

**MAILED**

Dec 30, 2020

OAH – SEATTLE

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

IN THE MATTER OF

OSPI CAUSE NO. 2020-SE-0101

OAH DOCKET NO. 07-2020-OSPI-01096

KENNEWICK 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 October 15, 16, 29 and 30, 2020. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Kerri Feeney, attorney at law. The Kennewick School District (District) was represented by Susan Winkelman, attorney at law. Also present was Becca Anderson, District Director of Special Programs. 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 July 27, 2020. OSPI assigned Cause No. 2020-SE-0101 and forwarded the Complaint to the Office of Administrative Hearings (OAH). OAH assigned the matter to ALJ Pamela Meotti. The District filed a response to the Complaint on August 6, 2020. ALJ Meotti issued prehearing orders on August 20, 2020 and October 7, 2020.

*Decision Due Date*

As set forth in the prehearing order dated October 7, 2020, the due date for a written decision in this case was extended at the Parents' request to thirty (30) days after the record of the hearing closes. The record closed on December 2, 2020, when the parties timely submitted post hearing briefs. Accordingly, the due date for a written decision in this case is January 1, 2021.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: P1; P4 through P20; P22 through P31; P33; P35 through P50.<sup>2</sup>

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

<sup>2</sup> Exhibits P21 and P32 were withdrawn. During the hearing, the Parents submitted page 10 of Exhibit P26, which was admitted without objection. The District agreed to the admission of P24 without objection if a missing page was submitted. The District's counsel agreed to provide the missing page to the Parents' counsel but neither

District Exhibits: D2; D4 through D6; D7 (page 2 only); D8; D10 through D14; D16 (pages 2 and 3 only); D17 through D19; D21 through D23.<sup>3</sup>

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

Scott D. Grewe, PhD;  
Katy Isley, RN, District school nurse;  
Kirsten Booth, District special education teacher;  
Elizabeth (Lissa) Power-deFur, PhD  
Nicole Atkinson, District speech language pathologist;  
Becca Anderson, District Director of Special Education;  
Katie Klute, Director, Recovery and Wellness Center of Eastern Washington;  
The Mother;  
Katherine Patterson, District counselor;  
Ben Schuldheisz, District counselor;  
Todd Hardy, District school psychologist;  
Kristine Garrison, District special education teacher and regular education teacher;  
Regina Marie McPeak, District special education teacher.

#### ISSUES

The issues for the due process hearing were set forth in the second prehearing order. At the start of the hearing on October 15, 2020, the Parents agreed to remove issue a.vi, leaving the following issues to be decided:

- a. Whether the District denied the Student a free appropriate public education (FAPE) from July 27, 2018 by:
  - i. Failing to provide Individualized Educational Programs (IEPs) for the 2018-2019, 2019-2020 and 2020-2021 school years that contained sufficient specially designed instruction in the areas of social/emotional, behavior, reading, speech and communication to enable the Student to make progress in light of his circumstances;
  - ii. Failing to conduct a functional behavioral assessment (FBA) and to develop a behavioral intervention plan (BIP) prior to January 2020;

---

party submitted a page to be added to P24. T690. Therefore, Exhibit P24 was admitted as originally submitted over the District's objection.

<sup>3</sup> Exhibits D1, D3, D7 (except page 2), D9, D15, D20, and D24 were withdrawn. There was some testimony about D9, which is the same as P25, before D9 was withdrawn. There was some testimony about D3, which is the same as P16, before D3 was withdrawn.

- iii. Failing to use evidence-based tools to measure the Student's progress;
- iv. Failing to place the Student in his least restrictive environment since April 2020;
- v. Exiting the Student from speech language services in 2019 without an evaluation;-  
and
- vi. ~~Conducting an inadequate evaluation in 2020.~~<sup>4</sup>

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

- i. Declaratory relief that the District denied the Student a FAPE;
- ii. A comprehensive independent educational evaluation (IEE) at public expense, to include a speech language assessment conducted by a qualified speech language pathologist (SLP) and an FBA conducted by a Board Certified Behavior Analyst;
- iii. An updated IEP informed by the IEEs;
- iv. An updated BIP informed by the FBA;
- v. Training for the Parents to use teaching strategies that target dyslexia so that they can support the Student's ability to access his SDI remotely during online learning;
- vi. Compensatory services in an amount and in areas to be established in the hearing;  
or,
- vii. Other equitable remedies, as appropriate.

