

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

IN THE MATTER OF

OSPI CAUSE NO. 2020-SE-0061
2020-SE-0090

OAH DOCKET NO. 03-2020-OSPI-01041
06-2020-OSPI-01078

HOCKINSON SCHOOL DISTRICT

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

A due process hearing in this matter was held before Administrative Law Judge (ALJ) Pamela Meotti by video conference on November 23 through 25 and 30, 2020. The Parents of the Student whose education is at issue¹ appeared and were represented by Shannon McMinimee and Whitney Hill, attorneys at law. The Hockinson School District (District), was represented by William Coats and Erin Sullivan-Byorick, attorneys at law. Also present was Keila Dean, District Director of Special Education. The following is hereby entered:

STATEMENT OF THE CASE

Procedural History

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on March 20, 2020. OSPI assigned Cause No. 2020-SE-0061 and forwarded the Complaint to the Office of Administrative Hearings (OAH). OAH assigned the matter to ALJ Pamela Meotti. The District filed a response on April 3, 2020. ALJ Meotti issued prehearing orders in this matter on April 22, 2020, and April 29, 2020. The Parents filed a second Due Process Hearing Request with OSPI on June 17, 2020. OSPI assigned Cause No. 2020-SE-0090. By agreement of the parties, the matters were consolidated for hearing on June 25, 2020. ALJ Meotti issued prehearing orders in these consolidated matters on June 25, 2020, June 26, 2020, July 9, 2020, August 7, 2020, September 1, 2020 (order on stay put), and September 15, 2020 (amended order on stay put).

Decision Due Date

As set forth in the prehearing order dated June 25, 2020, the due date for a written decision in these consolidated cases was extended at the Parents' request to thirty (30) days after the record

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

of the hearing closes. The record closed on January 19, 2021, when the parties timely submitted post hearing briefs. Accordingly, the due date for a written decision in this case is February 18, 2021.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J1 through J20.

Parent Exhibits: P1 through P4, P5 (page 2 only), P6, and P7.

District Exhibits: D1, D2, D6, D10 through D15, D17 (page 1 only) through D19, D21, D27 through D28, D30 (pages 4 to 7 only), D32 (pages 1, 2 and 4 only), D38, D41, and D43. ²

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

Leslie Ruby, District Special Education Teacher;

Carla-Marie Myers, Owner, Discovery Behavior Solutions;

Steven Marshall, District Superintendent;

Jessica Barkley, District Board Certified Behavior Analyst (BCBA);

Marilea Brock, Speech and Language Pathologist (SLP); Owner, Communication Connection NW;

Lionel Enns, Ph.D., BCBA-D;

Maryann Keyser, Special Education Teacher - Evergreen School District;

Troy Haverkamp, Occupational Therapist (OT) - Evergreen School District;

Robyn Spencer, SLP - Evergreen School District;

Christy Bisconer, District SLP;

Heather Schwartz, BCBA for Discovery Behavior Services;

Keila Dean, District Director of Special Education;

The Father.

ISSUES

The issues for the due process hearing are as follows:

a. Whether the District failed to comply with the requirements of the IDEA and denied the Student a free appropriate public education (FAPE) by:

i. failing to include an age-appropriate transition plan in the Student's individualized education program (IEP) from December 20, 2019 to June 19, 2020;

² Exhibit P6 contains a letter dated September 7, 2020, with an attached Order on Stay Put. After the letter was sent, an Amended Order on Stay Put order was issued on September 15, 2020. The parties agreed that it was not necessary to admit the amended order as an exhibit because it is part of the file in this case. T668-71.

- ii. failing to timely hold or offer an IEP team meeting for the Student between March 16, 2020 and April 23, 2020 as requested by the Parents, and failing to hold or offer an IEP team meeting during that time frame to review reports from an Independent Educational Evaluation (IEE) of the Student conducted at public expense;
- iii. failing to offer the Student any educational services from March 16, 2020 until mid to late April of 2020;
- iv. failing to provide the Student all of the specially designed instruction (SDI), related services, and supplementary aids and services called for in his December 20, 2019 IEP as amended on February 19, 2020 (February IEP amendment) from March 16, 2020 to June 19, 2020;
- v. refusing to implement the February 2020 Transition Plan for the Student from March 16, 2020 to June 19, 2020;
- vi. proposing an amendment to the February IEP amendment on June 16, 2020 that does not include an educational placement in the Student's least restrictive environment (LRE) and that is not reasonably calculated to allow the Student to receive FAPE because it does not include the supplementary aids and services the Student needs to be able to access an educational placement in his LRE, specifically receiving Applied Behavior Analyst (ABA) services from a Registered Behavior Technician (RBT) and/or Certified Behavior Technician (CBT) working under the supervision of a Board Certified Behavior Analyst (BCBA) and/or Licensed Assistant Behavior Analyst (LAB) consistent with Chapter 182-531A of the Washington Administrative Code and the professional standards for ABA;
- vii. predetermining (a) what SDI, related services, and supplementary aids and services the Student would receive between March 16, 2020 and June 19, 2020, and (b) that the Parents' request for in-person SDI, related services, and supplementary aids and services during that time frame would not be considered;
- viii. failing to provide the Parents with a written invitation to the June 16, 2020 IEP team meeting that provided the Parents with proper notice of all topics that would be discussed;
- ix. failing to provide the Parents with proper Prior Written Notice of its intention to implement and reject actions discussed at the June 16, 2020 IEP team meeting;
- x. predetermining with respect to the Student's Extended School Year (ESY) services during the summer of 2020: (a) the type, amount, duration and location for delivery of SDI, related services, and supplementary aids and services; (b) that the Parents' request for individualized ESY services would not be considered; and (c) that the District would remove the supplementary aids and services that the Student needs, specifically ABA services from an

RBT and/or CBT working under the supervision of a BCBA and/or LABA consistent with Chapter 182-531A of the Washington Administrative Code and the professional standards for ABA;

xi. predetermining that the Student would not be allowed to start the 2020-2021 school year in his LRE; and

b. Whether the Parents are entitled to their requested remedies:

i. Declaratory relief finding that the District violated the IDEA and that the Student was denied FAPE by the District's actions;

ii. Compensatory education and supplemental services for the Student to allow him to obtain the educational benefit that he would have received but for the District's violations of the IDEA and denial of FAPE;

iii. Reimbursement to the Parents for any educational services that they procure as a result of the District's failure to offer the Student FAPE in his LRE and ESY tailored to meet his unique needs with the supplementary aids and services he needs;

iv. An order directing the District to comply with the February IEP amendment to include ABA services from an RBT and/or CBT working under the supervision of a BCBA and/or LABA consistent with Chapter 182-531A of the Washington Administrative Code and the professional standards for ABA;

v. An annual IEP for the 2020-2021 school year that includes a placement in the Student's LRE with the supplementary aids and services that the Student needs, specifically receiving ABA services from an RBT and/or CBT working under the supervision of a BCBA and/or LABA consistent with Chapter 182-531A of the Washington Administrative Code and the professional standards for ABA;

vi. Or other equitable remedies, as appropriate.

See Prehearing Order dated July 9, 2020.

FINDINGS OF FACT

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

Background

1. The Student is [REDACTED] and resides in the Hockinson School District (District) with his family.³ T429; J2. He displays characteristics of Down Syndrome and Autism and qualifies for special education under the category of multiple disabilities. J2pp2, 6.⁴
2. The Student attended Hockinson Middle School (HMS) in the District until February 2019, when the District placed him at 49th Street Academy (49th Street) in the Evergreen School District (Evergreen). There are no general education students at 49th Street. T269-70. The Parents disagreed with the Student's placement at 49th Street, which they believed to be overly restrictive. T795.
3. Maryann Keyser⁵ was the Student's special education teacher at 49th Street. T269. Troy Haverkamp⁶ provided occupational therapy (OT) and Robyn Spencer⁷ provided speech language pathology (SLP) services to the Student at 49th Street. T352, 394.
4. The Student had one-to-one support from a para educator at 49th Street. T531. Board certified behavior analysts (BCBAs) and registered behavior technicians (RBTs) were available at 49th Street, but the Student did not show the need for an RBT. T325; 451, 532. Ms. Keyser and the Student's dedicated para educator were not formally trained in ABA therapy, but used ABA and other strategies in working with the Student to successfully address his behavior in the classroom. T451.
5. On December 20, 2019, the District held an IEP meeting to develop an annual IEP (December IEP) for the Student, who was [REDACTED] at that time. J2pp1-2. The December IEP provided that the Student would receive the following special education and related services:

³ Citations to the hearing transcript are to T. followed by the page number(s) on which the testimony appears. For example, a citation to T661 is a citation to page 661 of the transcript.

⁴ Citation to the exhibits of record are by the party ("P" for the Parents; "D" for the District; "J" for joint exhibits) and page number. For example, a citation to P20p1 is to the Parents' Exhibit 20 at page 1.

⁵ Ms. Keyser holds a bachelor of arts degree in special education and has been a special education teacher for Evergreen since she completed her degree in 2016. D41.

⁶ Mr. Haverkamp has a master's degree in occupational therapy. He has been employed by Evergreen as an occupational therapist for fifteen years. T350-51. Prior to working for Evergreen, Mr. Haverkamp worked as an OT for another school district for seven years. He also worked in hospitals and clinics for ten years. T351.

⁷ Ms. Spencer holds a master's degree in speech and language pathology. She has worked for Evergreen as an SLP since 2016. D43.

| Concurrent | Service(s) | Service Provider for Delivering Service | Monitor | Frequency | Location (setting) | Start Date | End Date |
|---|-------------------------|---|-----------------------------|--|--------------------|------------|------------|
| Special Education | | | | | | | |
| No | Fine Motor | Staff Assistant | Occupational Therapist | 10 Minutes / 4 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Communication | Speech-Language Pathologist | Speech-Language Pathologist | 30 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Adaptive Skills | Staff Assistant | Special Education Teacher | 100 Minutes / 4 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Behavioral Skills | Staff Assistant | Special Education Teacher | 100 Minutes / 4 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Math | Staff Assistant | Special Education Teacher | 50 Minutes / 4 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Reading | Staff Assistant | Special Education Teacher | 70 Minutes / 4 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Written Language | Staff Assistant | Special Education Teacher | 40 Minutes / 4 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Adaptive Skills | Staff Assistant | Special Education Teacher | 45 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Behavioral Skills | Staff Assistant | Special Education Teacher | 60 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Math | Staff Assistant | Special Education Teacher | 30 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Reading | Staff Assistant | Special Education Teacher | 30 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Written Language | Staff Assistant | Special Education Teacher | 20 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| Related | | | | | | | |
| Yes | Behavioral Consultation | Special Education Teacher | BCBA | 20 Minutes / 1 Times Monthly | Special Education | 12/20/2019 | 12/15/2020 |
| Yes | Occupational Therapy | Occupational Therapist | Occupational Therapist | 20 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| Total minutes per week student spends in school: | | | | <u>1695 minutes per week</u> | | | |
| Total minutes per week student is served in a special education setting: | | | | <u>1695 minutes per week</u> | | | |
| Percent of time in general education setting: | | | | <u>0% in General Education Setting</u> | | | |

Supplementary Aids and Services:

| Concurrent | Service(s) | Service Provider for Delivering Service | Monitor | Frequency | Location (setting) | Start Date | End Date |
|------------|-------------------------------|---|---------------------------------|------------------------------|--------------------|------------|------------|
| No | Occupational Therapy | Occupational Therapist | OT | 5 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | 1:1 Staff Assistance | Staff Assistant | Special Education Teacher | 375 Minutes / 4 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | 1:1 Staff Assistance | Special Education Staff | Special Education Teacher | 195 Minutes / 1 Times Weekly | Special Education | 12/20/2019 | 12/15/2020 |
| No | Speech and Language Therapist | Speech and Language Pathologist | Speech and Language Pathologist | 15 Minutes / 4 Times Monthly | Special Education | 12/20/2019 | 12/15/2020 |

J2pp23-30.

6. The IEP team also decided that the Student's behaviors had improved and he was ready to begin to transition from 49th Street to HMS. J2p33-34, 37-38.

7. The Parents were not present at the December IEP meeting and raised a number of claims related to that meeting in a separate due process hearing request. Those issues, in Cause No. 2020-SE-0008, were decided in a final order issued on September 28, 2020.

IEE Reports

8. Pediatric Therapy Associates (Pediatric Therapy) performed a physical therapy assessment of the Student as part of an Independent Educational Evaluation (IEE) funded by the District and issued a report on December 9, 2019. J1.

9. Heather Schwartz,⁸ a BCBA employed by Discovery Behavior Solutions (DBS), conducted a Functional Behavior Assessment (FBA) and created a Behavior Intervention Plan (BIP) for the Student. Ms. Schwartz prepared a report dated December 25, 2019. J3.

10. During January 2020, Dr. Lionel Enns, PhD,⁹ conducted an assessment of the Student as part of the IEE. J4; J11. Dr. Enns reviewed the Student's educational records and administered several standardized assessments. J4p1. He also observed the Student at 49th Street, where he saw the Student interacting with his para educator and Ms. Keyser. T243. Dr. Enns believed the environment at 49th Street was very restrictive. T243. He did not believe the Student belonged at 49th Street. He felt that Ms. Keyser and the Student's para educator did an excellent job containing behaviors. T 243-44.

