸ *Id.* T301.

228. The Parents' patio is covered and heated, allowing for year-round use. It is equipped with a desk, table, chairs, and access to the backyard, one of the Student's preferred areas. *Id.* T301. Ms. Hillier described it as "set up like a mini classroom." *Id.*

229. Although Ms. Hillier started her initial intake for the Student in late November 2020, Kyo did not begin to provide services for the Student on the Parents' porch until March 1, 2021. See S58p2 (Parents' counsel email on February 26, 2021: "[Parents'] private ABA team is scheduled to start Monday"). Each session on the patio lasted for 3 hours, from 11:30am to 2:30pm. HILLIER T351. By March 1, 2021, Kyo staff were all vaccinated against COVID-19. FATHER T1297.

230. Parents initially asked the Kyo staff to not use a bathroom inside their home. HILLIER T363. They asked Kyo staff to use a bathroom at a Starbucks down the corner from their home. *Id.* However, Ms. Hillier told them that was not appropriate, and that the Parents needed to provide Kyo staff an environment in which they could access a restroom. *Id.* The Parents finally agreed, and Kyo staff used a "separate entry" to access and use a bathroom inside the Parent's home as needed during the sessions. *Id.*

231. The Father confirmed that initially use of a bathroom inside the Parents' home was an issue. FATHER T1298. The "bathroom became an issue, and so we developed a protocol." *Id.* Staff walked in the front door, used the front bathroom, and then walked back out the front door. *Id.* T1298-T1299. One of the Parents would toilet the Student as needed when staff were on the porch. T1299.

232. All Kyo staff were vaccinated against COVID-19 as soon as they were eligible. HILLIER T308. However, it cannot be determined with certainty *when* Kyo staff were first eligible to be vaccinated.¹⁹ In order to provide instruction to the Student, Kyo staff had to be within arms-length of him. *Id.* T309. Kyo staff wore face masks and used hand-sanitizer with the Student. *Id.* T308.

¹⁸ The terms "porch" and "patio" were used by witnesses and in exhibits interchangeably. Both describe the same location at the Parent's home.

¹⁹ The best evidence for the earliest time KYO staff could possibly have been vaccinated is late 2020. See FATHER T1382 (By late 2020, the vaccine was emergency authorized).

233. Via email on December 17, 2020, Dr. Bube informed District staff that:

Karen Wilke has been assigned to complete the reevaluation for [the Student] along with Dr. Vanessa Tucker...Most of this will be a through (sic) review of records with additional interviews of team members and home-based observations...Feel free to ask family to bring student on site if an in-person assessment is absolutely needed and information can not (sic) be gathered in other ways.

S50p1. Dr. Bube followed her email to staff with an email to the Parents the same day, informing them that Dr. Wilke and Dr. Tucker would reach out to them to complete the reevaluation. S48pp1-2. The reevaluation would “include a records review, review of any hospitalizations and private evaluations as well as parent interviews and virtual observations for all areas on the consent.” *Id.* p1.

234. Dr. Bube extended another invitation for an IEP meeting to work together to develop a plan to serve the Student. *Id.* p2. Finally, Dr. Bube stated:

We continue to wait on updated Health Information so we can create a health care plan for [the Student] to be on-site. We specifically need, what additional accommodations or health and safety procedures we need in place per his doctor’s orders.

Id.

235. The Father replied via email to Dr. Bube the same day, stating in part:

The risks and the medical advice have not changed. [The Student] has not been vaccinated...He still has unsafe behaviors increasing the risk of infection. Therefore, we are puzzled by your request for health information to plan in-person services...We are always willing to meet as a team and will consider any dates.

S48p1.

236. The Parents filed their request for due process hearing (the Complaint) on January 5, 2021.

237. Via email to the Parents on January 5, 2021, Dr. Bube wrote, “We are working with our team to determine a good date for an IEP meeting. We currently have it narrowed down to Tuesday, January 12...or Thursday, January 14...Do you have a preference for either of these dates? S51p2

238. Via email to Dr. Bube on January 6, 2021, the Father wrote, “Before we agree to a date could you let us know when [the Student’s] evaluation will be complete and what the agenda and goals for this meeting will be?” S51p1.

239. Dr. Bube replied via email the same day stating:

Dr. Karen Wilke and Dr. Vanessa Tucker are working on the evaluation. It won’t be completed by next week but the more urgent concern is the IEP meeting. Once the evaluation is completed we can reconvene to discuss results. The agenda for this IEP is how to serve [the Student] right now.

S51p1

240. Responding to an email from a District staff person regarding an IEP meeting for the Student on January 14, 2021, Dr. Wilke wrote in a January 8, 2021 email, "I had no knowledge of this meeting and just received the invite this morning. I have a call in to Sue Anne to get more info. I can tell you the eval will not be ready by then. Vanessa and I just had our first conversation with parents this morning!" S52p1. In fact, the meeting on January 14 was not an IEP meeting, not. *Id.*

241. Dr. Wilke and Dr. Tucker's conversation with the Parents that morning was via a videoconference. WILKE T1108. They discussed how to obtain information for the reevaluation in light of the current circumstances with the COVID-19 pandemic and the Students complex medical condition. *Id.* T1107.

242. Via email to Dr. Bube on January 14, 2021, Dr. Wilke stated:

Sue Ann, you had suggested wrapping up by the end of February so that's been the target. I just sent out a follow-up invite to parents this afternoon to continue our conversation. Vanessa and I will be meeting to discuss what additional information we'd like to obtain and then chart out our next steps.

S53p9.

243. Via email to Dr. Tucker on January 15, 2021, Dr. Bube stated in part, "We also mutually agreed to cancel the IEP meeting scheduled for yesterday and decided to wait for the evaluation. In light of this, I was looking to see if there was any ability for the team to move up the timeline."

244. Via email on January 21, 2021 to Dr. Tucker, Dr. Wilke wrote, "I didn't hear back from parents yesterday and have not received any paperwork as of noon today."

245. Dr. Bube drafted a PWN dated January 25, 2021. D25. The PWN proposed to initiate "Virtual Learning" on February 1, 2021, because the "Student is unable to access in-person instruction (both in home and at school) due to health concerns." *Id.* The PWN went on to state that "The team considered holding an IEP meeting to discuss supports and services...But the IEP meeting was cancelled through mutual agreement with Parents and District." *Id.*

246. Dr. Bube understood that a PWN is intended to memorialize a decision. BUBE T908. In writing this PWN, Dr. Bube was "trying to be creative in developing a plan for Student." *Id.* T865. She "was trying to use a prior written notice to communicate an option the district was willing to provide the student."

247. This PWN was the first time the District offered virtual learning for the Student for the "2021 school year." FATHER T1292-T1293. He does not recall responding to this PWN, and the District never implemented the virtual learning set out in the PWN. *Id.* T1383, T1294. For Dr. Bube, if the Parents did not respond to the PWN, "that seemed to me as an automatic rejection." BUBE T907.

248. By this time, the Parents had already filed the Complaint, and had already started efforts to have Gateway (later Kyo) serve the Student in their home. FATHER T1381. They were considering Kyo because by late 2020, the COVID-19 vaccine was authorized for emergency use.

Id. 1382. As soon as a vaccination became a “possibility...which mitigated the risk somewhat, in-person care became an option.” *Id.*

249. Ms. Hillier completed her “Intensive Behavioral Intervention Treatment Plan – Assessment Report” for the Student on January 29, 2021. S62pp2-16. This was Ms. Hillier’s initial treatment plan for the Student. HILLIER T339. It was requested by the Parents’ insurance carrier as part of the process to secure insurance coverage for Kyo’s ABA services for the Student at the Parents’ home. *Id.* T340.

250. While Ms. Hillier’s report includes an FBA and BIP (pp5-13), each and every goal lacked sufficient baseline data. See e.g. S62p5 (Goal 1: Non-Compliance; Baseline Data: TBD – Additional data points needed), and S62p10 (Daily Living Skills – Goal 4; Baseline Date: TBD – Additional baseline data to be collected at the onset of services). Ms. Hillier’s BIP for the Student was finally completed in mid-March 2021. HILLIER T352.

251. To conduct an FBA “can take four hours a day for four for five days to get the data that you really want or need.” *Id.* T365.

252. Ms. Hillier understood that the Student returned to Glenwood in July 2021 “to get comprehensive care for a longer duration than I was able to provide, in a school setting.” *Id.* T356.