See Prehearing Order dated October 7, 2020.<sup>5</sup>

---

<sup>4</sup> Because the District has agreed to fund an independent educational evaluation (IEE), the Parents agreed that the appropriateness of the District's 2020 reevaluation of the Student was not at issue and should be removed from the issue statement. Evidence pertaining to the reevaluation was considered to the extent that the Parents are relying on that information to establish what SDI the Student's April 2020 IEP should have contained. T14.

<sup>5</sup> The Parents also claimed that the District's actions were discriminatory and deliberately indifferent under Washington state law, the Americans with Disabilities Act, Section 504 of the Rehabilitation Act (Section 504), and the Equal Protection Clause of the United States Constitution. Because this ALJ does not have jurisdiction over those claims, they were removed from the issue statement. This decision did not consider or make findings of fact related to a Section 504 claim.

## 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 currently in eighth grade and attends Desert Hills Middle School (Desert Hills) in the Kennewick School District (District). D13p1.<sup>6</sup> The District first found the Student eligible for special education and related services in 2011, when he was in preschool, to address articulation and language skills. P14p1; P50p1.

2. Peter Stewart, PhD, a clinical child psychologist at Sageview Youth Psychology,<sup>7</sup> conducted psychological evaluations of the Student in October 2012, when the Student was six years old, and in August 2015, when the Student was nine years old. P4p1. Dr. Stewart diagnosed the Student with Attention-Deficit/Hyperactivity Disorder (ADHD), Combined Type; Oppositional Defiant Disorder (ODD); Disinhibited Social Engagement Disorder; and Unspecified Anxiety Disorder. P4p5.

### *Reevaluation in 2017*

3. In April 2017, when the Student was ten years old and in fourth grade at Cottonwood Elementary (Cottonwood), the District reevaluated him in communication. On the Test of Language Development (TOLD-I:4), the Student's overall spoken language composite index score of 76 placed him at the 5<sup>th</sup> percentile with a rating of "poor." On the Test for Expressive Morphology, the Student scored 45/54 with an age level estimate of 7 years old. The Student had made significant growth in articulation. P7p3. The reevaluation team determined the Student "continues to present with a mild to moderate impairment in the area of Communication, specifically with articulation and expressive language." The team recommended specially designed instruction (SDI) in communication with respect to articulation and expressive language. P7pp1-4.

4. In April 2017, the District also reevaluated the Student in academics, executive functioning and health. D2p11. District school psychologist Todd Hardy<sup>8</sup> prepared a reevaluation report that noted:

---

<sup>6</sup> Citation to the exhibits of record are by the party ("P" for the Parents; "D" for the District) and page number. For example, a citation to P20p1 is to the Parents' Exhibit 20 at page 1.

<sup>7</sup>Dr. Stewart, a clinical child psychologist, retired from clinical practice several years ago. Grewe T60.

<sup>8</sup> Mr. Hardy has a master's degree in school psychology. He has been a District school psychologist for thirty years. He currently serves as the school psychologist at Desert Hills and Cottonwood. Hardy T708.

The Student was referred by his parents on 3/13/2017. The IEP team recommended evaluation in academic, executive functioning and nursing areas. [The Student] suffers from a diagnosed anxiety disorder. His mother also noted concerns regarding [his] reading comprehension.

Additionally, [the Student] has diagnoses of ADHD, ODD, Disinhibited Social Engagement Disorder, and unspecified Anxiety Disorder as diagnosed by Dr. Stewart at Sageview Youth Psychology. He began meds for ADHD in the summer of 2016. The team has noticed improved behavior this year compared to last. [The Mother] reported that [the Student] has seen a psychiatrist for medication management for the past 5.5 years. He also has seen five different counselors and has a 504 Plan. His parents believe he is in need of more individualized help for reading.