11. Marilea Brock¹⁰ conducted a communication assessment of the Student as part of the IEE, and issued a report on February 28, 2020. T183; 193. J7p1. Ms. Brock reviewed the Student's educational records and observed him at 49th Street for approximately two hours. T184; 194; J7pp1-2, 7-8. She used standardized assessment tools to measure the Student's articulation and social communication. T184; J7pp3-7. Ms. Brock was concerned that the Student's placement at 49th Street did not afford him many opportunities to interact with any of his peers. T186. Ms. Brock believes the Student needs access to typically developing peers to develop social communication skills, and needs practice in group settings with a variety of students. T192.

⁸ Ms. Schwartz has a master's degree in early childhood special education and is a BCBA. J17p1.

⁹Dr. Enns has a PhD in School Psychology. He is a child psychologist and BCBA, with a doctoral level BCBA credential. Many of the children he works with have disabilities. He also conducts special education evaluations for school districts and parents. T241; J16.

¹⁰ Ms. Brock is a credentialed SLP, licensed to practice in Washington and recognized by the National Association of Speech/Language Pathologists. She has been practicing since 2005. Brock T223-25; J20.

12. Advanced Pediatric Therapies, Inc. (Advanced Pediatrics) conducted an OT assessment as part of the IEE and prepared a report dated February 11, 2020. J5.

Transition from 49th Street to HMS

13. On February 18, 2020, the District issued a prior written notice (PWN) proposing to amend the December IEP to include a transition plan to facilitate the Student's transition from 49th Street to HMS. The amendment did not change the SDI and related services provided in the December IEP. J6pp1-2.

14. The parties collaborated on creating a transition plan for the Student to return to HMS. T610. Ms. Keyser and Ms. Schwartz drafted the transition plan, which provided in relevant part:

Provision of Supplemental Aides and Services

In order to facilitate [the Student's] return to HMS and his continued placement there in his [least restrictive environment (LRE)], this Transition Plan will be attached to his IEP. The transition will serve as [the Student's] interim placement.

[The Student] will receive dedicated support from a Registered Behavior Technician (RBT) and/or Certified Behavior Technician (CBT), working under the supervision of a Board Certified Behavior Analyst (BCBA) and/or Licensed Assistant Behavior [Analyst] (LABA). The District will ensure that substitute RBTs and/or CBTs are available to work with [the Student] as required by the BCBA.

It is anticipated that the District will contract with Discovery Behavior Solutions (DBS) to provide Applied Behavior Analysis (ABA) services,¹¹ including the RBTs and/or CBTs and BCBA and/or LABA, as the District has already contracted with DBS to have BCBA Heather Schwartz observe [the Student]. It is anticipated that Ms. Schwartz¹² will be the BCBA assigned to work with [the Student] and supervise the dedicated RBTs and/or CBTs who are assigned to serve him and to serve as substitutes for him.

¹¹ "The dedicated RBT and/or CBT would be supervised by the BCBA and/or LABA consistent with the Behavior Analyst Certification Board Ethics Code. [The Student] would be provided ABA services throughout his educational day as a supplementary service and as a method for providing specially designed instruction in the areas of adaptive, behavior, and social emotional skills." (footnote is from transition plan)

¹² "This is not intended to bind Ms. Schwartz in any way, but instead to identify who has already observed [the Student] and is familiar with him. The District currently has a contract with DBS. This plan does not supersede or dictate the terms or duration of the contractual relationship between the District and DBS." (footnote is from transition plan)

Any decisions to make such a material and substantial change in [the Student's] receipt of services must be supported by data and would need to be a decision made by the IEP team.

The certificated special education teachers from the District and/or the Evergreen School District will ultimately be responsible for the supervision of the delivery of specially designed instruction and have the authority to direct the BCBA and/or LABA and RBTs and/or CBTs as necessary. . . .

J6p3. (Footnotes in original).

15. During the hearing, the parties disputed whether the transition plan provided the Student with an RBT during his time at HMS and 49th Street, or only during his time at HMS. Ms. Keyser's understanding, from working on the transition plan, was that the Student would continue to have a dedicated para educator during his time at 49th Street, and would have an RBT at Hockinson. T330. The plan was written with the knowledge that the Student was being successfully served by a para educator at 49th Street. Ms. Keyser explained during the hearing: "We had a plan for Evergreen and we were continuing that plan." T449. Ms. Keyser thought it was clearly understood at that time that the Student did not need an RBT at 49th Street because he was showing so much success that he was able to transition back to HMS. T441. Ms. Schwarz, who also drafted the transition plan, agreed that the Student's needs were being served by a para educator at 49th Street, and that she and Ms. Keyser discussed how they could transition the Student to HMS duplicating the strategies that had been so successful at 49th Street. T531-32. Both Ms. Keyser and Keila Dean, District Director of Special Education,¹³ believed that the transition plan pertained to the Student's time in the District because Ms. Keyser had successfully addressed the Student's behaviors in her classroom at 49th Street, and the transition plan would address the Student's behaviors at HMS. T451, 680-1, 712-13. The Father testified that the Parents were surprised to learn that the Student did not have dedicated support from an RBT at 49th Street because the District had emphasized that BCBAs and RBTs were available at 49th Street when they decided to place the Student there in 2019. T774. Considering the evidence as a whole, I find that the transition plan provided the Student with an RBT in the District to ensure that he had the support he needed for a successful transition. I further find that the transition plan did not provide an RBT for the Student at 49th Street, because his behaviors had already been addressed successfully with assistance from a para educator, and he did not show a need for an RBT.

16. The District implemented the transition plan on or about February 24, 2020. J6p2; T609. Leslie Ruby,¹⁴ who was the Student's special education teacher at HMS in 2019 before he transferred to 49th Street, was also his special education teacher when he transitioned back to HMS. T29-30.

¹³ Ms. Dean holds a master's degree in school psychology and worked as a school psychologist between 2006 and 2015 prior to becoming the Director of Special Education for the District. J18.

¹⁴ Ms. Ruby holds a master's degree in special education. She has been a District special education teacher since 2013. J19p2.

17. The District contracted with DBS to provide services to the Student. Ms. Schwartz was the Student's BCBA supervising his CBT during his time at HMS. T90. The Student did not display inappropriate behavior during the first week of the transition, other than to say "toot," "butt cheeks," and "butt head." T42; 519; J8p1. The Student did very well during the transition. T44; 463; 518.

18. Under the Behavior Analyst Certification Board Ethics Code, a BCBA must supervise an RBT or CBT for 5 percent of the time they are working with an individual the BCBA is supporting. T517; 529. When Ms. Schwartz worked with the Student during the spring of 2020, she was supervising his CBT between 5 and 10 percent. This was to ensure she was available to support the CBT if needed. T518.

19. On March 9, 2020, the District issued a PWN proposing to update the Student's transition plan to reflect his progress and increase his time at HMS from 1 hour to 2 hours per day. J8p1; J9p1.

COVID-19

20. On March 13, 2020, Governor Inslee issued Proclamation 20-09,¹⁵ closing schools statewide to prevent the spread of COVID-19. District schools closed at that time. D6p1; T63. The Student was then spending two hours at HMS, and was one day away from spending three hours at HMS. T427.

21. Between March 16 and March 20, 2020, the District was not providing instruction to any students. D6p3. The District treated this time as a "snow week" to be made up at the end of the year. D6p8. The District notified parents it would provide resources for families to use at home until online learning began the week of April 6, 2020. D6p8. Ms. Dean sent a letter to parents explaining that special education staff had been working to provide progress information related to students' IEP goals and to provide resources to maintain skills during spring break. D12pp5-6; T650.

22. The District's spring break started on March 30, 2020, and extended through Friday, April 3, 2020. April 6 and 7, 2020, were non-school days to be made up at the end of the year. T651; D2.

23. The District counted half days, days when it offered remote services, and days when it provided learning resources as school days. T717. Additionally, the final day of school moved from June 10 to June 19, 2020, to account for March 16 through 20, 2020, and April 6 and 7, 2020. T651. Accordingly, the District offered 180 days of instruction for the 2019-2020 school year. T717.

24. On or about March 18, 2020, the Parents requested an IEP meeting. D10p3. On March 25, 2020, Ms. Dean asked for the Parents' availability to meet on or after April 8, 2020, because staff

¹⁵ The parties' counsel agreed that this tribunal may take official notice of the Governor's proclamation pursuant to Revised Code Washington (RCW) 34.05.452(5). See Proclamation 20-09: *Statewide K-12 School Closures*, March 13, 2020, available at: <https://www.governor.wa.gov/office-governor/official-actions/proclamations> (last visited February 16, 2021).

were on spring break. District staff could not meet until April 6, and Evergreen staff could not meet prior to April 8, 2020. T716; D9p1; D10pp1-4; D12pp104. The District was not willing to demand that its staff attend a meeting during spring break, and did not believe it could require Evergreen staff to do so. The Parents wanted to meet prior to April 8, 2020, believed the meeting should occur during spring break, and did not provide their availability to meet following spring break until April 15, 2020. D10pp1-2; D12pp1-3; D14p4. At that point, the parties agreed to meet on April 23, 2020. D15p1.

Change in the Delivery of the Student's Special Education Service During the Pandemic

25. During spring break, Ms. Keyser prepared for remote learning by creating materials for each student to use at home. She duplicated classroom materials and adapted them if necessary. Ms. Spencer and Ms. Keyser met daily to plan for offering remote services and prepared iPads for students to use. T302, 304, 395. Ms. Spencer loaded two programs onto the Student's iPad to help him practice his speech goals. T395-96. The Student's iPad and materials were ready for him to use on April 6, 2020. Ms. Keyser dropped them off at the Student's home. T305.

26. On April 8, 2020, the District issued a PWN (April 8 PWN) proposing to change the delivery of the Student's special education service during the COVID-19 pandemic as follows:

Description of the proposed or refused action:

Reading services – 65 min per week with special education teacher through online virtual communication or telephonic communication

Writing services- 65 min per week with special education teacher through online virtual communication or telephonic communication

Math services – 65 min per week with special education teacher through online virtual communication or telephonic communication

Adaptive – 75 min per week with board certified behavior analyst through online virtual communication or telephonic communication

Behavior – 75 min per week with board certified behavior analyst through online virtual communication or telephonic communication

Communication- 30 min per week with Speech Language Pathologist through online virtual communication or telephonic communication

Occupational Therapy- 25 min per week with Occupational Therapist through online virtual communication or telephonic communication

Reading services – materials will be supplied for 30 min daily (65 minutes per week will be concurrent with direct services from staff) at home instruction for parents to access and implement

Writing services- materials will be supplied for 30 min daily (65 minutes per week will be concurrent with direct services from staff) at home instruction for parents to access and implement

Math services – materials will be supplied for 30 min daily (65 minutes per week will be concurrent with direct services from staff) at home instruction for parents to access and implement

Adaptive – materials will be supplied for 30 min daily (75 minutes per week will be concurrent with direct services from staff) at home instruction for parents to access and implement

Behavior – materials will be supplied for 30 min daily (75 minutes per week will be concurrent with direct services from staff) at home instruction for parents to access and implement

Occupational Therapy – materials will be supplied for 10 min 4 times weekly fine motor program for at home instruction for parents to access and implement

These services are provided primarily through the Evergreen School District, with support from Hockinson staff. Staff will be reachable during school hours by email. They will have flexible office hours and will work to accommodate the family schedule for phone calls and online virtual communication to answer additional questions outside of scheduled times.

D13pp4-5.

27. The District did not hold an IEP meeting to discuss how the Student would be served during the pandemic prior to issuing the April 8 PWN. T271, 273-74; T612, 772. Ms. Dean contacted Ms. Keyser, Mr. Haverkamp, Ms. Spencer, and Ms. Ruby to discuss the services they could provide. She also contacted Ms. Schwartz to discuss what behavioral supports she could provide. T538, 657.

28. The goal was to provide services as close as possible to those offered before the pandemic. T656-57. Ms. Dean directed staff to work with the Student's family to meet his needs related to his IEP goals to the best of their ability. T633. Ms. Dean acknowledged during the hearing that it was not possible to provide services during the pandemic that were identical to the services in the December IEP as amended by the transition plan, but she believed the services listed in the April 8 PWN came as close to providing those services as possible. T717.

29. The April 8 PWN indicated that materials had been provided to the Student's family and his online instruction had begun on April 6, 2020, although the general District calendar listed April 6 and 7, 2020, as non-school days. D13p5; D2p1. The District anticipated that the Parents would support the Student with at-home instruction. T275.

30. The April 8 PWN also rejected the Parents' request for the Student to receive in-person support from an RBT throughout the day at home, at HMS, or at the DBS clinic. D13p5. Ms. Dean contacted Carla-Marie Myers, owner of DBS, to determine what services DBS could provide. T89, 638. DBS started serving clients in person on April 1, 2020, and was able to provide in-person RBT services to the Student from that date through June 19, 2020. T98, 644. However, the District did not believe it could safely have an RBT work with the Student in person. T722-23; D13p5. In reaching this conclusion, Ms. Dean consulted a registered nurse at the Clark County Health Department and OSPI. T723.