253. On February 2, 2021, Dr. Bube drafted another PWN. S55pp2-3. The PWN proposed to initiate “Hybrid In-person & virtual plan.” *Id.* p2. It offered the Student:

- Four hours per week of virtual coaching for the Parents from a BCBA and a certificated special education teacher aligned with the Student’s IEP goals;
- Two RBTs at all times during the school day;
- RBTs supervised by virtual and on-site BCBA;
- A BCBA and special education teacher to design a program for in-home practice and parent skill building to manage online learning;
- SLP, OT, and PT to each provide 30 minutes per week of virtual services to the Parents or Student;
- Access to a virtual PE class with Mentor Student and special education staff.

Id.

254. The District proposed this plan because the “Student is unable to access in-person instruction (at school) due to health concerns and (the) student can access in-person instruction within the safety of the home if in-person staff have been vaccinated.” *Id.*

255. The PWN also stated:

The District will provide fully vaccinated, single provider, Registered Behavior Techs (i.e., both shots and staff with no other in-person clients) to work in the home. The BCBA that might need to be on-site for supervision will either be a BCBA that has not seen another client in the home for at a minimum of 14 days, or a BCBA that has no other in-person clients.

Id. The PWN also stated that the “action” would be initiated on March 8, 2021. *Id.*

256. Dr. Bube sent the PWN to the Parents via email on February 2, 2021. S55p1. Dr. Bube’s email stated that the “District has updated our proposal to include vaccinated in-person staff to support [the Student’s] learning. *Id.* p1. Her reference to the District updating its proposal was a reference to Dr. Bube’s earlier January 25, 2021 PWN. BUBE T873.

257. Dr. Bube does not believe the Parents accepted the offer in the February 2, 2021 PWN because “If (the services) were...accepted...we would have provided them.” *Id.* T875.

258. The Father understood that the PWN was offering the Parents a program on their porch with a BCBA lead. FATHER T1295. However, the District did not offer an IEP meeting to discuss the program, and did not initiate the program on March 8, 2021. *Id.* The Parents never refused the offer of this program. *Id.* T1295-T1296.

259. No IEP meeting was held between the January 25, 2021 and February 2, 2021 PWNs. BUBE T873.

260. In an email on February 9, 2021, to District’s counsel and the District’s public records officer, Parents’ counsel made a Public Records Act request of the District. S74p1. The District complied and produced all records that were responsive to the request on March 15, 2021. S74pp9, 2-8.

Dr. Tucker’s Evaluation Report

261. As part of her evaluation of the Student for his pending District reevaluation, Dr. Tucker provided the Parents with a number of documents and forms seeking their responses. See generally S56. The Parents completed their responses on February 9, 2021. See e.g. S56pp 20, 23, 26. Dr. Tucker received at least some of these documents from the Parents as an attachment to an email from the Father on February 10, 2021. S56p19.

262. The Parents reported that “Currently we rarely experience hard/defiant refusals to transition at home. This is due to the implementation and continued refinement of (ABA-based) behavioral techniques to lessen resistance.” S56p1. They reported “We are not currently experiencing aggressive episodes,” and elopement and bolting are “Not an issue at this time at home.” *Id.* p2.

263. In addition to this feedback from the Parents, Dr. Tucker also conducted remote video interviews with the Parents. TUCKER T1147.

264. On February 22, 2021, Dr. Tucker submitted her Evaluation Report to the District. *Id.* T1135, T1162; S57pp1-20. After submitting her report, Dr. Tucker continued as a BCBA consultant on the Student’s case until April 2021. TUCKER T1125.

265. The purpose of Dr. Tucker’s evaluation was to conduct the social/emotional and behavioral components of the Student’s pending District reevaluation, and “provide context regarding eventual placement decisions.” S57 p1; TUCKER T1126.

266. The Student's pending reevaluation "was prompted by a request from the family for out of home, full time treatment for [the Student] after a serious behavioral decompensation in 2020." S57p1. Dr. Tucker reported that the Student "is currently (per family input) qualified for DDA services via the CIIBS waiver (Children's Intensive In Home Behavioral Services), although it is unclear whether or not services have yet been started." *Id.* In addition, the Student's family had engaged an ABA agency to start remote services by a BCBA, but it was unclear whether those services had been started. *Id.* p2.

Dr. Tucker observed that the "[Student] is non-verbal but communicates well in other ways...His parents are fluent in [the Student's] unique language, and can provide much context to what he is trying to say." *Id.*

267. Dr. Tucker reviewed Ms. Simpson's Connections Behavior Planning and Intervention report (S31pp5-13), Dr. Padilla's FBA report (S36), and Dr. Enns' Psychological Assessment Report (S37) as part of her evaluation. *Id.* pp2-6.

268. Dr. Tucker collected data to conduct an FBA as part of her evaluation. *Id.* p6. Data was collected via interviews and rating scales with the family in January and February 2021. *Id.* Dr. Tucker acknowledged her FBA was "unusual, in that I didn't have direct access to [The Student] in a variety of school-type situations." TUCKER T1142. At the time of her evaluation, Dr. Tucker understood that it was going to be "remote." *Id.* The district understood the Parents were following COVID-19 restrictions due to health concerns. *Id.* However, the Parents did not tell her directly that they would not give her access to the Student. *Id.* T1145-T1146. Dr. Tucker had no understanding that she would be able to observe the Student in a school environment. *Id.* T1165.

269. Dr. Tucker acknowledged there are differences between home and school environments. *Id.* T1166. In particular, "people with autism or with intellectual disability...can become prompt dependent upon certain stimuli or persons. And what that ends up looking like is a lack of generalization between different settings." *Id.* "And this actually relates to a larger body of literature around how we teach people that have intellectual disability or autism, is that we have to make the environment as close to natural as possible in order to assist with generalization." *Id.* T1178.

270. During the period of Dr. Tucker's evaluation, the Parents were still self-isolating and had not yet accepted in-home assistance. S57p6. The Parents reported that the "focus behaviors" were not present or were markedly less than when the Student was in crisis.²⁰ *Id.* The Parents do "shifts" with the Student and exchange information throughout the day in order to provide "seamless care." *Id.* p7.

271. Unable to conduct direct observations of the Student, Dr. Tucker's report noted that frequency data and ABC data regarding the target behaviors (Transition Refusal, Aggression (Self

²⁰ Dr. Tucker also refers to "target behaviors" in her evaluation report. S57p7. It appears as through the terms "focus behaviors" and "target behaviors" are used interchangeably.

and toward others) and Elopement/Bolting) was not “available due to the pandemic restrictions.” See e.g. S57p9. Explaining more fully, Dr. Tucker wrote:

Rating scales are used to provide context but are not a replacement for the examination and analysis of real time data such as observation in the home/school/community. This restriction was placed due to circumstances arising from the pandemic.

Id. p10.

272. It is Dr. Tucker’s opinion that the Parents’ prepared environment at home “may be difficult to recreate (entirely) in a community or school setting in it’s (sic) true home form. However, there are certain things that can be used in the school setting (or other settings) that have been shown to have effectiveness.” *Id.* p17.

273. Dr. Tucker’s report closed with her placement recommendations for the Student. *Id.* pp19-20. She noted that, “At this point [the Student] is successful within the confines of his home environment, but this will need to be expanded as restrictions are slowly lifted, and redefined within the context of an early warning system for crisis management.” *Id.* p19. Her recommendations included:

- Communication supports in all settings and across all persons;
- A “prepared environment” replicating aspects of the family home environment;
- School/Community supports, including ABA interventions in the home and school settings;
- In-home staff from an ABA agency;
- School staffing pair with ABA agency providers in home setting to acquire and develop fluency in his programming;
- School/ABA/DDA staff prepare an environment in the “community school setting”;
- Slowly transition the Student to the school setting, starting with an hour a day;
- Frequent team meetings;
- Team members have crisis management and dual diagnosis/mental health training.

Id. pp19-20.

274. In March or April 2021, Dr. Tucker was asked to write a BIP for the Student. TUCKER T1128, BUBE T879-T880. Although Dr. Tucker had included all the information necessary to create a BIP in her Evaluation Report, she was asked to produce her BIP as a separate document. *Id.* T1129. In response, Dr. Tucker took the information already in her Evaluation Report and reformatted it into another, separate document entitled “Behavior Intervention Plan.” *Id.* T1152; S68pp35-41.

275. There was considerable expert testimony regarding whether or not Dr. Tucker’s Evaluation Report constituted an FBA of the Student. Dr. Tucker opined her report was an FBA because it:

- Has target or operationalized behaviors;
- Has background and parent input;
- Has a review of available records;
- Has indirect assessments;
- Includes live parent interviews
- Has Hypothesis statements/summary statements and recommendations.