D2p1; P14p1.

5. The Student's scores on the Behavior Rating Inventory of Executive Function-Second Edition (BRIEF-2) indicated that the Student's overall executive functioning was within the average range, at the 82nd percentile. D2p3<sup>9</sup>; Hardy T711.<sup>10</sup> The team determined that the Student was not eligible for special education services in this area. D2p8.

6. Katy Isley,<sup>11</sup> a District school nurse, performed a nursing assessment. P14p8; IsleyT148.

7. The Student's special education teacher administered the Woodcock-Johnson Tests of Achievement-Fourth Edition (Woodcock-Johnson IV) to measure the Student's academic skills. The Student's score of 103 in basic reading skills fell within the average range. His score of 79 in reading comprehension indicated an area of difficulty for the Student. D2p5; Hardy T712. The Student was functioning at a grade level of 2.6 in reading comprehension. D2p4. His reading recall score of 77 placed him at an age equivalency of 7 years and 6 months. D2p5.

8. The reevaluation team determined that the Student was eligible for special education services under the Health Impaired category and recommended specially designed instruction (SDI) in the areas of communication and reading, with a focus on building comprehension. D2p4; 8.

---

<sup>9</sup> Exhibits D2 and P14 contain a portion of the District's 2017 reevaluation. Both exhibits were admitted without objection because neither exhibit contains the full reevaluation.

<sup>10</sup> Citations to the hearing transcript are to the name of the witness, except in the case of the Mother and Father, followed by the page number(s) on which the testimony appears. For example, a citation to Mother T661 is a citation to the Mother's testimony at page 661 of the transcript.

<sup>11</sup> Nurse Isley is a registered nurse. She has been employed by the District as a school nurse since 2014 and was the school nurse at Cottonwood and Desert Hills when the Student attended. Isley T145.

*June 2018 IEP*

9. On June 8, 2018, the Student's individualized education program (IEP) team developed his annual IEP. The Student's present levels of performance in reading indicated he was struggling with comprehension. His Measures of Academic Progress (MAP) score of 199 placed him at a grade level of approximately 4.0. He could decode text with fifth grade level fluency. P16p1.

10. The Student's present levels of performance in communication indicated he had made significant growth with his speech and language skills. He had improved with naming, categorization, and use of accurate verbs and plurals. He had improved with peer interaction. His articulation of /r/ and /th/ was as high as 80% accurate during structured speech tasks,<sup>12</sup> but his accuracy dropped to 70% in spontaneous speech at a conversational level. P16p1.

11. The Student's present levels of performance in math and writing skills were within the average range, and his motor, social, behavior and life/adaptive skills were within normal limits. P16p1.

12. The IEP set two reading goals: (1) the Student "will increase [his] ability to read and comprehend important ideas and details from independent reading level of 4.0 grade level to 5.0 grade level as measured by District Assessments (MAP or similar leveled assessment)" by June 8, 2019; and (2) the Student "will increase [his] ability to analyze, interpret, and synthesize information and ideas with 4.5 grade level text to 5.5 grade level text as measured by curriculum based assessments" by June 8, 2019. P16pp2-3.

13. The IEP established an articulation goal and an expressive language goal as follows: (1) the Student "will increase his articulatory competency from his current level of /r/ and /th/ in conversational speech with 90% accuracy or better, from a baseline of 70% by June 8, 2019"; and (2) the Student "will improve his score on the Semantics Communication Checklist to 48/48, from a baseline of 43/48, by June 8, 2019." P16pp4-6. The Semantics Communication Checklist (communication checklist), contained in Exhibit P16 page 5, lists skills related to use of language in talking, reading and writing. Atkinson T370-71. For example, it includes skills such as "describes objects with one attribute (e.g., color object)"; and "explains how two concrete items are the same." P16p5.

14. The IEP provided 150 minutes per week of SDI in reading and 30 minutes per week of speech services. P16p11. The Student's IEP called for him to spend 90 percent of his time in the general education setting. P16p12.