31. With respect to adaptive and behavior instruction, Ms. Schwartz recommended 75 minutes per week in each area, for a total of 150 minutes per week, to support the Student when he was receiving remote services. T540; 657-58. Ms. Schwartz provided this support remotely. She was not available to provide in-person support until September 2020. T541.

April 23, 2020 IEP Meeting

32. On April 21, 2020, Ms. Dean notified the Parents that she had received the report that Ms. Schwartz had prepared on December 25, 2019, which was “the final piece of the IEE.” D17p1. Ms. Dean believed that she received the report on April 21, 2020, because she “would usually send things off right away.” T660. There is no other evidence in the record to establish when the District received this report. Based on Ms. Dean’s testimony, and the email sent on April 21, 2020, I find that the District received the DBS report on or about April 21, 2020. The District received the other private provider reports before April 21, 2020, but the record does not contain evidence of when they were received.

33. The IEP team met on April 23, 2020 (April 23 meeting). T613. The majority of the meeting focused on discussing the private provider reports that were part of the IEE (reports from Dr. Enns, Ms. Brock, Advanced Pediatrics, DBS, and Pediatric Therapy). T754. When the team reached the topic of the Student’s services during the pandemic, the Parents discussed that they wanted the Student to have assistance from an RBT in person. T773. The remainder of the team felt that in-person assistance was unsafe. T757; D19pp2-3. The team determined that it would “follow official state guidelines for when it is safe to resume such services.” D19p3. The Parents did not request assistance from an RBT remotely. T758.

34. During the April 23 meeting, the team also discussed the Student’s extended school year (ESY) program. At that point, the team anticipated the Student would attend Evergreen’s ESY program. T662. Ms. Keyser had prepared a draft program that proposed 900 minutes per week for four weeks of ESY, with dedicated support from a staff assistant.¹⁶ D18pp4-5; T661. The team intended that ESY services would be provided in person if possible but was not ready to adopt a specific program. T424; 559.

Remote Learning

35. On April 6, 2020, Ms. Keyser, Mr. Haverkamp, and Ms. Spencer started working with the Student remotely. T305, 353, 395. Ms. Ruby started providing remote instruction on April 8, 2020. T36.

36. The Student was not physically present in a classroom at HMS or 49th Street between March 16, 2020, and June 19, 2020, and was not provided any in-person instruction during that time frame. T284, 297, 631-32. Additionally, the District did not provide an RBT to assist the Student during that time frame. T521, 618, 632. A para educator was not available to work with the Student in person during his instruction from 49th Street, but 49th Street made staff available to the Student online throughout the day. T459, 465, 618, 758, 774.

37. The Student could not log on to remote instruction on his own and required one-to-one support to engage in his learning activities. T83, 85; 162, 274, 775, 797. He also needed one-to-one

¹⁶ When discussing the support that the Student received at 49th Street, the parties used the terms staff assistant and para educator interchangeably.

assistance to use manipulatives and other tools used to provide him with instruction in academic areas. T287. The Student's Mother, who is a substitute teacher for the District, supported the Student during his learning activities and helped him to stay on track. T38-39, 82, 275. The Father also helped on occasion. T74.

Remote Instruction from Ms. Keyser

38. Ms. Keyser met with the Student individually to provide remote instruction from mid-morning until lunch time, for approximately one hour each day. T283, 323. Ms. Schwartz was present during that time to support the transition to HMS and address behavioral needs. T324, 455, 758, 678. Because the Student's behavioral and academic goals overlap, Ms. Keyser and Ms. Schwartz were sometimes working on academics and behavioral skills at the same time. T437-38.

39. When the Student was not working with Ms. Keyser individually, he could meet with other staff online. T283. Staff were available to work with him online every day starting at 8 until 11:30 a.m. on Wednesdays, and until 2:30 p.m. every other day. T283-84; 618. The Parents had the option to access a full day of activities for the Student for each school day. T288-89; 308, 465. Ms. Keyser created an online schedule for the Student to replicate the services she had been providing in person prior to March 16, 2020. T288. The schedule was based on a typical school day, which added up to 1,695 minutes per week, and included activities and all the materials needed for those activities. T288. Ms. Keyser created these materials with the assumption that an adult would be available to work with the Student. T291. As Ms. Keyser explained during the hearing, "it was the full, full gamut with calendars and all of the things that if someone was able to, then they would be able to do a full day of work with the Student. I kept Google Meets and all those things open – the Zooms open all day. I spent all day at school so that I was available without pressuring someone into creating an unsafe situation or a negative situation at home for their own student." T458-59.

40. Ms. Keiser provided materials for the Student to access all of his minutes, but she did not know what minutes he worked on apart from the hour he spent with her each day. T431. Additionally, although Ms. Keyser provided materials and guidance to the Parents so that the Student could access all of the minutes provided by his IEP, she and her staff did not work with the Student to provide all of those minutes. T432-33.

Remote SLP Services

41. The December IEP as amended by the transition plan provided 30 minutes weekly from an SLP, and 60 minutes per month of supplementary aids and services from an SLP. T405-406; J2pp29-30. Starting on April 6, 2020, Ms. Spencer provided at least 30 minutes per week of remote SLP services, sometimes more based on the Student's needs. T396-97, 407, 418. She also consulted with Ms. Keyser and the Student's teachers at HMS daily, ranging from 2 minutes to 60 minutes per meeting. T418. Ms. Spencer believed this met the 60-minute requirement in the Student's IEP. T418. Prior to

the pandemic, in providing these minutes, Ms. Spencer would have consulted with a classroom teacher or a para educator. T421.

42. To work on the Student's social skills, Ms. Spencer used video modeling. T399. She and the Mother discussed how the Student could practice his skills at home. For example, Ms. Spencer described strategies the Student could use to advocate for himself with his brothers. T 399.

43. Ms. Spencer collected data every time she met with the Student. Ms. Keyser sometimes attended and took notes. T323; 415. Based on both of these sources of information, Ms. Spencer determined that the Student made sufficient progress on his communication goal, which focused on improving his ability to share personal experience with others, during remote learning. D21p14-15. He was able to answer "who, what, where, when and why" questions about 80 percent of the time. T401. He was able to look at pictures of himself and talk about his dogs and his family. T400-403. He gave a tour of his house, describing things that belonged to his siblings and presents he had received at Christmas. T400.

44. Ms. Spencer coordinated with Christy Bisconer, the SLP at HMS, about once each month to talk about the Student's progress and programming and to share ideas to help the Student successfully transfer from 49th Street to HMS. T403-404; 472, 474. When the Student was receiving remote instruction from Ms. Ruby, Ms. Bisconer "pushed in" for thirty minutes each week for the purpose of getting to know the Student and establishing rapport. T476, 480, 483.

Remote OT Services

45. The December IEP as amended by the transition plan provided fine motor instruction for 40 minutes per week and provided 25 minutes weekly of OT services.¹⁷ J2p29. Starting on April 6, 2020, Mr. Haverkamp met with the Student remotely once each week for 30 minutes. T356, 359, 370. He communicated with Ms. Keyser to coordinate the Student's services, and also communicated with the Parents. T354. He prepared a bin that contained fine motor manipulatives that the family could use to practice with him at home. T353. This included different-sized containers he knew would interest the Student and figures of bears and spacemen that the Student could put into the containers. Mr. Haverkamp put seashells into containers so that the Student could open the container, take the sea shell out, and listen for the ocean. T362. The Student's Father or Mother were always present for OT sessions. T363. The Student needed someone with him to be able to access his materials and engage in activities. T370. Mr. Haverkamp worked with the Parents on how to coach the Student and to provide ideas and strategies on how to interact with the Student on his fine motor activities. T356.

46. To address the fine motor component of the Student's IEP, Mr. Haverkamp provided materials for 40 minutes per week of fine motor instruction at home by the Parents. T384, 387; D13p5. The

¹⁷ The December IEP as amended by the transition plan includes 20 minutes of OT under the related services tab and 5 minutes of OT under the supplementary aids and services tab. J2pp29-30.

Student did not have a staff assistant or RBT with him during his sessions with Mr. Haverkamp, either in person or remotely, and Ms. Schwartz did not participate. T371, 374-75. 379, 387-388.

47. The Student made progress on his fine motor goal. T359-60. He could open a screw top lid with standby assistance and replace a pop-off container lid with minimal assistance. D21p13; T361. The Student did not make a lot of progress on his goal of legibly writing his first name, but he had not made progress on that goal the prior year either, and it was removed from his IEP during the April 23 meeting. T359; D19p2.

Remote Instruction from HMS

48. Between April 8, 2020, and June 19, 2020, Ms. Ruby provided separate online instruction to the Student to continue with the transition plan. T37; 324. She instructed the Student and one other student for one hour, three times weekly. T36-37, 73. The Student did not have an RBT or staff assistant with him, either in person or remotely. T38. Ms. Ruby focused on reading, math, and writing skills. She also worked with Ms. Keyser to focus on the Student's adaptive and advocacy skills. She also focused on the Student's connection to HMS to support his transition back to HMS. T37, 76. Ms. Schwartz occasionally joined the remote sessions but the record does not establish how often. T74; 84-85.

The Student's Success with Online Learning

49. Ms. Ruby felt the Student did a "really, really, really good job during the Zoom instruction, which . . . can be challenging." T74. She believed she was successful in helping the Student to maintain a connection and relationship with HMS. Ms. Ruby did not see any regression in the Student's ability to make transitions; he made progress in his adaptive skills with support from his Mother. T77-78.

50. Ms. Keyser also found that the Student did "really well" with online learning. He was "cheery and pleasant," and "wasn't very different from the way he is at school. And that's why I felt like he was responding well to online. He didn't seem to have a lot of trouble with the fact that it was a screen versus a person. Obviously it wasn't the same and I'm not saying it was the exact same, and it was challenging for all of us. But I felt like especially . . . for [the Student], he got used to the format pretty quickly." T316-17. Ms. Spencer also believed the Student did great with remote instruction. T398.

51. Ms. Schwartz felt that during remote learning the Student was able to work on following a schedule, asking for help, and increasing his tolerance for work that was difficult for him. In her opinion, however, he would have benefited from in-person services. T522.

52. During the hearing, Ms. Brock testified that she does not recommend online learning for the Student because it does not allow for the meaningful peer interactions the Student needs to develop his communication skills. T187. She did not think the Student would be able to make educational progress if his only communication partner was a Parent. T201. Ms. Brock has not observed the

Student since February 2020, however, and has never provided services to the Student, other than in assessing him. Additionally, Ms. Brock did not speak with Ms. Spencer about the Student. T193-94; T203. Accordingly, I give more weight to the testimony of Ms. Spencer because she worked with the Student in person and remotely.

June 2020 IEP Meeting

53. On June 5, 2020, the District sent the Parents an invitation to a meeting on June 17, 2020, to develop an ESY program for the Student. J13p1. The District also prepared a second invitation to a meeting to take place on June 16, 2020, to discuss the Student's transition services, annual goal progress, and behavioral intervention plan, to review his current IEP and instructional needs, to determine his placement, and to develop ESY. J13p11. The "Date Sent to Participants" field on the second invitation is blank. Neither party elicited any testimony as to whether the District sent the second invitation or whether the Parents received it. The Father testified that he believed ESY would be the focus of the IEP meeting. Considering this evidence collectively, I find that the District provided the Parents with the invitation on Exhibit J13 page 1, which explicitly states it was sent on June 5, 2020, but did not provide the Parents with the second invitation on Exhibit J13 page 2, which does not contain a sent date. This is consistent with the Father's testimony that he believed ESY would be the focus of the meeting.

54. The Student's IEP team met on June 16, 2020¹⁸ (June 16 meeting). J13; T621. The team discussed and adopted an age-appropriate transition plan for the Student, which was recommended by Ms. Keyser.¹⁹ J13pp40-42, 50; T51, 709, 771. This type of plan prepares students for postsecondary success. T39-40. It is important for students who are nearing the age of 16 to have this type of plan in place to ensure a successful transition to postsecondary life. T40. According to the Father, Ms. Keyser had intended to discuss this type of plan earlier but had forgotten to do so. T771.

55. The team also discussed the Student's transition from 49th Street to HMS. On March 13, 2020, the Student had been one day away from spending three hours a day at HMS. The team decided that when the Student returned to in-person services for ESY, he would start at three hours per day in the District. T427. They discussed that if the Student successfully completed ESY, he would spend four hours a day at HHS when he started in the fall, with the remainder of his time at 49th Street. T427-28.

¹⁸ The record contains conflicting evidence as to whether the IEP meeting occurred on June 16 or June 17, 2020. The first invitation refers to June 17, 2020. J13p1. The second invitation refers to June 16, 2020. J13p11. Ms. Dean believed the meeting occurred on June 17, 2020, but did not appear certain. T621. Because the District issued two PWNs, both dated June 16, 2020, and because the Parents filed their second due process complaint on June 17, 2020, I find that the meeting occurred on June 16, 2020. J13p6; J13p50.