TUCKER T1143. Dr. Tucker opined that the lack of ABC or frequency data in her report does not mean it was an inappropriate assessment. *Id.* T1167. “(W)e did the best we could with what we had. Standard practice, when we have cases like this, is to try to train the parents on how to take ABC data, and that would have been one of the next steps we would have done, for sure.” *Id.* T1167.

276. Dr. Tucker explained and contrasted an FBA with a “functional analysis.” *Id.* T1130-T1132. Summarizing her explanation, Dr. Tucker identified the difference as follows:

In an analysis you are taking the behavior in question and you are testing it under different variables. That is typically not something that we see a lot in the school setting because it tends to evoke behavior. And so there are ethical issues with that. An FBA is a study of behavior. And in the school setting, an FBA is how we determine whether a behavior in question is being maintained by a particular variable. Doing a functional behavior assessment helps to understand the antecedents and consequences around the behavior in question. When a school is doing an FBA, they are not providing a causal statement. What they are doing is providing a document that is our best guess on how we then would create a behavior intervention plan.

Id. Dr. Tucker characterized an FBA as an assessment, and a BIP as an active action plan or “an active road map that must constantly be redesigned based on what we see.” *Id.* T1133. An FBA must be conducted in order to develop a BIP. *Id.* T1134.

277. Dr. Enns reviewed Dr. Tucker’s Evaluation Report and although he considers her a “very skilled clinician,” opined it is not an FBA because there is no data, and it lacks direct assessment(s). ENNS T154, T462, T463. However, he agreed that conducting an FBA on the Parents’ patio would not inform an FBA in a school setting. *Id.* T463. Dr. Enns has never spoken with Dr. Tucker about her Evaluation Report. *Id.*

278. Dr. Padilla also reviewed Dr. Tucker’s Evaluation Report. PADILLA T1061. Dr. Padilla observed that while the report contains many indirect assessments, there are no direct measures of data collection. *Id.* T1062. Dr. Padilla understood that Dr. Tucker “had her hands tied behind her because it was the middle of a pandemic.” *Id.* Although Dr. Tucker’s report does not contain data from direct assessments, Dr. Padilla opined it was an FBA. *Id.* T1063. Like Dr. Enns, Dr. Padilla opined Dr. Tucker’s FBA could not be used to develop a school-based BIP. *Id.* T1064-T1065.

The Student’s Reevaluation and First Reevaluation Team Meeting

279. The Parents first received a draft copy of the Student’s reevaluation report on February 24, 2021. S59p1.

280. A reevaluation team meeting was held, apparently via a remote format, on February 25, 2021. There is very little evidence about who attended this meeting or what occurred at the meeting. Dr. Tucker confirmed she attended a meeting on February 25 from her personal notes. TUCKER T1135, T1163. Parents’ counsel referenced a meeting on February 25, 2021, in a letter

to District's counsel the next day, and references an agreement to schedule a subsequent second meeting. S59p1. The second reevaluation meeting would ultimately take place on March 10, 2021. D20p7.

281. After learning that Kyo would begin providing ABA services on the Parent's patio on March 1, 2021, District's counsel reached out to Parents' counsel via email on February 26, 2021. S58p1. District's counsel wrote that the "district evaluation team would welcome the chance before the team reconvenes to review any evaluation report that the family's new in-home ABA provider has completed regarding Student's identified educational needs in the home." S58p1.

282. Parents' counsel replied via email the same day, stating:

As for the Perch services, having heard your explanation, the parents are not willing to let the district off the hook. They will proceed with Gateway services starting Monday and they will also accept Perch's *vaccinated*-staff on their heated, covered porch starting March 8. These parallel services will require coordination. Gateway (Kyo) will be working with [the Student] from 12 to 3, so Perch will need to come earlier (e.g., between 8:30 and 11:30). Again, for safety reasons, services may not include toileting or other activities indoors.

Id. (Italics in original). PERCH is another private ABA provider. FATHER T1296. In December 2019, PERCH was one of the private ABA providers Dr. Bube approached about providing additional behavioral support for the Student. BUBE T802.

283. The District had earlier proposed in its February 2, 2021 PWN to implement a hybrid in-person and virtual plan to provide the Student ABA services on the Parents' porch beginning March 8, 2021. S55pp2-3. In anticipation of implementing that plan, Dr. Bube had contacted PERCH about providing ABA services on the Parents' porch. BUBE T875. However, anticipating the Parents would respond to her offer of at-home services in the PWN but receiving no response, by the time Parents' counsel confirmed on February 26 that the Parents would accept the District's offer, PERCH was no longer available to the District to provide services. *Id.* T875-T876.

284. On February 26, 2021, Parents' counsel wrote a letter to District's counsel. S59. In that letter, Parents' counsel stated, "The district initiated the evaluation in response to the parents' August 27, 2020 proposal for a residential placement." *Id.* p1. In a footnote associated with this statement, Parent's counsel wrote, "That proposal was precipitated by a *mental health crisis which has since abated*." *Id.* at Footnote 1 (emphasis added). The Father agreed that the Student's "mental health crisis" had abated. FATHER T1385.

285. Via email to Parents' counsel on March 2, 2021, District's counsel stated that:

(T)he District was not proposing a split-provider program in the home. But the District is willing to move forward in getting this lined up to start as outlined below. Perch is no longer available to start the 8th, but is available to begin on 3/22/21. The District will get further details of how the split-provider program can work and send those out later this week for Parents' review.

S60. Although the email references a matter “outlined below,” nothing more appears in or below this email from District’s counsel.

286. The Parents never received any “further details of how the split provider program” would work. FATHER T1302.

287. Via email to Parents’ counsel and others on March 4, 2021, District’s counsel wrote that “the District has asked Dr. Tucker to help coordinate the split-provider program. To facilitate the necessary planning, the District is asking that Parents authorize Dr. Tucker and (Kyo) Gateway to exchange information via the attached form.” S61p1. The same day, Parents’ counsel provided the Father’s signed authorization for Dr. Tucker to exchange information with Kyo. *Id.* p2.

The Student’s Reevaluation and Second Reevaluation Team Meeting

288. A second reevaluation feedback meeting was held on March 10, 2021. D20p7. The participants appeared via Zoom. *Id.* p26. The Parents and the District each had counsel present. *Id.* p11. Both Parents attended. *Id.*

289. The reevaluation report remarked that:

It is important to note that direct assessment was not possible due to the health-related COVID-19 restrictions imposed on in-person interaction and the inability to conduct assessments online. [The Student] has also not attended school for almost a year; therefore, current data about his functioning was provided primarily through parent interview. School data is limited to that obtained prior to closure in March 2020. Results should be viewed with this caveat.

D20p7.

290. The team determined the Student remained eligible under the multiple disabilities category and required SDI in the Adaptive, Social/Emotional/Behavioral domains, as well as Functional Academics. *Id.* p9.

291. The reevaluation report included information provided by the Parents:

(The) Parents report that up until Fall (sic) 2019, [the Student’s] behavior was fairly predictable...In the fall of 2019, [the Student’s] behavior shifted and ‘life got a lot more complicated.’ He became more agitated, particularly at night and his behavior became increasingly physical. [The Student] became aggressive with his mother and his episodes of agitation became more prolonged, disturbing and appeared ‘psychotic.’

Id. p15. The Parents went on to report that, “Since (August 2020 and re-admission to the PBMU), the Student’s behavior has stabilized and there have been no further significant issues.” *Id.*

292. Dr. Wilke was the “coordinator’ for this reevaluation. WILKE T1106. To her knowledge, the Parents never refused to make the Student available for on-site testing at MIHS. *Id.* T1109, T1110. She did not ask the Parents if they would come into the building for an in-person assessment. *Id.* However, during a video conference on January 8, 2021, the Parents said they

were not allowing anyone to come into their home. *Id.* T1110. Dr. Wilke interpreted that to mean the Student was not available for in-person assessment or instruction. *Id.* T1110-T1111.

293. Dr. Wilke concluded that “the tests that we use are normed under certain conditions, and the expectation is that they will be administered under those conditions. And under the circumstances, given the...necessity for social distancing and masking...those kinds of circumstances made it very difficult to obtain relevant information.” T1108. However, in her opinion the reevaluation report contains sufficient information to develop an IEP for the Student. *Id.* T1108. Dr. Enns did not believe he needed to conduct any standardized assessments of the Student for his August 2020 evaluation based on the long-standing nature of the Student’s disabilities. ENNS T447-T448.