---

<sup>12</sup> A structured speech task refers to a highly-regulated task, such as a clinician stating a word for the student to repeat, showing the student a picture card, or asking the student to read. Power-deFur T279.

*2018-2019 School Year - 6<sup>th</sup> Grade*

15. On August 27, 2018, Kristine Garrison,<sup>13</sup> the Student's case manager, amended the Student's IEP because he was advancing from elementary to middle school and she needed to adjust his schedule. At Cottonwood, students were pulled out of class to receive reading instruction in the resource room. At Desert Hills, all classes in English Language Arts (ELA) are for two periods. Garrison T859-862. To reflect this, the amendment increased the Student's reading instruction from 150 minutes per week to 690 minutes per week because the Student would receive his SDI in reading in a two-period special education class. This also reduced the Student's time in the general education setting to 60%. D4pp1-3. The amendment was not made in an IEP team meeting; there were no other changes to the June 2018 IEP. D4.

16. The Student started at Desert Hills on August 28, 2018. P1p1. Ms. Garrison sent the IEP amendment home to be reviewed and signed, with a note asking the Parents to contact her if they had questions. The Student started following his amended schedule before the amendment was signed. The Parents did not express any disagreement with the amendment and signed it. Garrison T883.

17. Ms. Garrison and other case managers followed this process for adjusting IEPs to conform to middle school scheduling with other students as well; the District has subsequently changed this process, which had become "an issue." Garrison T862-64.

18. The Student's MAP scores in the fall of 2018 showed a RIT<sup>14</sup> growth in reading of -8, meaning that he was regressing, rather than progressing. Booth T196-99. Ms. Garrison referred to this as the "summer slide," because students are not working on skills in the summer and it is not uncommon for both special and general education students to see scores "slide backwards over the summer." Garrison T873.

19. During the 2018-2019 school year, the Student began to work with Kristen Booth,<sup>15</sup> a District special education teacher. Ms. Booth was a resource room teacher and the Student came to her class for support. Booth T183.

*Homework Struggles*

20. On August 28, 2018, the Mother sent an email to Ms. Garrison explaining that the Student struggled with reading homework and refused to allow the Parents to work on it with him. D22p3. Ms. Garrison responded that she did not really issue homework and that students had plenty of time in

---

<sup>13</sup> Ms. Garrison has a master's degree in teaching with a K-8 general education endorsement and a K-12 special education endorsement. She has a teacher's certification. Garrison T836-37.

<sup>14</sup> The record does not contain evidence of what "RIT" stands for.

<sup>15</sup> Ms. Booth received her special education certification in 2015, and has been employed by the District as a special education teacher since 2016. Booth T180; 236.

class to complete assignments. If the Student refused to do the work at home, he could finish assignments in class. Additionally, she accepted late work. Garrison T840-41; T887; D22p7.

21. On September 19, 2018, the Mother notified Ms. Garrison and others that the Student had a “full blown anxiety attack. He has been crying and pulling his hair for over an hour over the THOUGHT of homework. It is the end of the day. There are no meds left in his system We saw his counselor yesterday and she and I are in agreement that until we adjust and balance out his meds, homework is truly pointless.” D22p8.

22. At the beginning of the 2018-2019 school year, the Mother showed Mr. Hardy, the school psychologist, and Ms. Garrison three videos of the Student refusing to do his homework, crying, screaming and yelling. Mother T534-35. Ms. Garrison was shocked because the behavior was so different from what they saw at school. Garrison T842; D22p7.

23. Ms. Garrison developed a plan to prevent the Student from avoiding assignments. She asked all of his teachers to notify her, Ms. Booth and the Mother of any assignments, the time required to complete the assignment, the due date, and helpful information for completing the assignment. The goal was to “build time into our classes to support him and hopefully reduce the amount of homework he has to do; creating less stress for him at home. We are hoping that the majority of his work can be finished in Mrs. Booth’s [support] class and that he will have minimal homework.” D22p10; Garrison T843.