¹⁹ This order uses the phrase "transition plan" to refer to the plan to transition the Student from 49th Street to HMS, and uses the phrase "age appropriate transition plan" to refer to a plan to prepare the Student for postsecondary success as discussed in WAC 392-172A-03090(k)(i).

During the meeting, the Parents discussed that they wanted the Student to be at Hockinson High School (HHS) full-time when he started the 2020-2021 school year. T53. The team decided, however, to continue with the transition plan.

56. The team also reviewed the proposed IEP (June IEP amendment). The general education teacher report in the IEP amendment noted that the Student's FBA identified crowds, transitions, seeing a peer, and less structured activities as some of the triggers for his behaviors. Those triggers had been reduced in the Student's placement at 49th Street, where the Student demonstrated "a significant reduction in the identified behaviors of running away and initiating physical contact/aggression with others. Based on this behavior reduction it is recommended that [the Student] begin a transition back to his neighborhood school. The transition should include a[n] awareness of [the Student's] previous triggers and with these in mind an integration paced to meet his behavioral needs." J13p18.

57. The June IEP amendment provided one-to-one assistance throughout the Student's day for a total of 1,695 minutes per week. J13p46. It provided that an RBT would provide 180 minutes per day, 5 times per week, and a staff assistant would provide 159 minutes, 5 times per week. J13p47, T678-79.

58. During the hearing, it became clear that the parties had different understandings about the Student's one-to-one services. The Father testified that the Parents believed the Student was receiving support from an RBT throughout his day under the transition plan. In Ms. Dean's view, however, the transition plan provided that the Student would get support from an RBT only when he was at HMS, and would get support from a para educator at 49th Street. This meant that as his time at HMS increased, the amount of RBT support increased as well. T743-44. This is what the team had done in practice by providing an RBT for one hour when the Student started at HMS, then increasing it to two hours when his hours at HMS increased to two. T746-47. Accordingly, the proposal that the Student would receive one-to-one assistance from an RBT for 180 minutes per day 5 times weekly reflected that he was going to be spending three hours at HHS when he started ESY. T679-80, 746-47; J13p48.

59. The District also proposed related services from a behavioral analyst supervised by a BCBA. The team determined that it would increase those services from 20 minutes monthly to 45 minutes weekly. J13p6, 50.

60. The team also continued its discussion of the Student's ESY program from the April 23 meeting. The team discussed that the Student qualified for ESY because he had emerging skills that he needed to continue working on during the summer. T49, 293. During the hearing, Ms. Keyser acknowledged that the PWN sent after the June 16 meeting (Exhibit J13 pp6 and 7) refers to the Student demonstrating regression following breaks from school, rather than emerging skills, as the basis for ESY. She explained that this is usually the basis for ESY and that she "probably just auto-piloted that one." T446-47. Ms. Keyser credibly testified, however, that she was certain that emerging skills was the basis for the Student's qualification for ESY. T448; 464. Ms. Dean agreed that the Student required

ESY to continue development of emerging skills related to behavior and the transition that was in process. T620.

61. In Ms. Spencer's view, the Student did not qualify for ESY services in SLP because he did not demonstrate regression in communication skills after extended breaks. Ms. Spencer also considered whether the Student had emerging skills that required ESY, but determined that the Student was continuing to make progress in building upon social communication skills he had already developed. T404. Mr. Haverkamp did not believe the Student showed regression of skills; he was making steady progress and maintained skills over breaks. T365-66. Whether the Student had emerging skills was more difficult for him to state definitely because the Student was not fully consistent on putting a pop-on container on a lid. T366. Ultimately, Mr. Haverkamp did not testify during the hearing that he believed the Student showed a need for ESY. T365-66.

62. The team also discussed the Student's ESY services and the duration of those services. T559; T47. Team members agreed the Student needed ESY for more than a two-week period, which was the duration of the standard District program. T47. This would give the Student additional time to transition to the high school setting from the middle school setting. T49-50. The team also determined that a four-week ESY program provided sufficient ESY services to meet the Student's needs, and that the Student did not require ESY services for the entire summer. T49, 79, 339-40; J13p6.

63. During the hearing, the Father testified that the Student's family needed to travel out of state to care for other family members during August and hoped that the timing of the Student's ESY program could be tailored to that need. T794. When the Student's ESY program was proposed, however, Ms. Dean was not aware that the family would be out of town in August. T686-87. Although the Parents pointed to an email to Ms. Dean indicating they would be away, the email was sent after the ESY program had ended. T624, 625-26; D28p4. Considering the evidence in the record as a whole, I find that the IEP team was not aware, at the June 16 meeting, that the Parents wanted the District to tailor the ESY program to their need to be away in August.

64. The team also discussed the preference for the Student to receive services in person. T448. The District began offering in-person services to some special education students during its ESY program in July 2020. T611. Ultimately, the District offered the Parents a four-week ESY program at HHS for three hours each day starting on July 20, 2020. The Student would be able to attend in person and would have support from an RBT throughout the day provided by District staff. T621; 758-59; J13p6.

65. During the June 16 meeting, Ms. Dean told the Parents that the District was planning to change the Student's ABA provider. The Parents told the team they wanted DBS to continue to provide the Student's ABA support because those supports were in place and working well. J13p6. T619, 775. The District had hired its own BCBA and RBTs, and decided to use them to serve the Student. J13p6; T629. The Father felt like the District had already determined what services the Student would receive, that they would not be provided by DBS, and that there was no room for discussion. T775-76, 792.

66. On June 16, 2020, the District issued two PWNs proposing to initiate the Student's ESY program and to amend the Student's IEP. J13p6; J13p50. The PWN concerning ESY reflected that the Parents wanted DBS to continue providing the Student's ABA support and their belief that this was necessary for the Student's success. J13p6. The PWN concerning an amendment to the Student's IEP noted that the team had completed an age-appropriate transition plan. It also documented the Parents' continued concerns about the Student's placement at 49th Street and the team's decision to continue following the transition plan. J13p50. The PWN discussed the team's proposal to "increase BCBA time from 20 minutes monthly to 45 minutes weekly," but did not specify that ABA support would no longer be provided by DBS. The PWN did not specify the change to the Student's RBT minutes, but stated that more information could be found in the LRE tab. J13p48. The LRE tab provided: "During the transition, [the Student] has been supported by a para while receiving services from [49th Street] and an RBT while receiving services from [the District.] When in-person services resume (ESY) [the Student] will start at 3 hours at [HHS], a BCBA will supervise a minimum of 5% of time RBT works with [the Student.]" J13p48.

The Student's Progress during the 2019-2020 School Year

67. On June 16, 2020, the District issued a progress report amendment reflecting the Student's progress in March and June 2020. D21p1. The Student was making progress on all of his goals, with a marking of "SP" for sufficient progress, or "PM." T323; D21pp1-15. The notation "PM" meant that the Student was still making progress, but that it was hampered by new circumstances presented by the pandemic. T277, 316, 319.

68. The Student was making sufficient progress toward his math, reading, reading comprehension, written language, fine motor, and communication goals. D21pp6-15; T319-23.

69. Ms. Keyser used the PM notation with respect to the Student's adaptive and behavior goals because it was more difficult to measure progress in these areas than in academic areas. T285-86; 437. She could not take data on her own because the Student was in a different environment. Ms. Keyser did not ask the Parents to collect data, but considered their feedback. T286, 317-18. She considered this feedback in determining that the Student was making progress. T317-19.

70. For example, Ms. Keyser used the PM notation for the Student's "Independent Routines" goal because it was difficult to collect data on this goal during remote instruction. T279. When the Student attended school in person, he had routines for the morning, lunch, and the end of the day. During remote learning, Ms. Keyser adapted those routines to his home environment, but she was not there to observe and collect data and did not feel comfortable reporting. T278-79. Other goals needed to be adapted for home, such as the Student's "Responding to Cues" goal, which required the Student's participation in a group led by a teacher. D21p2; T280-81.

Unilateral Placement at DBS for ESY

71. The Parents did not agree with the District's proposed ESY program. T741; P1; D27. On June 29, 2020, they notified the District of their intent to unilaterally place the Student at DBS during the summer of 2020, and to seek reimbursement from the District.²⁰ P1p1. The Parents asserted that the District was refusing to implement the transition plan to return the Student to HHS full time, was not offering an individualized ESY plan, and was not offering the Student the supplementary aids and services he required to access his least restrictive environment (LRE). P1p1; D27p1. The Parents were concerned that the District was seeking to have the Student's services provided by staff assistants who did not have any experience working with him, rather than DBS. P1p1.

72. During the hearing, the Father explained that when the District informed the Parents that DBS would not be providing behavioral supports during ESY, the Parents were concerned to the point that they did not want him to go to ESY "with new supports and new faces and everything else." T777. They were concerned that these new supports would not work and would lead to behavior regression. They feared that as a result, the Student would be removed from his community school again. T777.

73. In the notice of unilateral placement, the Parents expressed their belief that the Student required both SLP and OT services during ESY, and identified specific providers, including Ms. Brock, that they were seeking to have serve the Student. P1p1.

74. On July 7, 2020, the District denied the Parents' request for reimbursement, emphasizing that it had offered an appropriate placement and was "ready, willing, and able to provide an appropriate program and services both for transitioning the Student back to [the District] as well as for ESY." D27p1.

75. The District also contended in its response to the Parents that when the IEP team met on June 16, 2020, it "identified appropriate goals and services based on the individual needs of the Student. The team determined that the Student required 900 minutes per week for four weeks of services in the areas of behavioral skills, adaptive skills, math, reading, and written services. The team also determined that the Student would receive related services from the BCBA for 45 minutes a week as well as 1:1 assistance from an RBT for 180 minutes, five times per week. . . . All of these services would be provided at [HHS]. The IEP team determined that the services and minutes provided in the ESY plan were fully appropriate for the Student's individual needs." D27p1.

76. The District further responded:

Although the Parents sought services to be provided by DBS at DBS, the team determined that the Student would most benefit from in-person services at the District. As the District has already hired a BCBA and is presently training RBTs to serve the

²⁰ The Parents did not admit any evidence about the costs of the DBS ESY services.

Student, there is no need for the District to contract with an outside provider. The District intends to have a contracted BCBA through DBS and the District BCBA overlap during ESY. This dual support during ESY will allow for a fluid introduction of the Student to new staff under the direction of previous staff. Further, data from previous ESY services demonstrated that the Student's needs would be met with the four-week program offered. It is also hoped that the Student's successful completion of the ESY program at [HHS] will allow him to begin his Transition Plan with four hours at [HHS] in Fall 2020. D27pp1-2.

77. Because the Student has goals that directly target speech and language and communication skills, Ms. Brock believed the Student required that an SLP be directly involved in his ESY program. T190. I give more weight to Ms. Spencer's testimony that the Student did not require SLP services during ESY because she worked with the Student throughout the 2019-2020 school year, in contrast to Ms. Brock, who has never worked directly with the Student and has not observed him since February 2020.

Events Leading Up to the 2020-2021 School Year

78. On August 7, 2020, the Parents inquired how the District planned to provide the Student with access to typically developing peers following the District's announcement that it was starting the 2020-2021 school year by offering remote instruction only. P3pp1-2. The District determined that certain special education students would begin the 2020-2021 school year in person. T611.

79. On August 13, 2020, Ms. Dean emailed the Parents to discuss potential service options as a starting point for a team discussion. Ms. Dean hoped to discuss these at an IEP meeting, but the Parents were out of town caring for family and were not available to meet. The options included having the Student 1) spend part of his day at HHS and part of his day at 49th Street, with the caveat that in-person access to 49th Street was limited to 1.5 hours per day; 2) spend all of his day, in person, at HHS; 3) participate in remote learning full time; and 4) a combination of the foregoing. D28p5; T696-98. During the hearing, Ms. Dean testified that she believed the Parents would choose for the Student to spend all of his day in person at HHS. T679. She acknowledged, however, that her email to the Parents setting out the possible options did not expressly state that the Student would have an RBT with him throughout his day at HHS. T743.

80. On August 21, 2020, Ms. Dean contacted the Parents to request an IEP meeting as soon as possible to discuss options for possible locations to provide the Student's services. She discussed that the Student's IEP and transition plan currently indicated he would spend 0% of his time in the general education setting. She further discussed that the "District, in alignment with the Governor's and Washington State Department of Health recommendations, will be providing all general education through remote instruction. Based on this instructional modality, the District will not have general education students in the school. For these reasons articulated, [the Student] will not have access to general education peers at the start of the school year." P4p1. The Parents were very concerned that

the Student would not have access to general education peers and provided research materials and the private provider reports from Dr. Enns and Ms. Brock discussing the importance of such access. P4pp1-2.

81. The District did not hold an IEP team meeting prior to the start of the 2020-2021 school year because the Parents were unavailable to meet. T697.

The 2020-2021 School Year

82. The Student started the 2020-2021 school year on September 2, 2020. D28p10; T742. He started his day in person at 49th Street from 8:00 a.m. until 9:30 a.m. He then transitioned to the HHS campus for the remainder of the day, but spent part of his time at HHS accessing his education with 49th Street remotely. J28p10; T31, 79, 175, 300. An RBT worked with the Student throughout his time at HHS, even when he engaged in online learning with 49th Street. T80, 175.