294. On April 2, 2021, the Parents spoke with Rebecca Partridge, M. D., about the Student’s specific risks and best ways to keep him safe from COVID-19. PARTRIDGE T648. Dr. Partridge is physician and pediatrician. TS72p16. She is currently the director of the Down Syndrome Program at Virginia Mason Hospital. PARTRIDGE T638. Her medical practice is primarily for people with Down syndrome. *Id.* The Student is one of her pediatric patients. *Id.* T639.

295. The Parents were concerned about a proposed school program. *Id.* T649. They were very concerned about the possibility of sending the Student back to school without a vaccine, and they were planning on keeping him home until he could be vaccinated. *Id.* Dr. Partridge agreed with their plan. *Id.* She estimates the risk of the Student contracting and succumbing to COVID-19 is ten times that of the general population. *Id.* p643.

The Student’s IEP and IEP Team Meetings

296. The Student’s IEP team first met on March 31, 2021 and then met a second time on April 16, 2021. S68p4, See S68p30. The Parents and the District each had counsel present at both meetings. The Parents participated at both meetings. S68p30.

297. The IEP included goals in the Adaptive, Social/Emotional/Behavioral domains, as well as Functional Academics (math, reading, and writing) and communication. *Id.* pp9-20. It provided the Student with a behavior technician and a paraeducator. *Id.* p25. It provided both direct and indirect behavior support and coaching with a BCBA, and services with a PT. *Id.* It placed the Student in an adapted general education PE class. *Id.* P27. It continued the Student’s placement in a PLP classroom. *Id.* It provided the Student with ESY. *Id.* p28. The IEP did not include a BIP.

298. Ms. Kenyon was responsible for drafting the IEP, and she was assisted in writing the goals by Ms. Winder and Dr. Tucker. KENYON T854. The IEP was drafted based on a records review and impressions of the Student from when he last attended MIHS. *Id.* T972-T973. Ms. Kenyon acknowledged they “didn’t have all the information we needed to get the best baseline for functional academics.” *Id.* T973.

299. A PWN drafted by Ms. Kenyon on April 21, 2021, provides additional information regarding the IEP team’s decisions at the IEP meetings. S68pp29-30.

300. The District proposed two options for implementation of the Student's IEP. First, it proposed to implement the IEP as written at MIHS. *Id.* p29. If the Parent declined that offer, the team proposed implementing a Homebound IEP with services in the Parents' home with modified activities and services to meet the needs of the Student in his "natural environment." *Id.*

301. The Parents continued to assert the Student was unable to access in-person instruction at school due to health concerns, so the team proposed to teach the Student within the Parents' home and modify the educational activities to align with independent living activities within the home. *Id.* The Parents proposed that all instruction take place only on the family's porch. *Id.* That proposal was rejected by the team, as the porch was not a natural environment for the Student, is too small and limiting, and the Student would have difficulty transferring learned skills across environments. *Id.*

302. Ms. Kenyon and Dr. Tucker were both concerned that if the Student was served on the Parents' porch, he might have difficulty later generalizing what he learned to a school environment. KENYON T975, TUCKER T1176-T1177, T1166, T1178.

303. Given the nature of the Student's disability, he required concrete instruction in natural environments. BUBE T897. So if the Student was receiving instruction about cooking, that needed to take place in a kitchen. *Id.*

304. The Parents proposed that the Student be supported by two behavior technicians, rather than one behavior technician and one paraeducator. *Id.* p29. The team rejected this proposal because having one RBT, a paraeducator, a BCBA, and a certificated special education teacher would provide the skills and would complement each other. *Id.*

305. The Parents proposed including a BIP as part of the Student's IEP. The team rejected this proposal because the District proposed creating a more specific and detailed BIP once the Student accessed instruction for 4 to 6 weeks, as a BIP is context specific. *Id.*

306. The District's proposal to create a more specific BIP once Student accessed instruction for 4-6 weeks is what Dr. Tucker expected the District to do with her BIP. TUCKER T1178-T1179; S68pp35-41.

307. The District was also prepared to provide fully vaccinated providers and implement King County Health Guidelines for Students in schools if the Student returned to MISD. S68p30.

308. The April 16 IEP meeting "really changed...the path" the Parents were on. FATHER T1402. The District presented only two options: in-person at MIHS for an unvaccinated child or inside their home. *Id.* "Those options were not...consistent with the Student's medical risks." *Id.*

309. The decision of the IEP team meant that "the behavior intervention plan was irrelevant because neither of those options were acceptable." *Id.* T1402-T1403.

310. Via email to the Parents and others on April 21, 2021, Dr. Bube provided the Parents with a copy of the IEP (S68pp4-28), and Dr. Tucker's BIP (S68pp35-41).

311. The Student received his first COVID-19 vaccination in May 2021, and received his second vaccination in early June 2021. PARTRIDGE T659-T660.

312. Via email to Dr. Bube and others on May 14, 2021, the Father stated:

Please accept this as notification that we are rejecting the placement of our son [the Student] for 2020-2021 because it will not meet his needs. We intend to enroll [the Student] as a residential student at the private Glenwood school at the district's expense.

S70. Although the Student had already received his first vaccination, they "felt that residential placement for him...was what he needed at that time." FATHER T1323.

313. Dr. Bube understood the Parents were asking for a resident placement because of their concerns about the Student contracting COVID-19. BUBE T890. But she did not understand why residential placement would be more appropriate for the Student given all the mitigation measures taken by the District. *Id.*

314. The Parents completed an "open-ended functional assessment interview" in June 2021. S80p19. They reported "they are not currently experiencing any behaviors of severe impact at the home; however, [the Student] will engage in refusals, flopping and elopement." *Id.*

The Parents Return the Student to Glenwood

315. On June 30, 2021, the Mother and the Student flew to Birmingham, Alabama. MOTHER T1219. The Student's behavior on the flight was "excellent." *Id.* T1220. The Mother stayed with the Student for 12 or 13 days. *Id.* T1205.

316. On July 1, 2021, the Student was admitted to Glenwood. S80p18. His "official enrollment" date at Allan Cott was July 20, 2021. FATHER T1244. The Student is enrolled at Glenwood for the "full school year. Beyond that, it depends on the Student." *Id.* T1403. The Father has not observed the Student at Glenwood since his return. *Id.* T1404.

317. In order to return the Student home to Mercer Island, the Parents would need to see "marked improvements" in behavior, socialization, achievements in education, evidence of social relationships, transferrable skills, and that protocols have been developed. *Id.* T1403. "But you know, our plans are keeping him there for the full year." *Id.*

318. The Father asserted that Glenwood had "a behavior intervention plan in place from day one." *Id.* T1401. The Father did not explain how Glenwood was able to develop a BIP in one day.

319. Ashley Watkins is the special education coordinator and a certified special teacher at Glenwood. WATKINS T561. She oversees the implementation of the Student's education plan. *Id.* Ms. Watkins works alongside the "classroom instructor" in the Student's classroom. The classroom instructor is not currently a certified teacher in Alabama. *Id.* T599.

320. The Student has an assigned 1:1 RBT. *Id.* T577. All of the Student's in his classroom have 1:1 paraprofessionals or aides. *Id.* T565. There are presently 3 other student's in the Student's classroom. *Id.* T565. They range in ages from 8-13 years old. *Id.* T606. One of three other students is 13 years old. *Id.*

321. Glenwood "group(s) student based on needs, and we felt that [the Student's] needs were similar to (the other students in his classroom), including the 13-year-old's, and placed him accordingly." *Id.* T606.

322. Classroom staff use "mobile dividers" in the classroom to "help narrow that focus and...eliminate some of the visual clutter or distractions." *Id.* T594. "Clutter" can be a form of visual stimulation." *Id.* T595.

323. The students in the Student's classroom under the age of 12 have not been vaccinated against COVID-19. *Id.* T622.

324. There are no general education students at Glenwood or Allan Cott School. *Id.* T592.

325. The Student has an IEP developed at Allan Cott School on August 30, 2021, that includes multiple goals. S80pp1-17. No standardized assessment tools were used in developing those goals. WATKINS T610-T611.

326. On August 10, 2021, Dr. Partridge wrote a letter "To whom it may concern." S71. Dr. Partridge wrote in part that:

People with Down syndrome are at significant risk of severe morbidity and mortality from SARS-CoV2...For people like [the Student] who have additional risk factors like chronic sleep apnea, the risk is even higher. [The Student] also has obesity and has in the past required hospital admission for community acquired pneumonia (2018), thus he is at even higher risk...As [the Student] is not able to tolerate a mask or participate in social distancing or critical hygiene/self-protective measures it absolutely would have been unsafe and inappropriate to send [the Student] to public high school prior to his vaccination. It would have also been unsafe to have [the Student] participate in therapies indoors, even within his own home. A much safer alternative would have been participating in therapies outdoors where transmission is approximately 20 times less than indoor transmission. Once [the Student] was 2 weeks past his second Pfizer COVID vaccine, attendance at a residential specialized ABA center and school to meet [the Student's] educational, social, emotional, and physical needs was the most appropriate placement.