24. Ben Schuldheisz,<sup>16</sup> a counselor at Desert Hills, met the Student during the 2018-2019 school year. He typically saw the Student each day at lunch or in the hallway. The Student was talkative and willing to engage. Schuldheisz T655-56. Mr. Schuldheisz checked in with the Student periodically. Sometimes the Student was doing well; other times he was struggling, which was typical middle school behavior in Mr. Schuldheisz’ experience. When the Student was struggling, Mr. Schuldheisz talked with him and worked on coping strategies. The Student responded well and typically returned to class within five minutes. Schuldheisz T657-58.

#### *Reading Instruction*

25. Ms. Garrison delivered the Student’s reading SDI in a resource room with a small group of students. They worked on the Student’s IEP goals and sixth grade standards. This involved daily reading and writing activities including vocabulary, spelling, reading, reading comprehension, fluency and accuracy. The Student tried very hard and had a good attitude. Ms. Garrison typically worked with each student one-on-one each week. She would listen to them read a short passage and ask comprehension questions. When the Student read aloud to Ms. Garrison, he was reading at close to grade level and could answer most comprehension questions. In terms of behavior, the Student was always willing to help but had some issues socially with some other students in the class. Garrison T837-38; 846-47.

---

<sup>16</sup> Mr. Schuldheisz has a master’s degree in counseling and psychology He is a counselor at Desert Hills, where he has been employed for twenty-three years. T654-55.



26. Although Ms. Booth helped the Student with reading and writing related to assignments in general education classes, she was not tasked with implementing the Student's goals or evaluating his progress. Booth T186-87; 237; 242; Garrison T844. The Student had trouble focusing and sitting down long enough to read. He was easily distracted by peers and did not understand the social consequences of things he did or said to peers. He also tried to avoid work. Ms. Booth helped him work through conflicts to refocus on work. She tried to give him space in class to reduce distractions. Booth T188-90; 237-38.

#### *Communication Instruction*

27. Nicole Atkinson<sup>17</sup> worked with the Student on his communication goals starting in the fall of 2018. Ms. Atkinson was employed by the District as a Speech Language Pathologist (SLP) on the basis of an emergency certification. Atkinson T350. The emergency certification was a two-year license granted by the State of Washington that allowed her to fulfill the role of an SLP within the school setting. Atkinson T369. Ms. Atkinson reviewed the Student's therapy file but she did not review the Student's complete special education history. Atkinson T350-52. A therapy file, or speech file, typically includes therapy logs, past testing, IEP goal pages, IEPs, and progress reports. This information gave Ms. Atkinson the information she needed to deliver the communication services in the Student's IEP. Atkinson T350; 369-79.

28. Using the June 2018 IEP, Ms. Atkinson worked with the Student on his articulation and expressive language goals. Atkinson T363; P16. This was the Student's second year working toward the same articulation goal, although he had made progress toward that goal. Atkinson T364; 376; compare P8p3 with P16p6. Ms. Atkinson provided the Student's instruction in one weekly 30-minute session in a small group setting to allow spontaneous conversation. Atkinson T365; 371; 378-79. To work on expressive language skills, Ms. Atkinson focused on the skills on the communication checklist. T371. For example, to work on expressive language skills, Ms. Atkinson would provide a verb and ask the Student to conjugate it. Atkinson T384.

#### *Visits to the Health Room*

29. The Student visited the health room at Desert Hills more frequently than other students. Isley T155. On September 11, 2018, Nurse Isley sent an email to the Student's teachers explaining that at Cottonwood, the Student would "use any excuse to come to the health room and get out of class." She stated that at Desert Hills, "[h]e is already averaging two or three times a day in the past few weeks. I'm just asking for your help to keep him in class." P17p1. It is not typical for a middle school student to visit the health room several times per day unless they have an injury. Isley T157; 160.