83. Ms. Ruby was the Student's case manager and was responsible for overseeing his educational program. T32; 45.

84. Starting on his first day at HHS, the Student worked with Jessica Barkley,²¹ a BCBA hired by the District in September 2020. T155. Ms. Barkley assisted in the classroom and worked with the Student directly if behaviors of concern arose. She taught strategies to prevent such behaviors. T156. Ms. Barkley also observed the Student when he was receiving educational services remotely from 49th Street. T157. In Ms. Barkley's opinion, the Student required one-to-one teaching staff next to him. T162.

85. Ms. Barkley helped the Student to work on peer interactions and appropriate behaviors when he had an opportunity for conversation. T164. She believed this work was important because the Student had had difficulties with peer interactions in the past, and improving these behaviors increased his likelihood of becoming more independent and successful in interacting with others. T165-66.

86. Both Ms. Ruby and Ms. Barkley believed the Student's transition to HHS at the start of the school year went very well. T80; 168. Ms. Ruby anticipated seeing minor behavioral issues because "[i]t was a change. It was a different setting, different environment for him. I'm really proud of the work that he did and his transition into [HHS]." T80, 594.

87. On his first day of school, the Student had one instance where he ran upstairs to the upper gym and wanted to play chase. He was redirected and easily transitioned. On the second day of school, the Student made four inappropriate comments, engaged in spitting, property destruction, throwing his

²¹ Ms. Barkley has a bachelor's degree in psychology and a master's degree in education with an emphasis on autism. She became a BCBA in 2018, and has worked as a BCBA in both private and school settings. T171.

head phones and water bottle at others, pushed his RBT against the bench in the break room, thrust himself toward her and hit her on the bottom. P5p2; T580.

88. The Parents did not believe the school year was starting well. 780. They were very concerned because the Student had not engaged in this type of behavior before. P5p1. They worried that District staff did not have the skills to ensure the Student's successful transition back to HHS. P7p1. The Parents opined that the obvious change was that the District had substituted its own staff for DBS staff, and requested an IEP meeting to address the issue with Ms. Schwartz and Dr. Enns present. P5p1; P7p1.

89. In September, Ms. Barkley was supervising the Student's RBTs more than 5 percent of the time. T157-58. She spent more time in order to get to know the Student and build rapport with him. T159. From September until mid-way through October 2020, Ms. Barkley was the only BCBA providing services to the Student. T157.

90. By the second week of the 2020-2021 school year, the Student's behaviors were decreasing as he became used to his environment, the people, and the expectations. T210.

91. Ms. Bisconer started providing SLP services to the Student at the start of the 2020-2021 school year. She started by providing services remotely, and worked on the Student's IEP goals. At the start of the year, the Student was at 61 percent on his communication goal and had maintained his skills. T478.

92. On September 15, 2020, the undersigned ALJ issued an amended order on stay put. It provided in relevant part that the Student:

shall commence the 2020-2021 school year at HHS in person for the full school day and shall receive all the special education and related services set forth in the December 2019 IEP as amended by the transition plan. As set forth above, this requires that the Student receive support throughout his school day from an RBT under the supervision of a BCBA.

Amended Stay Put Order, September 15, 2020, Conclusions of Law 10.

93. On September 24, 2020, the Student threw an activity box, knocking off Ms. Ruby's glasses. He then ran to the courtyard. T582-84; D32p3.

94. The Student's IEP team met on October 5, 2020. J14p1. Ms. Ruby and Ms. Barkley discussed that the Student had been "doing great," and was requesting breaks more and more frequently. The Student had engaged in some "low level eloping." The team discussed that Ms. Schwartz would be overseeing the Student's program in the future. She would coordinate with Ms. Barkley, who would oversee the Student's RBTs. J15p24.

95. Ms. Schwartz started working with the Student at school in early October 2020. J15p24. At that point, the Student had completely transitioned to HHS, and was being served by HHS staff and Ms. Schwartz. T596. Ms. Schwartz collaborated with Ms. Ruby and Ms. Barkley, and went to HHS two times per week. T526. Ms. Barkley supervised the Student's RBTs. T526. In the Parents' view, the Student's behaviors improved when Ms. Schwartz started working with him again. T780.

96. Since October 2020, Ms. Schwartz has worked with the Student at home for two hours per week, and an RBT has worked with the Student at home for ten hours per week. Ms. Schwartz supervises the RBT for two of those hours. T527, 554-55, 779-80. The Parents' insurance covered this cost. T762, 778.

97. In early November, the Student started attending wood shop at HHS two days per week. A typically developing peer also attends that class with him, and other general education peers are starting to participate via Zoom. T222; 225.

98. Overall, the District was very pleased with the Student's behavior at HHS. D32p1. The Student's interactions with his peers have been positive, and he has done very well at HHS. T167, 210. Ms. Schwartz also believed that the Student was doing well at HHS. T545. The Student has adapted well to the new setting and routines and has shown few behaviors of concern. T168. He has not shown any regression in his behavior and is doing well academically. T575. He mastered his adaptive and behavior goals, which focused on following routines, responding to cues, and requesting a break. T551-52, 577; D30p4. He was close to meeting his "task completion with transition" goal. T552, 578; D30pp4-5. He met his reading goals and writing goal, and made progress toward his math goal. T578-79; D30pp507.

99. The District has not offered the Student any compensatory services for the time period during which he received only remote services because it believes he made adequate progress during that time. T142, 630.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Because the Parents are seeking relief, they bear the burden of proof in this case. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof to resolve a dispute in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981); *Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 4, 256 P.3d 339 (2011). Therefore, the Parents' burden of proof in this matter is preponderance of the evidence.

The IDEA and FAPE

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

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

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

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

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

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

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

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

7. The Ninth Circuit has explained the *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 . . . taking into account the progress of his non-disabled peers, and the child’s potential.

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

ISSUES AND REMEDIES

Age-Appropriate Transition Plan

8. The Parents’ first claim is that the District failed to comply with requirements of the IDEA and denied the Student a FAPE by failing to include an age-appropriate transition plan in the Student’s IEP from December 20, 2019, to June 19, 2020 (Issue a.i.).

9. Under WAC 392-172A-03090(k):

Beginning not later than the first IEP to be in effect when the student turns sixteen, or younger if determined appropriate by the IEP team, and updated annually, thereafter, the IEP must include:

(i) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and

(ii) The transition services including courses of study needed to assist the student in reaching those goals.

10. Because the Student is [REDACTED], the District was not required to include an age-appropriate transition plan in his IEP unless the IEP team determined one was appropriate. There is no testimony in the record that any IEP team member recommended an age appropriate transition plan during the December 2019 meeting, or that the team determined one was appropriate.

11. When Ms. Keyser recommended amending the Student's IEP at the June 16 meeting to include an age-appropriate transition plan, the team agreed to do so. There is no testimony in the record to demonstrate any prejudice to the Student because this plan was adopted in June 2020, rather than December 2019. Based on this evidence, the Parents have not met their burden to show that the District violated the IDEA and denied the Student FAPE by failing to adopt an age-appropriate transition plan between December 20, 2019, and June 19, 2020.

Request for IEP Meeting

12. The Parents claim that the District violated the IDEA and denied the Student a FAPE by failing to timely hold or offer an IEP team meeting for the Student between March 16, 2020, and April 23, 2020 to review reports from an IEE of the Student conducted at public expense,²² and by failing to hold or offer an IEP team meeting during that timeframe in response to the Parents' request for one. (Issue a.ii.)

13. Under WAC 392-172A-05005, parents of a student eligible for special education have the right to obtain an IEE of the student if the parent disagrees with the school district's evaluation. If a parent requests an IEE at public expense, the school district must either initiate a due process hearing within fifteen days to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense without unnecessary delay. WAC 392-172A-05005(2)(c). If a parent obtains an IEE at public or private expense that meets applicable criteria, the district must consider the results of the evaluation. WAC 392-172A-05005(5)(a).

14. Although the IDEA does not define the term "unnecessary delay," the Office of Special Education Programs (OSEP) has explained that the term allows for "a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE." *Letter to Anonymous*, 56 IDELR 175, 111 LPR 13073 (OSEP 2010). The determination of whether there has been unnecessary delay depends on the facts of each particular case. *J.P. v. Ripon Unified Sch. Dist.*, 52 IDELR 125, 109 LRP 22025 (E.D. Cal. 2009).

²² The Parents' prior due process hearing request (Cause No. 2020-OSPI-0008) alleged that the District violated the IDEA and denied the Student a FAPE by failing to timely complete an IEE at public expense. Although the Parents raised a similar claim in this matter, the District did not file a motion to dismiss and it remained part of the issue statement. To the extent that principles of res judicata or collateral estoppel might apply in this case, neither party has briefed that issue and it is not addressed.

15. The Parents contend that the District unnecessarily delayed the completion and consideration of the private provider reports they obtained as part of an IEE.²³ They assert that the District did not meet until four months after it received the first private provider report. With the exception of the DBS report, however, the Parents did not elicit any testimony to establish when the private provider reports were sent to or received by the District. The evidence establishes that Ms. Dean did not receive the report from DBS until April 21, 2020. It is reasonable that the District would wait until it had all of the assessments that were part of the IEE before it conducted its review of the evaluation. Ms. Dean received the “final piece of the IEE” on April 21, 2020, and the meeting was held on April 23, 2020. Therefore, the Parents have not shown by a preponderance of the evidence that the District violated the requirements of the IDEA or WAC 392-172A-05005.

16. The Parents also argue that the District failed to convene or offer an IEP meeting until April 23, 2020, despite their request for a meeting on or about March 18, 2020. They point to WAC 392-172A-05001(1)(a), which provides that “parents of a student eligible for special education must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, educational placement and the provision of FAPE to the Student.”

17. The evidence establishes that the Parents requested an IEP meeting on or about March 18, 2020, to discuss the Student’s services during the pandemic. Ms. Dean responded to the request on March 25, 2020, approximately one week after it was made. At that time, special education staff were busy providing progress updates and resources for families to maintain skills during spring break. This evidence does not establish that Ms. Dean’s response to the Parents’ request for an IEP meeting was unduly delayed.

18. Further, when Ms. Dean responded, she made clear to the Parents that the District could meet on or after April 8, 2020. Although the Parents contended that the need to meet was urgent enough that the District should require its staff and Evergreen staff to meet during spring break, the Parents did not provide their availability to meet until April 15, 2020. At that point, the meeting was scheduled for April 23, 2020. Based on this evidence, the Parents share responsibility for the meeting being held on April 23, 2020, rather than the week of April 8, 2020.

19. The District argues that even if the delay in holding the IEP meeting violated the procedural requirements of the IDEA, there is no evidence of harm to the Student. The Parents argue that they were precluded from contributing to the plan for serving the Student during the closure due to the delay. The evidence does not support the Parents’ assertion. Although the District issued the April 8 PWN without first holding an IEP meeting, the District held an IEP meeting on April 23, 2020. During that meeting, the Parents did not raise any concerns about the Student’s services during the closure, other than to request that the Student receive in-person support from an RBT. Additionally, the Parents did not raise any concerns about the plan to serve the Student during the closure after they received the April 8 PWN, which set out the Student’s services in detail. Considering the evidence as a whole,

²³ These are the reports from Dr. Enns, Ms. Brock, Advanced Pediatrics, DBS, and Pediatric Therapy Associates.

the Parents have not established that the District's failure to hold an IEP meeting prior to April 23, 2020, impeded the Student's right to a FAPE, significantly impeded their right to participation, or deprived the Student of educational benefit. WAC 392-172A-05105(2).

Educational Services Between March 16, 2020 and June 19, 2020

20. The Parents raise several claims related to the District's provision of educational services to the Student between March 16, 2020, and June 19, 2020. They claim that the District violated the IDEA and denied the Student a FAPE by failing to offer the Student any educational services from March 16, 2020, until mid to late April of 2020. (Issue a.iii). They also claim that the District failed to offer the Student all of the SDI, related services, and supplementary aides and services provided by his December IEP as amended by the transition plan. (Issue a.iv).

Applicable Law

21. The District was ordered to stop all in-person educational programs on March 13, 2020, by proclamation from the Governor of Washington State. Governor Proclamation 20-08, 20-09. The U.S. Department of Education (DOE) Office of Special Education and Rehabilitative Services (OSERS) issued guidance that same day stating,

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

OSERS, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak* (March 2020) at p. 2.

22. The Washington Office of Superintendent of Public Instruction also issued guidance stating, "There remains an expectation that individualized education program (IEP) services will be delivered to the maximum extent possible during the pandemic while adjusting delivery methods to comply with state and local health/safety restrictions." OSPI, *Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in the 2020-21 School Year* (originally released 3/24/20, last updated 1/13/21), Question A-1. This guidance further recognized that there have been no changes made to the IDEA or its implementing regulations, thus, school districts are not relieved of their obligation to comply with those laws. *Id.*

Services From March 16, 2020, through April 6, 2020

23. Under the guidance from OSERS, the District was required to provide special education services to the Student when it was providing educational services to other students. Here, the District provided educational services to other students from April 8, 2020, through June 19, 2020. Accordingly, the District was required to start providing special education services to the Student on April 8, 2020.