Id. Given all of the Student's other risk factors (obesity, sleep apnea, sinus infections, community-acquired pneumonia), Dr. Partridge determined that the Student's risk of death should he contract COVID-19 is definitely greater than ten times the risk of the general population. PARTRIDGE T643. Prior to the Student being fully vaccinated, his risk of morbidity and mortality related to COVID-19 was "very high." *Id.* T651. Prior to his vaccination, it "would not have been safe for Student to be educated indoors by anyone other than his parents." *Id.* T653.

327. After reviewing the District's health, safety, and cleaning protocols (Appendix A: S42pp3-9), Dr. Partridge concluded that as of September 7, 2020, those protocols would not have been adequate to protect the Student from COVID-19 before he was vaccinated. *Id.* T647.

328. Dr. Partridge's opinion that a "residential specialized ABA center and school...was the most appropriate placement" for the Student is her medical opinion. *Id.* T665. She used "appropriate" in a medical context, not an educational context. *Id.* Dr. Partridge has no legal training. *Id.*

329. Dr. Partridge has had no contact with anyone at Allan Cott School. *Id.* T661. All of the "data" she references in the last paragraph of her letter was provided to her by the Parents. *Id.* She does not know what measures Glenwood has in place to mitigate the risk of the Student contracting COVID-19 at Glenwood. *Id.* T662.

330. Dr. Judith Habeeb is a pediatrician practicing in Birmingham, Alabama. S72p8. She was the Student's pediatrician from birth until the family moved to Mercer Island. HABEEB T478. She resumed treating the Student when he returned to Glenwood in July 2021. *Id.* She agrees that the Student is at least 10 times more likely than the general population for risk of death from COVID-19. *Id.* T485.

331. In her August 24, 2020 FBA, Dr. Padilla recommended a residential treatment placement for the Student because he had just been readmitted to the PBMU. PADILLA T1047. Dr. Padilla is aware the Student is now at Glenwood. *Id.* T1050. During her testimony, Dr. Padilla opined that Glenwood is "consistent" with her recommendations for a residential placement for the Student, and that she would still recommend residential treatment for the Student at Glenwood at the present time. *Id.* T1051, T1073. However, Dr. Padilla did not persuasively explain how the circumstances that existed almost a year ago, just after the Student was discharged from his second admission to the PBMU, are in any way equivalent to the Student's circumstances as of the hearing in September 2021.

332. Additionally, her recommendation for a residential placement at Glenwood currently is based on a review of the exhibits she was provided for the due process hearing. *Id.* T1050. Dr. Padilla has never spoken with anyone at Glenwood regarding the Student's current admission there. All of her information is from the Parents' reports to her. It is also clear that Dr. Padilla's use of the term "appropriate" in relation to any placement for the Student is not based on a legal understanding that "appropriate" is a term of art in special education law. See, e.g. PADILLA T1095-T1097. For these reasons, Dr. Padilla's opinion that the Student requires a residential placement at Glenwood at the present time is given little weight.

333. Dr. Enns offered his opinion regarding the Student's need for a residential placement *in August 2020* after a psychotic episode, decompensation, and his second admission to the PBMU. ENNS T123-T124, T126; S37p26. However, with respect to any *current* need for the Student's placement in a residential facility, a careful review of Dr. Enns' testimony provides limited guidance. See *generally* ENNS T121-T129.

334. Dr. Enns clearly identified only two factors supporting a current need for residential placement. First, the Student needs to be "stabilized." *Id.* T121. Second, the Student needs

psychiatric care. *Id.* T129. However, unlike his recommendation for residential placement in August 2020, Dr. Enns does not know if the Student has experienced any psychotic episodes, periods of decompensation, or further hospital admissions since August 2020. *Id.* T128 (“I haven’t had a chance to really reconnect about that with the family”). Further, and likely attributable to the Parents’ tremendous efforts caring for the Student at home since his second admission to the PBMU in August 2020, the evidence supports finding the Student’s challenging behaviors have generally improved since August 2020. Given this, it is unclear why Dr. Enns’ believes the Student requires residential placement for stabilization at the present time, or in July 2021 when the Parents unilaterally returned the Student to Glenwood. For these reasons, Dr. Enn’s opinion that the Student required a residential placement at any time after August 2020 is given little weight

CONCLUSIONS OF LAW

The IDEA and Jurisdiction

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Parents. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

3. The IDEA and its implementing regulations provide federal money 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 Act, 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). For a school district to provide 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.

4. 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 . . .

Endrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Endrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential.

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 583 U.S. ___, 138 S. Ct. 556 (2017).

5. Procedural safeguards are essential under the IDEA. The Ninth Circuit has stated:

Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001). Procedural violations of the IDEA amount to a denial of FAPE, and therefore warrant a remedy, only if they:

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

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

Whether the District Violated the IDEA and Denied the Student FAPE by Dis-Enrolling Him Based on COVID-Related Absences Instead of Accommodating His Health Condition

6. Dr. Bube temporarily dis-enrolled or un-enrolled the Student in October 2020 for purely administrative reasons related to a count of the District's students for federal reporting purposes. This had no impact on the Student's eligibility or opportunity to receive special education services from the District; Dr. Bube could have simply reenrolled the Student at any time. In their closing brief, the Parents assert without any explanation or argument that un-enrolling the Student denied him FAPE. Parents' Post-Hearing Brief (Parents' Brief) p. 23. It is concluded the Parents have not proven that by un-enrolling the Student, the District denied him FAPE. This issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Promptly Comply with the Parents' Request for the Student's Educational Records

7. The evidence relevant to this issue is exceedingly sparse. With respect to any records request pursuant to the Family Educational Rights and Privacy Act (FERPA), the only evidence is contained in an email from Parents' counsel to the District's counsel on October 30, 2020. In that email, Parent's counsel asserts a request was made on August 20, 2020, but no documents had been produced. The Parents' Brief does not further address this issue. It is concluded that this is simply insufficient evidence to carry the Parents' burden of proof.

8. There is also evidence of a request for records under the Public Records Act on February 9, 2021 in an email from Parents' counsel to the District. Presumably this is a request pursuant to Chapter 42.56 RCW. The best evidence is that the District promptly complied with this request from Parent's counsel by March 15, 2021. The Parents' Brief does not further address this issue. It is concluded that the Parents have not proven any violation of the Public Records Act.

9. This issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Provide Him with Services Comparable to Those He Received at Allan Cott School From January 14, 2019, to April 18, 2019.

10. WAC 392-172A-03105(5) provides that:

If a student eligible for special education services transfers from a school district located in another state to a school district within Washington state and had an IEP that was in effect in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district:

- (a) Conducts an evaluation to determine whether the student is eligible for special education services in Washington state, if the school district determines an evaluation is necessary to establish eligibility requirements under Washington state standards; and
- (b) Develops and implements a new IEP, if appropriate, that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

The parties' closing briefs do not cite any legal authority for determining what constitutes comparable services. The IDEA does not define the term "comparable services." The federal Department of Education (DOE) explained it was not necessary to provide a definition in the IDEA, as it interpreted comparable to mean "similar" or "equivalent." 71 Fed Reg. 46,681 (2006). There is not an abundant amount of case law going to what constitutes comparable services. Similar to the DOE, courts have held that the IDEA does not require the new school district to provide an exact replica of the services a student received from their former school district. *See, e.g., Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2008) (holding that a Nevada district could provide school-based services to a child with a cochlear implant who received home-based services from his former district).

11. The Parents argue that at Allan Cott School the Student was in a classroom where he had interaction with the other students nearly all day long, that Allan Cott School used ABA as its

instructional methodology, and that the Student had science, math, reading, and writing goals and group activities. Parents' Brief pp2-5. The District argues that the Student's office in Ms. Tessier's PLP classroom was specifically designed consistent with recommendations from Glenwood staff for a learning space with few distractions. District's Post-Hearing Brief (District Brief) pp23-24. The facts establish that the Student's team at IMS employed ABA principles to instruct the Student, including Discrete Trial Training, and that the student had interaction with other students in the PLP classroom multiple periods each day.