24. Therefore, the District's failure to provide the Student with any services between March 16, 2020 and April 8, 2020, did not violate the IDEA because the District was not providing services to any students during that time period.

Services From April 6, 2020 through June 19, 2020

25. The Student started remote instruction with Ms. Keyser on April 6, 2020, and started remote instruction with Ms. Ruby on April 8, 2020, and continued through June 19, 2020.

26. The Parents' closing brief contends that 49th Street did not start providing remote instruction until April 27, 2020. PB17. They argue that Evergreen "started providing remote instruction and take-home packets on April 27, 2020. D-1." PB17. This information does not appear anywhere in Exhibit D-1. Moreover, Ms. Keyser, Ms. Spencer, and Mr. Haverkamp credibly testified that they started providing remote instruction to the Student on April 6, 2020. The Parents had an opportunity to challenge that testimony or to explore inconsistencies on cross-examination, but did not do so. As a result, I rely on the credible and unchallenged testimony of Ms. Keyser, Ms. Spencer, and Mr. Haverkamp.

27. Between April 6, 2020, and June 19, 2020, the Student received services in accordance with the April 8 PWN. At issue is whether the District's services to the Student satisfied its obligation to implement the Student's IEP, and if not, whether any failure to implement the IEP was a material failure. See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007).

28. The Parents contend that the District did not provide the Student with one-to-one assistance between March 16, 2020, and June 19, 2020, as set forth in the December IEP as amended by the transition plan. They also contend there was a significant difference between the supports and services provided by the December IEP as amended by the transition plan, and the supports and services provided by the April 8 PWN.

29. The December IEP as amended by the transition plan called for the Student to receive 1,695 minutes of one-to-one assistance per week. It is clear from the record that the District did not provide the Student with any one-to-one assistance between April 6, 2020, and June 19, 2020. It is also clear that the Student could not engage in remote learning on his own because he required assistance to

log in and to engage in online activities. The Mother provided assistance to the Student on most days, and the Father provided assistance occasionally.

30. The Parents also claim that the Student's services were significantly reduced by the April 8 PWN. Ms. Dean acknowledged that while the District had done its best to replicate the services in the Student's December IEP as amended by the transition plan, it was not possible to provide services during the pandemic that were identical to the services the District had previously provided.

31. With respect to both SLP and OT services, with the exception of fine motor, the December IEP as amended by the transition plan and the April 8 PWN provided the same number of minutes – 25 minutes of OT and 30 minutes of communication.

32. On March 21, 2020, OSERS offered guidance that addressed the role of online learning during the pandemic. OSERS, *Supplemental Fact Sheet: Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities*, (March 21, 2020). This guidance stated in relevant part:

To be clear: ensuring compliance with [the IDEA] . . . should not prevent any school from offering educational programs through distance instruction.

School districts must provide a free and appropriate public education (FAPE) consistent with the need to protect the health and safety of students with disabilities and those individuals providing education, specialized instruction, and related services to these students. . . . However, school districts must remember that the provision of FAPE may include, as appropriate, special education and related services provided through distance instruction provided virtually, online, or telephonically.

(*Id.* at pp. 1-2.) (Emphasis in original.)

33. Here, with the exception of fine motor, the District provided all of the Student's OT and SLP service minutes provided by the December IEP as amended by the transition plan, but in an online format, rather than in person. The provision of services in other areas is more complicated. Ms. Keyser met with the Student individually for 60 minutes each day, five times weekly, and provided him with remote instruction in various subjects during that time. The Student also met with Ms. Ruby for 60 minutes per day, three days weekly, for remote instruction in reading, math and writing, along with adaptive and transition skills. The Student also received 75 minutes weekly of remote instruction in adaptive and 75 minutes weekly of instruction in behavior from Ms. Schwartz. Collectively, the Student was receiving approximately 690 minutes of remote instruction weekly (300 minutes from Ms. Keyser; 180 minutes from Ms. Ruby, 150 minutes from Ms. Schwartz, 30 minutes Mr. Haverkamp and 30 minutes from Ms. Spencer).

34. Ms. Keyser worked hard to ensure the Student had access to all of the remaining minutes provided by the December IEP as amended by the transition plan, along with the materials and activities he needed, and staff available online to work with him. Similarly, Mr. Haverkamp worked hard to supply the Parents with materials to provide forty minutes of fine motor instruction at home and worked with the Parents on how to coach and interact with the Student on his fine motor activities. The Student could not, however, access any of those minutes without assistance from his Parents.

35. The District argues that its online program provided the Student an education program comparable to the December IEP as amended by the transition plan, and points to the Student's progress during remote instruction. The Parents emphasize that the Student could not have accessed his online learning and could not have engaged in much of his instruction without adult assistance.²⁴ They acknowledge that the Student made progress but argue that a student's IEP must be implemented in its entirety regardless.

36. In *Van Duyn*, the court addressed how a student's progress factors into the analysis, stating:

[W]e hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP. Because the parties debate whether [the student's] skills and behavior improved or deteriorated . . . we clarify that the materiality standard does not require that the child suffer demonstrable education harm in order to prevail. However, the child's education progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. For instance, if the child is not provided the reading instruction called for and there is a shortfall in the child's reading achievement, that would certainly tend to show that the failure to implement the IEP was material. On the other hand, if the child performed at or above the anticipated level, that would tend to show that the shortfall in instruction was not material.

502 F.3d at 822 (emphasis in original).

37. Applying the reasoning in *Van Duyn* to the facts of this case, it is clear the shortfall in instruction was material. *Id.*, at 822; see also *Los Angeles Unified School District*, 77 IDELR 116 (SEA CA August 24, 2020) (student's distance learning fell materially short of adequately implementing IEP because student received less than half of minutes provided by her IEP and none of the in-person support she required to make meaningful progress). While the Student received approximately 690 minutes of

²⁴ The Parents' closing brief contends that the District never held an IEP team meeting to eliminate the Student's fine motor services or to change them to a consulting model. The Parents' issue statement does not include this claim and their brief has not provided any argument as to why this claim should be considered despite not having been raised. *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS 37815 *15-16 (E.D. Cal. Mar. 7, 2019), *aff'd* 810 Fed. Appx. 588 (9th Cir. 2020); *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 *34-35, 37 (W.D. Wash. May 8, 2019). Accordingly, this claim is not addressed.

online instruction per week, this was less than half of the instruction called for in the Student's December IEP as amended by the transition plan. The Student had access to all of the minutes provided by his IEP and had staff available to assist him for all of those minutes, but his ability to access those minutes depended entirely on whether someone at his house was available to assist him. The District did not provide one-to-one assistance as required by the Student's IEP because it determined that it was not safe to do so. Additionally, while the Student did well with online learning and made progress toward his IEP goals, Ms. Keyser acknowledged that it was difficult for her to measure the Student's progress toward his behavioral and adaptive goals because she was unable to collect data on her own and because some goals could not be measured as written. She determined that the Student was making progress based on the feedback from the Parents. Considering this evidence collectively, the Parents have shown by a preponderance of the evidence that the District failed to provide all of the SDI, related services, and supplementary aids and services in the Student's December IEP as amended by the transition plan. In addition, they have shown that even when the Student's progress is considered, this was a material failure to fully implement the IEP that denied the Student a FAPE. *Id.*, 502 F.3d at 815. The Student's progress in specific areas is further considered below with respect to the appropriate compensatory education.

38. The District argues that the Colorado Department of Education recently determined that a district did not deny FAPE to a student during remote learning even though the district failed to fully implement the Student's IEP. *Denver Public Schools District 1*, 120 LRP 29273 (SEA CO 2020). In that case, however, the student missed out on 260 minutes of SDI, which is significantly less than the amount at issue here. Moreover, in this case, unlike in *Denver Public Schools*, the Student required, but did not receive, the one-to-one assistance he required to access his education. As such, the District's argument is unpersuasive.

The Transition Plan

39. The Parents next contend that the District refused to implement the Student's transition plan from March 16, 2020, to June 19, 2020. (Issue a.v.) They argue that the District's "unilateral determination that the Student would stop the transition" to HMS prevented the Student from transitioning into his LRE.

40. The District argues that because the IDEA does not address extended school closures resulting from emergencies such as the COVID-19 pandemic, it was appropriate for the District to provide services comparable to those provided by the transition plan. The District relies on provisions that apply to interstate transfer of a student, which require a new district to provide the transfer student with services comparable to those provided in their previous IEP. 34 CFR 300.323(f). The parties both rely on stay-put analysis, reaching opposite conclusions about the Student's stay-put placement under that standard. Neither of these analogies are correct. Rather, the relevant inquiry with respect to the implementation of the transition plan, which is a part of the Student's IEP, is whether it was adequately implemented under the *Van Duyn* standard, discussed above, and the standard set forth in *N. D. v. State Dep't of Educ.*, 600 F.3d 1104, 1117 (9th Cir. 2010) ("a school district's failure to provide the

number of minutes and type of instruction guaranteed in an IEP could support a claim of material failure to implement an IEP”). *Los Angeles Unified School District*, 77 IDELR 116 (SEA CA 2020).

41. The evidence here does not demonstrate that the District refused to implement the transition plan. Rather, it shows it implemented it as best as possible in the remote learning format. Teachers at both 49th Street and HMS were providing materially similar educational services to the Student under the same IEP. The transition plan existed to ensure the Student’s slow, steady, and successful transition to HHS. Throughout the online learning period, District staff worked with staff at 49th Street and Ms. Schwartz to build the Student’s connection to HMS, and to develop relationships and rapport. The Student was unable to attend either school physically, but was able to attend both schools remotely and to build rapport with staff in both locations. Finally, the evidence demonstrates that the Student has, in fact, transitioned to HHS successfully. Under the particular facts of this case, the Parents have not shown that this constitutes a material failure to implement the IEP’s transition plan that denied the Student a FAPE.

Claims Related to the June 16 IEP Amendment

42. Next, the Parents claim that the District violated the IDEA and denied the Student a FAPE by proposing an amendment to the Student’s IEP on June 16, 2020, that does not include an educational placement in the Student’s least restrictive environment (LRE) and that is not reasonably calculated to allow the Student to receive FAPE because it does not include the supplementary aids and services the Student needs to be able to access an educational placement in his LRE, specifically receiving ABA services from an RBT and/or CBT working under the supervision of a BCBA and/or LABA consistent with Chapter 182-531A of the Washington Administrative Code and the professional standards for ABA. (Issue a.vi.)

43. The Parents first contend the June IEP amendment is inappropriate because it reduced the Student’s support from an RBT.

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

45. The June IEP amendment proposed that the Student would receive one-to-one assistance throughout his day, for 1,695 minutes per week, which is consistent with the December IEP as amended by the transition plan, and with the Student’s needs.

46. The June IEP amendment further provided that the Student would receive 180 minutes per day, for a total of 900 minutes per week, of support from an RBT. It proposed that the remainder of his behavioral support would be provided by a staff assistant.

47. The Parents' claim that this constitutes a reduction in services provided by an RBT is premised on their belief that the transition plan provided the Student with support from an RBT at all times, both at HMS and at 49th Street. Based on the evidence in the record, however, I found that the transition plan provided the Student with an RBT only during his time in the District to ensure that he had the support he needed for a successful transition. The transition plan did not provide an RBT for the Student at 49th Street because the Student's behaviors there had already been addressed successfully with assistance from a para educator, and he did not show a need for an RBT. Consequently, the proposed amendment did not reduce the Student's RBT minutes, despite the Parents' belief that it did. Moreover, regardless of whether the transition plan required all of the Student's one-on-one to be provided by an RBT, it was not necessary for the June IEP amendment to provide support for the Student from an RBT during his time at 49th Street based on his needs at the time.

48. When the Student's IEP team met on June 16, 2020, the team believed the Student would attend ESY in the District for three hours each day. During the hearing, Ms. Dean credibly explained that the proposed IEP amendment reflected that the Student would be at HHS for three hours during ESY, and therefore needed 180 minutes of RBT support, which covered all of his time at HHS. Ms. Dean's explanation is consistent with how the District had provided support when it implemented the transition plan during February and March 2020. At that time, the District provided the Student with one-to-one assistance from an RBT only for all hours he spent at HMS. The minutes of RBT support increased as the Student's time at HMS increased.

49. Because the June IEP amendment provided the Student with support from an RBT for all of the hours he would be spending at HHS, and because the evidence demonstrates that one-to-one assistance from a staff assistant was sufficient to meet the Student's needs when he was at 49th Street, the Parents have not shown that the June IEP amendment was not reasonably calculated to enable the Student to make progress in light of his circumstances.