12. After review and consideration of the evidence, it is concluded that the District provided the Student with services comparable to the services he was receiving under his IEP from Allan Cott School. While the Student likely had fewer interactions with the other students in his PLP classroom at IMS than he had in his classroom at Allan Cott School, the evidence does not support concluding the discrepancy rises to the level where his peer interactions were not comparable. Both schools employed components of ABA methodology to instruct the Student. With respect to the Student's goals at Allan Cott School versus his goals at IMS, the record is clear: those goals remained the same. The Transfer IEP at IMS did not in any way alter the goals in the Student's IEP from Allan Cott School. The Student's goals did not change until his new IEP at IMS was developed in April 2019.

13. It is concluded that the Parents have not proven the services the Student received at IMS were not comparable to the services he received at Allan Cott School. This issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Conducting an Inadequate Evaluation of the Student in March 2019

14. As a matter of law, evaluations under the IDEA are reviewed under the same legal standard as IEPs; Evaluations must be appropriate, not adequate or inadequate.

15. The Parents argue the District's initial evaluation of the Student in March 2019 was not appropriate because the District did not gather relevant academic information to develop an IEP, and because it did not include relevant functional information about the Student's behavior. Parents' Brief pp5-7.

16. WAC 392-172A-03020(2) provides that in conducting the evaluation, the group of qualified professionals selected by the school district must:

(a) 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, that may assist in determining:

(i) Whether the student is eligible for special education services as defined in WAC 392-172A-01175; and

(ii) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum, or for a preschool child, to participate in appropriate activities;

(b) Not use any single measure or assessment as the sole criterion for determining whether a student's eligibility for special education services and for determining an appropriate educational program for the student.

Contrary to the Parents' argument, the District did gather relevant academic information regarding the Student as part of its initial evaluation. The District's evaluation included gathering information regarding his classroom performance from Ms. Tessier and other staff, a review of records, and use of the Becker Work Adjustment Profile to determine his level of pre-academic skills. Acknowledging the Parents' disagreement with the means used to gather relevant academic information does not compel a conclusion that the District's evaluation in this area was not appropriate. The Parents did not offer an opinion by a qualified expert to contest the accuracy of the results, or the means by which those results were obtained.

17. The Parents characterize the assessment of the Student's behavior in the evaluation as "thin." Parents' Brief p7. It apparently criticizes the evaluation for not including the "actual scores" from the BASC-3, and for not including a new FBA. There is no provision in the IDEA that requires assessment scores, or the raw data upon which the assessment scores are based, to be included in an evaluation report. And as a matter of law, a district is only required to conduct an FBA in two circumstances, neither of which are present in this case. See WAC 392-172A-05147(1); 392-172A-05148.

18. The District's assessment of the Student's behavioral domain included a records review, consideration of recommendations from staff at Allan Cott School, use of the BASC-3, and reports from District staff. Of particular note was the fact that from his entry into IMS in January 2019, to March 2019 when the evaluation was completed, the Student's challenging behaviors were decreasing.

19. It appears the Parents' more fundamental argument about a lack of information on the Student's behavior is that the evaluation did not include a new FBA. However, there is no evidence to find anyone, including the Parents, requested an FBA or raised the issue of whether the evaluation should include an FBA. Given this, the Parents' argument that the evaluation should have included an FBA becomes a retrospective one. The Parents seek to rely on an increase in the Student's challenging behaviors months later, first manifesting at home rather than at school, as *ex post facto* confirmation that the District's BIP, based on the Student's FBA from Glenwood, was inappropriate or fatally flawed. The critical element missing to support this assertion is the element of causation. For the reasons discussed below relevant to the issue of whether the District provided the Student with an effective behavior intervention program from January through December 2019, it is concluded that the Parents have not carried their burden of proof to establish the Student's March 2019 evaluation was not adequate or appropriate.

20. The issue of whether the District conducted an inappropriate evaluation of the Student in March 2019, is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Conducting an Inadequate Evaluation of the Student in March 2021

21. The Parents make two specific arguments why the Student's March 2021 reevaluation is not appropriate. First the Parents cite a lack of any direct testing of the Student and lack of surveys of school staff members. Second, the evaluation did not include a valid FBA. Parent's Brief p9.

22. A school district is not required to conduct standardized assessments under all

circumstances. See e.g. *Robert B. v. West Chester Area Sch. Dist.*, 2005 U.S. Dist. LEXIS 21558 (E.D. Penn 2005). In *Robert B.*, the school district did not violate the IDEA by not conducting standardized testing when it had the information it needed to establish the student's needs, and there was no evidence the student's needs had changed. With respect to the Student's March 2021 reevaluation, Dr. Wilke opined that the reevaluation report contained sufficient information to develop an IEP for the Student. And Dr. Enns elected not to use any standardized assessments for his psychological assessment of the Student in August 2020 based on the long-standing nature of the Student's disabilities. No one with the relevant education, training, and experience offered an opinion that the Student's March 2021 reevaluation was not appropriate because it did not include any direct testing of the Student or surveys of school staff.

23. With respect to Dr. Tucker's FBA of the Student conducted as part of the March 2021 reevaluation, Dr. Tucker, Dr. Enns, and Dr. Padilla all agreed that even had Dr. Tucker been able to conduct her FBA at the Parents' home, it could not have been used to develop a school-based BIP. The record is clear that the Parents had no intention of allowing the Student to return to MIHS at the very least until the Student was fully vaccinated, which was not until June 2021, particularly for the amount of time it would take to allow the Student to adjust to the MIHS environment and then conduct sufficient observations for an FBA. There is no evidence to conclude that had Dr. Tucker conducted her FBA on the Parents' porch it would be any more relevant to a school-based behavior program or BIP. And for reasons discussed further below, even were the undersigned to conclude that Dr. Tucker's inability to conduct direct assessments or conduct direct observations of the Student for her FBA constitutes a procedural violation of the IDEA, it would be concluded that the procedural violation did not deny the Student FAPE or warrant any remedy.

24. It is concluded that the Parents have not carried their burden to prove that the District violated the IDEA and denied the Student FAPE by conducting an inadequate or inappropriate evaluation of the Student in March 2021. This issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Address the Student's Functional Academic Needs Before April 2021.

25. The Parents argue that the District abandoned the academic goals and instruction the Student received at Allan Cott School when it developed his April 2021 IEP because the March 2019 evaluation did not assess his academic needs and did not find him eligible for functional academic skills. Parents' Brief p10. When the Student entered IMS in January 2019, the District reviewed and agreed to implement the Student's IEP from Allan Cott School until it could conduct a reevaluation of the Student. Implementation of the Student's last IEP from Allan Cott School included implementation of the goals in that IEP. The District correctly points out that those goals were implemented, and the Student's progress towards those goals was reported to the Parents in March 2019. It is concluded that from January 2019 through the Student's reevaluation in March 2019, the District did not abandon any academic goals or instruction, and did not deny the Student FAPE.

26. The issue of whether the Student's March 2019 evaluation assessed the Student's academic needs has already been decided above. The Student's evaluation included gathering information regarding his classroom performance from Ms. Tessier and other staff, a review of

records, and use of the Becker Work Adjustment Profile to determine his level of pre-academic skills.

27. With respect to the period from April 2019, when the Student's team at IMS developed his first IEP in Washington State, through the Student's last IEP in April 2021, the underlying premise of the Parents' argument appears to be that because the Student's IEPs did not include goals identified as academic goals and did not identify a need for academic SDI, like the Student's last IEP from Allan Cott School, the District denied him FAPE. This argument is not persuasive.

28. It is concluded that the Student continued to have pre-academic or functional academic goals in his IEPs and continued to receive pre-academic or functional instruction at his developmental level after April 2019. This conclusion is supported by the testimony of multiple witnesses, including Ms. Tessier, Mr. Woodside, Mr. O'Malley, Ms. Winder, and Dr. Bube regarding the Student's instruction, including use of the Shoebox curriculum and table tasks at an appropriate developmental level.

29. Furthermore, while the Parents argue the District simply "abandoned" academic goals and instruction from the Student's Allan Cott School IEP, thereby denying FAPE, the Parents offered no witness qualified by education, training, and experience to prove the goals and instruction in the Student's IEPs in the District were not appropriate. It appears as though the basis for the Parents' belief the District's IEPs were inappropriate with respect to academic goals and instruction is based on the fact that what was provided at Allan Cott School was *different* than that was provided by the District. This in and of itself without substantiating evidence remains just a belief, not a proven denial of FAPE.

30. It is concluded that the Parents have not carried their burden to prove the Student was denied FAPE by any failure to address his functional academic needs before April 2021. That issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Confining the Student to a Small Room, Separate From Peers, Most of the Time at IMS From January to December 2019, and at MIHS from January to March 2020

31. The District interpreted this issue as involving a question of whether, by using the Student's offices at IMS and MIHS, the District failed to place the Student in his least restrictive environment (LRE). District's Brief p31. The Parents do not expressly identify this issue as associated with an LRE issue. See Parents' Brief pp10-12. Fundamentally, LRE issues require determination of how much time a student eligible for special education will spend at school with non-disabled peers, sometimes identified as general education peers. That is not an issue in this case because at Allan Cott School the Student's IEP placed him in a classroom with no time spent with general education peers, because Allan Cott School has no general education students. The Student's IEPs in the District place him in a general education setting at least some of the time.

32. First, the evidence does not support a conclusion that either of the Student's offices were "closet-like." Contrary to the Parents' Brief, Ms. Collins did not testify the Student's office at IMS was 10 square feet in size. Parent's Brief p11. Rather, Ms. Collins testified she estimated the Student's office to be about 10 feet by 10 feet, or 100 square feet in size. While it is true that the

estimates of the size or square footage varied depending on the particular witness, the evidence does not support a finding the offices were so small, cramped, or otherwise inadequate that the Student's instruction could not be comfortably and appropriately provided. The offices were also spacious enough to provide the Student with sufficient space for other, non-instructional activities.

33. The Parents argue that use of the Student's office at IMS separated him from his peers, presumably the other students eligible for special education in the PLP classroom. And because the Student was isolated in his office, his behavior eventually regressed in the fall of 2019. The Parents argue, perhaps relatedly, that the Student missed opportunities for socialization and group learning.

34. The Parents' argument that isolating the Student in his office led to the deterioration of his behavior in fall 2019 is also germane to the issue of whether the District denied the Student FAPE by failing to provide an effective behavior intervention program from January through December 2019, the period of time he attended IMS. First, there is no evidence to conclude the Student's behavior deteriorated or his challenging behaviors increased at school from January through March 2019. During that time, the frequency of his challenging behaviors actually decreased. From April 2019 with the development of the Student's first IEP and BIP in the District, until sometime in December 2019, IMS staff did not observe any considerable difference in the Student's behavior at school. The Student's behavior at home was a different story. The Father first noticed changes in the Student's behavior in August 2019. This was during the summer vacation from school. While on an airplane with his family in August, the Student had what the Parents characterized as a psychotic break. Sometime later, the Student attacked the Mother. It is unclear if the Parents contemporaneously reported these incidents to the District. But they both occurred outside of IMS. By mid-October, the Parents reported to IMS staff that they observed an increasing escalation in the Student's behavior at home. Then on October 16, 2019, the Student was admitted to the PBMU at Seattle Children's Hospital for nine days due to what were characterized as psychotic episodes. While admitted to the PBMU, the Student's physicians made a significant change to the Student's medications. The Parents would later in December 2019 return the Student twice to the emergency department at Seattle Children's Hospital due to escalations in his challenging behaviors, but the Student was not admitted.

35. Mr. Woodside, who was a paraeducator staff person assigned to the Student at IMS, opined the 2019-2020 school year started off okay with the Student, and it was not until December 2019 that the Student's challenging behaviors at school started to escalate. Ms. Tessier, Ms. Collins, and Ms. Riccion was also aware of the Student's increasingly challenging behaviors starting around Thanksgiving 2019.

36. The Student was briefly restrained by Ms. Tessier during an incident in her PLP classroom in December 2019. Dr. Bube immediately began to consider ways to address the Student's increasingly challenging behaviors at school. This ultimately led to the Student moving to MIHS in January 2020.

37. The Parents attribute the Student's increasingly challenging behaviors from at least April 2019 through December 2019 to the use of the Student's office at IMS to isolate him from social interactions with the other students in Ms. Tessier's PLP classroom. However, the missing and critical element the Parents have failed to prove is the causal link between use of the Student's

office and his increasingly challenging behaviors. The best evidence to support a causal link between the two is Dr. Enns' opinion that once the District discontinued support from a BCBA and did not require the Student's paraeducators to be qualified as behavior technicians, staff at IMS had no way of controlling the Student's behaviors. However, Dr. Enns' opinion does not account for the fact that there was no apparent escalation of the Student's challenging behaviors at school from April until December 2019. During that period, the Student's behavior at home was clearly deteriorating, but not at IMS.

38. After carefully reviewing and considering all the evidence, it is concluded that the Parents have not proven a causal link between the use of the Student's office at IMS and a denial of FAPE. With respect to the period from January when the Student entered MIHS until the school closure in mid-March 2019, the evidence does not support a conclusion there were any behavioral problems at MIHS that were caused by use of his office at MIHS for the same reasons as considered for the earlier period at IMS.

39. It is concluded that the Parents have not proven the District violated the IDEA and denied the Student FAPE by confining the Student to a small room, separate from peers, most of the time at IMS from January to December 2019, and at MIHS from January to March 2020. This issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Provide an Effective Behavior Intervention Program from January through December 2019

40. As a matter of law, the appropriateness of an IEP, and in this case the associated BIP, is determined based upon what was known at the time the IEP/BIP were created. This is the so-called "snap-shot" rule. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). Accordingly, whether the District's April 2019 IEP/BIP provided an effective behavior intervention plan must be based on what was known to the IEP/BIP team on April 4, 2019. Given this, the evidence does not support a conclusion the team's plan was inappropriate. Since beginning his attendance at IMS in January 2019, the Student's rate of challenging behaviors had decreased. The IEP/BIP team had no reason to suspect that when the Student's IEP/BIP was created it would not offer the Student an appropriate level of behavioral support, or was inappropriate. Dr. Enns' *ex post facto* opinion regarding the Student's behavior intervention program does not alter this conclusion.

41. It is concluded that the Parents have not proven the Student's behavior intervention plan at IMS was inappropriate. This issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to Ensure that the Student's Education was Appropriately Ambitious

42. The Parents argue that the goals in the Student's IEPs lacked any connection to general education standards, did not include academic goals, were too easy, and when met were not updated. Parents' Brief pp13-15. In part, the Parents cite to Dr. Enns' conclusion that he did not observe any academic instruction during his single, two-hour observation of the Student at MIHS as part of his August 2020 evaluation. With all due respect to Dr. Enns, a single observation limited to well less than one school day is found to be insufficient evidence to support a conclusion

the District was not providing appropriately ambitious instruction for the Student. As has already been considered above, the Student's IEPs at the District had pre-academic or functional academic goals, and those goals have not been proven inappropriate. There is no requirement in the IDEA that an IEP team immediately amend a student's IEP when a student masters some part or subset of all the goals in an IEP, and the Parents' Brief cites no case law in support of this proposition. The Parents' reference to the Student's Progress Report (D7) does not confirm the Student met his Social/Emotional Behavior goal to participate alongside a peer for 10 minutes by June 2019. See D7p1 (Student making sufficient progress (SP) to meet goal within duration of IEP). The Parents' reference to the Student's Progress Report (D13), confirms that he only mastered one of his IEP goals prior to November 2019, which was eight months into the IEP. The Student did not master any of the other goals from his April 2019 IEP until almost a year later on March 19, 2020. It is concluded that the Parents have not proven that, collectively, the goals in the Student's IEP were too easy, or not appropriately ambitious. Nor have the Parents proven the Student's IEP team committed any procedural violation when it did not immediately convene to revise or add a goal after the Student met one goal eight months into the IEP period.

43. The Parents' final argument, that the Student's IEP goals had no connection to general education standards, is not persuasive. The Parents are correct that under *Andrew F., supra*, an IEP must be appropriately ambitious in light of a student's circumstances. It is clear that the Parents believe the Student demonstrates considerable skills at home. However, even the Parents' experts agree that the Student functions at "extremely low" levels in the intellectual, adaptive, and communication domains. And there is no evidence to find that the experts' opinions are inconsistent with the skills the Student demonstrates at school. It is concluded that the Parents have not proven the District denied the Student FAPE by failing to ensure that the Student's education was appropriately ambitious. This issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Excluding the Parents from a Placement Decision in December 2019

44. A district violates a parent's right to meaningfully participate in the IEP process if it predetermines a student's placement, such as when it "independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003).