50. The Parents further contend that the June IEP amendment did not provide sufficient support from a BCBA, and provided less support from a BCBA than is permissible by law. PB29. First, this ALJ does not have authority over the issue of whether the amount of support from a BCBA satisfies legal requirements governing the practice of CBAs, and that issue is not addressed. See WAC 392-172A-05080. Additionally, the evidence establishes that the IEP team increased the support from a BCBA during the June IEP meeting from 20 minutes monthly to 45 minutes weekly. As the Parents acknowledge in their closing brief, this constitutes 5 percent of the 900 minutes of RBT support provided by the June IEP amendment. PB 29. This is consistent with the Behavior Analyst Certification Board Ethics Code, which requires 5 percent supervision of RBTs. The Parents argue that Ms. Barkley and Ms. Schwartz actually spent more time than 5 percent supervising the Student's RBTs. Because

Ms. Barkley did not start working with the Student until September 2020, however, the IEP team could not have been aware of this information at the June IEP meeting. Additionally, the Parents have not shown that when the team decided to increase the amount of BCBA time from 20 minutes monthly to 45 minutes weekly, that Ms. Schwartz or anyone else advised providing even more time. Finally, the Parents have not shown by a preponderance of the evidence that more than 45 minutes weekly was necessary in order for the Student to make progress in light of his circumstances.

51. The Parents also challenge the District's decision to use District personnel to provide the Student's ABA supports. First, it is important to note that the transition plan specifically recognized that the Student's services might be provided by someone other than DBS personnel and Ms. Schwartz. The transition plan "anticipated," but did not require, that DBS and Ms. Schwartz would serve the Student. Accordingly, to the extent that the Parents suggest that the District unilaterally changed the transition plan by proposing to have its own staff serve the Student, that claim is without merit. Additionally, although the record clearly demonstrates Ms. Schwartz's ability to work with the Student successfully, it does not establish that District personnel with the same credentials would not be able to serve the Student, or that it was necessary for Ms. Schwartz to work with the Student in order for him to receive a FAPE. Moreover, it is generally within a district's discretion to make staffing decisions. See *Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp. 2d 880, 885 (D. Minn. 2003) (school districts have prerogative to assign staff). "So long as qualified personnel are available, the [d]eterminations as to which personnel will provide services to a child eligible for services under [IDEA] are left to State and local educational authorities." *Letter to Williams*, 21 IDELR 73, 79 (OSEP 1994). To hold otherwise would be to grant a child's parent an absolute veto power over a School District's selection of competent service providers" *Moubry v. Independent Sch. Dist. No 696*, 27 IDELR 469, 27 LRP 4625 (D. Minn. 1997).

52. Based on a comprehensive review of the evidence, the Parents have not shown that the June IEP amendment was not reasonably calculated to enable the Student to make progress in light of his circumstances because it failed to provide him with the supplementary aids and services that he required.

53. The Parents also argue that the District failed to consider whether it was appropriate to resume the transition plan in the fall of 2020, despite it having been interrupted on March 16, 2020. They contend that the June IEP amendment failed to provide the Student a placement in his LRE.

54. The Ninth Circuit has developed a four-part test to determine whether a student's placement represents the least restrictive environment, as first set out in *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994).

We consider: (1) the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on

the teacher and other students; and (4) the cost of educating the student in a mainstream environment. . . . The first factor requires us to analyze the educational benefits available to the child in a regular classroom, supplemented with appropriate aids and services, as compared to the educational benefits of a special education classroom.

Ms. S. ex rel. G v. Vashon Island Sch. Dist., 337 F.3d 1115, 1137 (9th Cir. 2003) (Internal quotation marks omitted; citations omitted). “While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child’s IEP goals.” *City of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996).

55. The June IEP amendment provided that the Student would continue with the transition plan that the parties had developed in February 2020. The plan was developed after Ms. Keyser and staff at 49th Street successfully addressed the Student’s behaviors, which enabled him to return to District schools. When it was developed, the parties agreed that the transition plan was necessary to ensure the Student’s smooth transition from 49th Street to HMS. As the June IEP amendment discussed, it was important for the transition plan to “include a[n] awareness of [the Student’s] previous triggers and with these in mind an integration paced to meet his behavioral needs.” J13p18. The transition plan was working very well until the pandemic arrived.

56. By the time of the June IEP meeting, the Parents believed that the Student should be placed full-time at HHS. Relative to the first and second *Rachel H.* factors, which focus on the academic and nonacademic benefits of a placement at HHS with appropriate supports, the IEP team discussed the status of the Student’s transition from 49th Street to the District, and the Parents’ strong desire to see the Student return to HHS full-time with appropriate supports. When the closure occurred, the Student was one day away from spending three hours in the District. The team determined that it was appropriate for the Student to start his ESY program with three hours at HHS. The idea was that he would spend three hours in the District’s ESY program, and if he completed that successfully, he would spend four hours at HMS at the beginning of the 2020-2021 school year. The Parents made clear, however, that they wanted the Student to start full time at HHS. They believed that placement at 49th Street was overly restrictive and did not give him the benefits of attending school with and interacting with his typical peers. They also believed that appropriate supports were essential to ensure that the Student did not see regression in his behaviors, which could lead to his removal from District schools again.

57. Considering this evidence collectively, it is reasonable to conclude that the parties all still agreed with the ultimate goal of returning the Student to HHS, but disagreed as to the pace of transitioning him there. Although the Parents felt that it was appropriate for the Student to return to HHS full-time, it is clear from the record that the transition plan worked well during February and March 2020. Additionally, while the Parents point to the testimony of Dr. Enns and Ms. Brock to establish that a placement at 49th Street was overly restrictive for him, that testimony does not establish that it was necessary to abandon the gradual transition from 49th Street to HHS in order to meet the Student’s

needs. Despite the restrictive nature of 49th Street, the Student's behaviors were effectively addressed there and enabled his return to the District. The evidence does not establish that it was inappropriate or unreasonable to maintain a connection to 49th Street by continuing with the gradual transition plan.

58. The third *Rachel H.* factor focuses on the negative effects a student's behavior may have on the teacher and other students. The general education teacher report in the June IEP amendment discussed some of the triggers for the Student's behaviors, which included crowds, transitions, seeing a peer, and less structured activities. At 49th Street, the Student saw "a significant reduction in the identified behaviors of running away and initiating physical contact/aggression with others." These behaviors had the potential to negatively impact the teacher and other students. While the Parents believed that the Student could safely start full-time at HHS, the evidence establishes that the Student did, in fact, do well during the gradual transition to HMS during February and March. There is no evidence in the record related to the fourth *Rachel H.* factor.

59. Based on a consideration of the evidence in the record, and the *Rachel H.* factors, the Parents have not shown by a preponderance of the evidence that the June IEP amendment failed to offer the Student a placement in his LRE.

Meeting Invitation

60. The Parents next claim that the District failed to provide them with a written invitation to the June IEP team meeting that provided proper notice of all topics that would be discussed. (Issue a.viii.)

61. WAC 392-172A-03100 requires school districts to ensure that one or both parents of a student eligible for special education are present at each IEP team meeting or are afforded the opportunity to participate. See also WAC 392-172A-05001. A district must notify parents of the meeting early enough to ensure that they will have an opportunity to attend. The notice must indicate the purpose, time, and location of the meeting and who will attend. WAC 392-172A-03100(3)(a).

62. The evidence demonstrates that the District sent the Parents an invitation to an IEP meeting to discuss the Student's ESY program. The District did not, however, send an invitation notifying the Parents that additional topics would be discussed. The District's failure to send appropriate notice violates the procedural requirements of the IDEA and WACs 392-172A-03100 and -05001.

63. The District contends that even if the meeting invitation was deficient, the Parents have not shown any harm from the procedural violation. The Parents contend that they did not have a meaningful chance for participation because they were unaware of the meeting's purpose.

64. "Not all violations of IDEA's procedures . . . deny a student FAPE—they do so only if they `impeded the child's right to a [FAPE]; significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of [FAPE] . . . ; or caused a deprivation of

educational benefits.’ 20 U.S.C. §1415(f)(3)(E).” *Butte Sch. Dist. No. 1 v. C.S.*, 817 F. App’x 321, 325 (9th Cir. 2020); WAC 392-172A-05105(2).

65. The Parents did not introduce any evidence to establish that they had concerns they would have voiced at the meeting if they had received more appropriate notice. The Parents’ closing brief alleges that they did not have sufficient opportunity to participate in the development of the Student’s age-appropriate transition plan. During the hearing, however, the Parents elicited no testimony that they felt the plan the team adopted was inappropriate or that they requested time to provide additional input. Moreover, the Parents reliance on *Nauset Public Schools*, 116 LRP 12351 (SEA MA 2016) is misplaced because in that case the parents’ inability to participate resulted from the district’s failure to convene IEP team meetings at critical junctures in the student’s education. Here, the District held an IEP meeting, which the Parents attended. The Parents have not shown that the District’s failure to comply with WAC 392-172A-03100 and -05001 impeded the Student’s right to FAPE, significantly impeded their right to participate in the decision-making process, or caused a deprivation of educational benefits.

Prior Written Notice

66. The Parents also claim that the District failed to provide them with proper PWN of its intention to implement and reject actions discussed at the June IEP meeting. (Issue a.ix.).

67. A district must provide PWN to the parents of a child eligible or referred for special education before it proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE to the student, or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. WAC 392-172A-05010; 34 CFR 300.503(a). The notice must include:

- (a) A description of the action proposed or refused by the agency;
- (b) An explanation of why the agency proposes or refuses to take the action;
- (c) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (d) A statement that the parents of a student eligible or referred for special education have protection under the procedural safeguards and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (e) Sources for parents to contact to obtain assistance in understanding the procedural safeguards and the contents of the notice;
- (f) A description of other options that the IEP team considered and the reasons why those options were rejected; and
- (g) A description of other factors that are relevant to the agency’s proposal or refusal.

WAC 392-172A-05010.

68. Moreover, written notice must be provided “a reasonable time” prior to the effective date. WAC 392-172A-05010(1); 34 CFR §300.503(a); *Letter to Chandler*, 59 IDELR 110 (OSEP 2012).

69. The Parents contend that the District’s PWN following the June IEP meeting was deficient because the date for the proposed action was only two days after the meeting, and because it failed to explain why the District was decreasing behavioral supports from the transition plan, reducing the Student’s services, and switching ABA providers. PB42-43. The District contends that the PWN was appropriate, but that even if it was not, the Parents have not established any resultant harm.

70. The PWN did not explain why ABA support would no longer be provided by DBS and contained minimal discussion about the change in RBT minutes. It also proposed that the action would take place several days after the meeting. Even if the PWN does not strictly satisfy the requirements of WAC 392-172A-05010, the Parents have not established that any deficiency impeded the Student’s right to FAPE, significantly impeded their right to participate in the decision-making process, or caused a deprivation of educational benefits. The Parents have not met their burden with respect to this claim.

Claims Alleging Predetermination

71. The Parents raise several claims alleging that the District predetermined decisions concerning the Student. “[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives.” *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 F. Appx 342, 344 (9th Cir. 2007). Predetermination of a student’s placement is a procedural violation that can deprive a student of FAPE. According to the Ninth Circuit, a school district violates IDEA procedures “if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003). A school district may not enter an IEP meeting with a “take it or leave it” position, and if it does so, then even the parents’ decision not to cooperate thereafter may not excuse the district’s error.” *Id.*

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

73. The Parents first assert that the District predetermined what SDI, related services, and supplementary aids and services the Student would receive between March 16 and June 19, 2020, and that the Parents’ request for in-person services during that timeframe would not be considered. (Issue a.vii). The Parents argue that the District did not hold an IEP team meeting before it issued the April 8 PWN that set out the services the Student would receive during the closure, and did not provide an opportunity for the Parents to discuss concerns about the Student’s services during the April 23

meeting. The District asserts that it considered the Parents' request for in-person services by an RBT but determined that it could not safely accommodate this request.

74. It is undisputed that the District issued the April 8 PWN without first holding an IEP meeting to discuss the services that the Student would receive during the closure, and without providing the Parents an opportunity to participate in the decision as to what services would be provided. At the April 23 meeting, however, the Parents had an opportunity to voice concerns. At that point, they focused on their belief that the Student required in-person services from an RBT. Although most of the April 23 meeting was devoted to discussing the private provider reports, there is no evidence in the record that the Parents were not given an opportunity to discuss other concerns about the Student's services, or that they raised issues about the Student's services that the District refused to consider. The record demonstrates that the District considered the Parents' request for in-person services from an RBT. Ms. Dean contacted Ms. Myers and Ms. Schwartz to see what services they could provide. She consulted with the Clark County Health Department and OSPI. Ultimately, however, the team determined that the District could not safely provide in-person services. Although parental participation is paramount under the IDEA, "a district does not necessarily violate the IDEA if it refuses to implement a parent's requests, and a parent does not have `veto' power over IEP provisions." *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 *58 (W.D. Wash. May 8, 2019). "The IDEA does not require a school district to comply with every request a parent makes; rather, the district must `seriously consider' the parents' input and concerns. *K.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d 995, 1008 (N.D. Cal. 2008)." *L.C.* at *63.