45. The Parents in essence argue that the Parents were denied a meaningful opportunity to participate in the decision to transition the Student from IMS to MIHS in December 2019. The evidence and facts do not support this argument. Concerned when the Student was briefly restrained by Ms. Tessier on December 18, 2019, Dr. Bube contacted the Parents the same day. She suggested as an option to consider transitioning the Student early to MIHS, and discussed this with the Parents. By the end of the conversation, Dr. Bube reasonably believed the Parents agreed to the moving the Student to MIHS. She followed this conversation with an email to the Parents later the same day, informing the Parents that Ms. Tessier would schedule an IEP meeting in January. Dr. Bube then asked for the Parents' permission to temporarily proceed with the transition process without holding an IEP meeting. The Father replied via email minutes later, granting permission. An IEP meeting was held on January 9, 2020. The Parents attended with their then-attorney. The team confirmed the decision to transition the Student to MIHS. The Parents and their then-attorney did not object.

46. It is concluded that these facts definitively prove the Parents were not denied a meaningful opportunity to participate in the decision to move the Student to MIHS. Accordingly, this issue is DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by Failing to: 1) Complete an FBA within 35 School Days of the Parents' Consent on February 13, 2020; 2) Complete a Reevaluation Within 35 School Days of the Parents' Consent on September 4, 2020; 3) Offer a Safe and Accessible Education to the Student During the 2020-2021 School Year, and; 4) Offer an Appropriate Behavior Intervention Plan at any Time During the 2020-2021 School Year

47. These four issues are considered together because they all share the same underlying analysis.

48. On March 13, 2020, the District closed all its school buildings due to the COVID-19 pandemic. The Parents informed the District at an IEP meeting on August 27, 2020, that they were ready for the Student to return to in-person services at MIHS. On September 14, 2020, the Father informed Dr. Bube that after additional thought, research, and consultation with experts, the Parents had decided the Student would not return to in-person services at MIHS. The Father went on to tell Dr. Bube that the Parents remained open to reconsidering in-person services if the District provided a detailed healthcare plan for the Student, and the incidence of COVID-19 transmission remained low after schools reopened. The Student never attended school in the District again.

49. Between September 14, 2020 and May 14, 2021, the Parents and the District engaged on multiple matters. In part, the District continued to offer educational programs for the Student that included hybrid in-person/remote services in the Parents' home, or a home-bound program. Finally on May 13, 2021, the Father informed Dr. Bube that the Parents were rejecting a placement for the Student for 2020-2021 because they intended to enroll the Student at Glenwood at the District's expense. By this time, the Student had received his first COVID-19 vaccination. He would later receive his second vaccination in June 2021. The Parents returned the Student to Glenwood and the Allan Cott School on July 1, 2021. The Parents have enrolled the Student at Glenwood and intend to keep him there for the full 2021-2022 school year

50. The Parents argue the District denied the Student FAPE for the 2020-2021 school year for multiple reasons. After careful review of the evidence and the law, it is concluded that the District did not deny the Student FAPE during the 2020-2021 school year.

51. It is axiomatic that every school district is legally responsible for providing every student eligible for special education with FAPE. However, in the Student's circumstances it was not the District that denied him FAPE during the 2020-2021 school year; it was COVID-19. A school district is responsible for evaluating a student, determining the educational impact(s) of the student's disability or disabilities, designing an educational program to address those educational impacts, and implementing that program with fidelity in a student's LRE. The District could not do that for the 2020-2021 school year not because it was unable to, but because of the non-educational, medical impact of a potential COVID-19 infection on the Student's health, and quite possibly his life. And despite any other questions or issues regarding the Student's education by the District for the 2020-2021 school year, it is manifest that the Parents were not going to

return him to in-person services at the District until such time as the Student was fully vaccinated. While the Parents began ABA services for the Student on their porch in March 2021, allowing the private providers to use a bathroom inside their home after initially refusing due to fear of the Student contracting COVID-19, the District had legitimate concerns that serving the Student on the porch would result in the Student being unable to generalize skills learned on the porch to other environments, thereby denying him FAPE.

52. COVID-19 is not a “disability.” A child with a disability or a student eligible for special education is defined, in part, as a student who has been evaluated and determined to need special education because of having a disability in one of 13 eligibility categories. WAC 392-172A-01035(1)(a). COVID-19 is not one of those disability categories. The two closest categories are the Multiple Disabilities category and the Other Health Impairment category. *Id.* at (2)(h) and (2)(j). Careful review of those definitions does not support a conclusion that COVID-19 falls within either one. Indeed, an individual cannot “have a disability,” from COVID-19 until such time as one is infected with COVID-19, which the Parents, to their credit, went to tremendous time and effort to avoid for the Student. But the impact of the Student’s recognized multiple disabilities on his receipt of an educational benefit through the provision of FAPE by the District did not change from prior to the COVID-19 pandemic through the present time.

53. This is not the first case involving the education of students eligible for special education during the COVID-19 pandemic that the undersigned ALJ had heard and decided. In some of those other cases, the undersigned ALJ has awarded remedies to a student because a district denied the student FAPE. But the facts in this case are extraordinarily unique. This is a case where, through no fault of the District, the Parents, or the Student, there was likely no school district anywhere that could have provided the Student with FAPE given the medically-confirmed risks, at least until such time as the Student was fully vaccinated against COVID-19.

54. It is true that the District did not timely complete the Student’s FBA and reevaluation. WAC 392-172A-03015(3). It is not necessary to determine whether the District offered the Student an appropriate behavior intervention plan during the school year, but assuming this is true these are all procedural violations of the IDEA.

55. Pursuant to WAC 392-172A-05105(2), procedural violations may warrant a remedy only when the procedural violation impedes the student’s right to FAPE, significantly impedes the parents’ opportunity to participate in the decision-making process, or causes a deprivation of educational benefits. It is concluded that these procedural violations or potential violation do not warrant any remedy because the Student was held out of the District by the Parents for a non-educational, medically-based reason; the fear the Student would contract COVID-19. The procedural violations or potential violation had no impact on the Student’s receipt of FAPE during the 2020-2021 school year because regardless of the violations or potential violation, the Student was not going to receive an education from the District because the Parents would not let him attend school in the District, or likely any other district until such time as he was fully vaccinated.

56. Whether it is true that the District could not offer the Student a safe accessible education during the 2020-2021 school year need not be determined for the same reasons discussed and considered above.

57. The four issues considered collectively above are DISMISSED.

Whether the District Violated the IDEA and Denied the Student FAPE by: 1) Deciding on a New Program on February 2, 2021 Without an IEP meeting; 2) Failing to Implement the February 2, 2021 PWN in a Safe and Timely Manner; 3) Failing to Provide an Opportunity for Parent Participation in Development of the April 2021 BIP

58. These final three issues, if true, would all be procedural violations. For the same reasons discussed and considered above, it is concluded that even if true these violations warrant no remedy. It is clear the Parents were not going to allow the Student to return to the District until such time as he was fully vaccinated, which did not occur until likely after the end of the 2020-201 school year. These three issues are DISMISSED.

The Student's Return to Glenwood and Allan Cott School in July 2021

59. Having determined that the issues raised in the Parent's Complaint should be dismissed without remedy, it is not necessary to reach the issue of whether or not Glenwood/Allan Cott School is a proper placement for reimbursement. However, if this issue had been reached, the evidence establishes that Glenwood/Allan Cott School is not a proper placement for reimbursement. Almost immediately after the Student was fully vaccinated against COVID-19, the Parents returned him to Glenwood. This timing is suspect. The Student made progress under his IEPs in the District prior to the COVID school closures. While it might not have been as much progress as the Parents hoped, nevertheless it was demonstrable progress towards meeting the Student's IEP goals, which have not been proved inappropriate. It is clear that the Parents have expended extraordinary time, effort and resources to provide for the Student when he is not in school. Dr. Enns clearly observed the strain on the Parents in August 2020. The record also supports finding the Parents were concerned for the welfare of the Student's younger sibling at home. Given this, it is concluded that more likely than not, the Parents returned the Student to Glenwood/Allan Cott School for reasons other than the Student's educational need for FAPE. The District is correct in citing *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004 (9th Cir. 2009) for authority that a residential placement must be necessary for educational purposes, and not a response to medical, social, or emotional problems unconnected to the learning process. Accordingly, had the issue of reimbursement to the Parents or District payment for Glenwood/Allan Cott School been reached, the Parent's requested remedy would be denied.

60. All remaining arguments by the parties have been reviewed and considered.

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FINAL ORDER

The Mercer Island School District has not violated the Individuals with Disabilities Education Act or such violations do not warrant a remedy. The Parents' Complaint is DISMISSED.

Signed on the date of mailing.



MATTHEW D. WACKER
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.

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Dated December 20, 2021, at Seattle, Washington.

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

cc: Administrative Resource Services, OSPI