75. The Parents have demonstrated that the District decided what services the Student would receive between April 6 and April 23, 2020, without the Parents' input. In order to prevail on their predetermination claim, however, the Parents must demonstrate that the District was unwilling to seriously consider their input. Here, the District attempted to obtain the Parents' input by seeking to schedule an IEP meeting on or after April 8, 2020. Because the Parents did not provide their availability to meet until April 15, 2020, the meeting could not be held until April 23, 2020. This does not establish that the District was unwilling to consider the Parents' input. To the contrary, it demonstrates that the District was attempting to obtain the Parents' input. Moreover, when the meeting was eventually held on April 23, 2020, the Parents had an opportunity to voice their concerns and the District considered those concerns. Therefore, the Parents have not established that the District engaged in predetermination. WAC 392-172A-05105(2). To the extent that the evidence establishes that the District engaged in predetermination for the two-day period from April 6 to April 8, 2020, the Parents have not established that this denied the Student a FAPE, deprived the Student of educational benefit, or significantly impeded their right to participation.

76. The Parents next claim that the District predetermined decisions about the Student's ESY services during the summer of 2020 concerning (a) the type, amount, duration and location for delivery of SDI, related services, and supplementary aids and services; (b) that the Parents' request for individualized ESY services would not be considered; and (c) that the District would remove the supplementary aids and services that the Student needs, specifically ABA services from an RBT

working under the supervision of a BCBA consistent with Chapter 182-531A of the Washington Administrative Code and the professional standards for ABA (Issue a.x.).

77. The Parents contend that an ESY IEP plan “was presented to the Parents as is,” and that it was clear there would be no discussion of the Student’s needs. T36. The evidence demonstrates that Ms. Keyser prepared an ESY plan for consideration at the April 23 meeting, but the team did not make any determination as to ESY because it was unclear whether the Student would be able to attend in person at that time. The team revisited the Student’s ESY services during the June 16 meeting. The team discussed the services that had been proposed in the draft and how many weeks of service the Student required. After deciding that two weeks of ESY would not be enough to meet the Student’s needs, the team decided on a four-week ESY program and concluded that the Student did not need ESY services for the duration of the summer. The Parents wanted the Student to receive in-person services, and the team considered this and ultimately offered in-person services at HHS with support from an RBT. This evidence does not establish that the District had made up its mind about the Student’s ESY program before the meeting. The fact that Ms. Keyser prepared a draft ahead of time does not establish that the District was unwilling to consider parental input. See *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx at 344. Similarly, the fact that Mr. Haverkamp was somewhat conflicted during the hearing as to whether the Student showed emerging skills does not demonstrate that District had already made up its mind or that the Parents raised concerns that the District refused to consider.

78. The Parents further contend in their closing brief that Ms. Dean was aware that the Student would be out of town in August and was unwilling to consider the need for individualized ESY services. The Parents have not shown, however, that the IEP team was aware that they would be away in August. Although the Parents pointed to an email discussing that they would be away, it was sent after ESY was over. Ms. Dean credibly testified that she was not aware that the Student would be out of town in August at the time of the June IEP meeting.

79. During the hearing, the Father testified that he felt that everything had already been predetermined. The record is clear, however, that the Parents did raise concerns, particularly about in person services, that were considered. Therefore, the Parents have not met their burden to show that the District predetermined the type, amount, duration and location for delivery of SDI, related services, and supplementary aids and services, or that the Parents’ made a request for individualized ESY services that the District refused to consider.

80. Similarly, the Parents have not shown by a preponderance of the evidence that the District predetermined that it would remove the ABA services the Student required. When Ms. Keyser prepared an initial ESY proposal for the Student, she anticipated that he would attend ESY at 49th Street and proposed one-to-one assistance from a staff assistant throughout his day. When the team determined that the Student would attend ESY at HHS, they also determined that he would have one-to-one assistance from an RBT throughout his day. This evidence does not establish that the District predetermined that it would remove the Student’s ABA support.

81. Although the Parents' issue statement did not allege that the District predetermined that it would change the Student's ABA provider, the Parents raise this issue in their closing brief. The Parents have not briefed why this issue should be considered, even though it was not raised. *A.W. v. Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS at *15-16 (E.D. Cal. Mar. 7, 2019); *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS at *34-35, 37. Even if the claim is considered, however, the record clearly demonstrates that the Parents voiced their concern that they wanted DBS to continue serving the Student, and that they felt the Student required services from DBS. The District disagreed and believed its own staff could meet the Student's needs. In its response to the Parents' notice of unilateral placement, the District indicated that it intended for the contracted BCBA and the District BCBA to overlap to facilitate the Student's introduction to new staff. "[A] district does not necessarily violate the IDEA if it refuses to implement a parent's requests, and a parent does not have 'veto' power over IEP provisions." *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 *58 (W.D. Wash. May 8, 2019). Although the District did not agree to keep DBS as the Student's service provider, the Parents have not established that the District failed to consider their concerns.

82. Lastly, the Parents claim that the District predetermined that the Student would not be allowed to start the 2020-2021 school year in his LRE. (Issue a.xi.) The Parents contend that the District predetermined that at the beginning of the 2020-2021 school year, the Student would spend no time in the general education setting, despite the District's knowledge that the Parents wanted the Student to be at HHS full time, that Dr. Enns considered 49th Street to be too restrictive for the Student, and that the parties had agreed to the 2020 transition plan to return the Student to the District. In the Parents' view, Ms. Dean predetermined that the Student would not have access to typical peers when she reported that District general education students would be attending school remotely, in accordance with recommendations from the Governor and the Washington State Health Department.

83. As discussed above, predetermination occurs when a District "has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx at 344. In that case, the school district had a plan to return the student to a public school placement, assumed at the IEP meeting that the student would be moved to that placement, and did not discuss alternative placements. The court held: "This establishes that the School District desired the student return to a public school and believed that its proposed placement was appropriate. It does not, however, necessarily establish that the School District was unwilling to consider other placements." *Id.*, at 345. In this case, Ms. Dean's email to the Parents requested an IEP meeting as soon as possible to discuss options for possible locations to provide the Student's services. The Parents were not available to meet, and never gave the District a chance to discuss options for starting the Student's school year, one of which included full-time at HHS. Further, there is no evidence in the record that the Parents ever sought to discuss alternative ideas for increasing the Student's access to typical peers, such as including them by videoconferencing, or that the District was unwilling to consider such options. Given that the Parents were unwilling to attend an IEP team meeting to discuss the Student's placement options, they have not met their burden to show that the District was unwilling to consider their input, which is the heart of any predetermination claim.

Summary of Violations

84. The District violated the IDEA and denied the Student FAPE by failing to provide the Student with all of the SDI, related services and supplementary aids and services in the Student's December IEP as amended by the transition plan (COL 37).

85. The Parents have not otherwise proven a denial of FAPE.

Remedies

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

87. Some of the relief the Parents requested is no longer necessary. Specifically, the final order in the Parents' previous due process matter, Cause No. 2020-OSPI-0008, ordered:

As a remedy, the District shall place the Student at HHS with one-to-one support by an RBT under the supervision of a BCBA throughout his school day for the duration of the 2020-2021 school year. COL 180. Ms. Schwartz, if available, shall serve as the Student's BCBA and oversee RBTs who work with the Student. COL 181.

Accordingly, there is no need to address the Parents' requests for an order concerning an appropriate placement for the Student or an order directing the District to provide ABA support in accordance with the transition plan.

88. The Parents have also requested an annual IEP for the 2020-2021 school year that includes a placement in the Student's LRE with the supplementary aids and services that the Student needs, specifically receiving ABA services from an RBT and/or CBT working under the supervision of a BCBA and/or LABA consistent with Chapter 182-531A of the Washington Administrative Code and the professional standards for ABA. The District may have already updated the Student's annual IEP to reflect the order in Cause No. 2020-OSPI-0008, which would satisfy this request. If it has not done so, the overwhelming evidence in the record establishes that the Student is doing very well and is making progress in his current placement at HHS, with support throughout his day from an RBT under the supervision of a BCBA. Accordingly, the District shall update the Student's annual IEP to include placement at HHS with one-to-one support by an RBT under the supervision of a BCBA throughout his school day.

89. In its March 2020 guidance, OSERS recognized that "[t]here may be exceptional circumstances that could affect how a particular service is provided" to a student during the pandemic, in which case, the Student's IEP team "would be required to make an individualized determination as to whether compensatory services are needed under applicable standards and requirements." OSERS, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus*

Disease 2019 Outbreak (March 2020), at p. 1. Because the District determined that compensatory education was not appropriate because the Student had made progress, the Parents ask the ALJ to provide compensatory education.

90. “Compensatory education is an equitable remedy that seeks to make up for ‘educational services the child should have received in the first place,’ and ‘aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA.” *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir 2011)(quoting *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005)). “Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra*, 401 F.3d at 524.

91. A hearing officer may fashion individualized relief for students seeking compensatory education, including reimbursement of appropriate services provided by the student’s parents. As noted in *R.P. v. Prescott*:

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

631 F.3d at 1126.

92. The Parents seek hour-for-hour compensation for all of the SDI and related services the Student did not receive between April 8, 2020 and June 19, 2020. Because an award of compensatory education serves to place a student in the same position they would have occupied but for the school district's violations of the IDEA, it is appropriate to consider the Student’s progress. The Student did very well with remote learning. With assistance from his Parents, particularly his Mother, he made progress toward all of his IEP goals. Given this progress, the District contends that an award of compensatory education would be inappropriate. A close look at the evidence, however, indicates that it was difficult for Ms. Keyser to measure the Student’s progress in the areas of adaptive and behavior. In these areas, Ms. Keyser was not present to collect data and did not ask the Parents to do so. Instead, she relied on their feedback. While she concluded that the Student was making progress, it was difficult for her to quantify that progress. Additionally, because the Student was at home, he was unable to work on building behavioral skills while interacting with other students. In sum, while the Student made some progress in adaptive and behavior, the evidence demonstrates that he did not make the same progress he would have made if his IEP had been fully implemented. This is evident

from the use of the notation “PM” on his progress report, which indicated “progress being made but hampered by new circumstances.” It is therefore appropriate to compensate the Parents for half of the SDI that was not provided in the areas of adaptive and behavior. Because the Student made sufficient progress in all other areas, compensatory education is not appropriate.

93. The Student missed out on 755 minutes per week of instruction in adaptive and behavior between April 8, 2020, and June 19, 2020.²⁵ Accordingly, the District shall provide the Student with 68 hours of SDI in adaptive and behavior, with support from an RBT supervised by a BCBA. The services will be delivered outside the regular school day by a certificated special education teacher at any time during the two calendar years following the date of this decision at the duration and frequency determined appropriate between the Parents and the District. The award is calculated as follows: $755 / 2 = 377.5$ minutes \times 10.5 weeks = 3963.75 minutes / 60 minutes per hour = 66.06, rounded up to 67 hours.

94. Additionally, while the Student received all of the communication SDI provided by the December IEP as amended by the transition plan, and made progress toward his communication goals, the Student was unable to work on social skills with other students. The record demonstrates that building social skills is critical to the Student’s success at HHS and afterwards. Accordingly, it is appropriate to award the Student one-third of the communication SDI provided by the December IEP as amended by the transition plan. The District shall provide the Student with 2 hours of SDI in communication by an SLP, with support from an RBT supervised by a BCBA. The services will be delivered outside the regular school day at any time during the two calendar years following the date of this decision at the duration and frequency determined appropriate between the Parents and the District. The award is calculated as follows: $30 / 3 = 10$ minutes \times 10.5 weeks = 105 minutes / 60 minutes per hour = 1.75, rounded up to 2 hours.

95. Although a compensatory award is sometimes reduced to account for the fact that students generally progress more rapidly with one-to-one instruction as opposed to instruction in a classroom, it is not appropriate to reduce the award in this case. The evidence in the record establishes that the Student requires one-to-one assistance to access his education. It further establishes that Ms. Keyser, Ms. Spencer, and Mr. Haverkamp were providing instruction to the Student with no other students present, and that Ms. Ruby was providing instruction to the Student with only one other student present.

96. In their closing brief, the Parents sought funding for a summer program for students with disabilities of the Parents’ choice to compensate for a violation related to ESY. Such a remedy could potentially serve as an appropriate award of compensation for the District’s failure to provide the

²⁵ The December IEP as amended by the transition plan provided 445 minutes of adaptive and 460 minutes of behavior skills instruction weekly, for a total of 905 minutes. Between April 8, 2020, and June 19, 2020, the Student received 75 minutes of adaptive and 75 minutes of behavior weekly, for a total of 150 minutes. Therefore, the Student missed 755 minutes (905 minus 150) weekly.

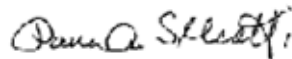
Student with all of the SDI and related services in his IEP. Unfortunately, the Parents did not provide any evidence in the hearing about such programs or whether they would be appropriate to meet the Student's needs. The link provided in the Parents' closing brief does not constitute evidence to support a finding that such a program would be an appropriate award of compensatory education. Nothing in this order precludes the parties from determining that the award of compensatory education may be made through a program agreeable to both parties.

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

ORDER

1. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education as set forth in Conclusion of Law 37.
2. The Parents have not otherwise established that the District denied the Student a free appropriate public education.
3. The District is ordered to provide compensatory education as set forth in Conclusions of Law 86 through 96.
4. The Parents' remaining requested remedies are denied.

Served on the date of mailing.



Pamela Meotti
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

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

Parents



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Dated February 18, 2021 at Seattle, Washington.

lan

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

cc: Administrative Resource Services, OSPI