30. On October 4 and 5, 2018, Nurse Isley removed pencil lead from under the Student's skin. The Student told Nurse Isley he was doing this on purpose. Isley T158. Ms. Garrison sent an email to

---

<sup>17</sup> Ms. Atkinson has a bachelor's degree in speech language pathology. She does not hold a certificate of clinic competence (CCC), which requires additional education and training. Atkinson T348-49.

the Mother and his teachers alerting them that the Student had been “shoving pencil lead into the first layer of his skin this week.” P17p3. The Mother responded that the Student admitted he was behaving this way to get out of class. She stated: “We REALLY need to crack down on leaving class. No nurse, no bathroom. He will use any excuse to leave. And obviously is escalating behavior in order to get out.” P17p4. Early in the year, the Student’s task avoidance complaints led to him missing approximately 15 to 20 minutes of class a few times a week. As soon as the Mother became aware of these behaviors and told the teachers not to let him out of class, the Student did not miss much class. Garrison T867.

31. Nurse Isley addressed the Student’s health room visits by sending emails to his Mother and teachers. Isley T162. She sometimes called the Mother for her thoughts on how to deal with situations. Nurse Isley did not make a referral for a functional behavioral assessment (FBA) or evaluation. Isley T171-72.

32. The Student visited the health room twice on November 5, 2018 for a stomach ache. P17p6. He cried when Nurse Isley told him he needed to return to class. P17p7. In January 2019, the Student frequently visited the health room “right as recess [was] over in tears.” P17p8; Isley T160-61.

33. On March 26 and 27, 2019, the Student visited the health room complaining of ear pain. On April 9, 2019, he visited the health room twice because his hand was bruised. P17p9. The Mother responded to Nurse Isley’s email that this was “his newest complaint to get out of class and work.” P17p9.

34. During the hearing, Nurse Isley could not recall when the Student visited the health room or whether he was missing instructional time when he did so. She asked students to sign in when they visited the health room, but they did not always do so. Isley T169; P35pp24-33. The Student’s online health record documented when and for how long the Student visited the health room. Isley T167-68. In determining when the Student visited the health room, I give more weight to the Student’s online health record, rather than to student sign in records, which were sporadic, or Nurse Isley’s recollections, which were admittedly limited. The online health record establishes that during the 2018-2019 school year, the Student visited the health room 26 times. Seventeen visits occurred from September through November, 2018. Nine visits occurred from December 2018 through June 2019. The Student’s visits ranged from 1 minute to 11 minutes, for a total of 110 minutes in the health room during the 2018-2019 school year. P35pp11-23.

#### *Reevaluation in Math*

35. On October 4, 2018, the District issued a prior written notice (PWN) proposing to reevaluate the Student in math. D5p3. The Student’s math teacher, Jeremy Grillo, did not have any concerns about the Student’s math skills, but the District conducted the reevaluation based on the Parents’ concerns. They worried that “[t]here is a lot of reading and note taking involved and he is struggling greatly.” D22p6; Hardy T713-15. The Parents did not suggest additional areas for assessment. D5pp4-5.

36. Ms. Garrison administered the Woodcock Johnson IV. D6p4. The Student scored in the average range, with grade equivalency (GE) scores of 6.1, 6.9, 6.8, and 5.7, in mathematics, broad mathematics, math calculation skills, and math problem solving, respectively. Hardy T717; D6p5.

37. The reevaluation team met on November 1, 2018, to discuss the reevaluation results. The Mother expressed her belief the Student should qualify for special education services in math. D6p7; Hardy T718. The team concluded that the Student did not qualify for special education services in that area because his math skills were in the average range. D6pp4-5. Ms. Garrison recommended that the Student could benefit from accommodations in math when it came to reading comprehension, such as word problems. D6p4. The parties did not elicit any testimony as to whether accommodations were in fact provided.

#### *Request for Reevaluation in Reading*

38. Ms. Garrison tracked the Student's progress toward his reading goals using the common core reading skills checklist for the fifth grade(reading checklist), which the District uses for every middle school student who receives SDI in reading. Garrison T846; D8p9; Booth T195. "Common core" refers to a set of standards the District uses to direct its teaching. Booth T246. The record does not contain evidence of who created the checklist. Booth T195; Garrison T892.

39. On November 5, 2018, Ms. Garrison's progress note stated: "[The Student] is reading at a 5-6<sup>th</sup> grade level. On a beginning 5<sup>th</sup> grade text [the Student] read 103 wpm with 98% accuracy and 80% comprehension. On an end of 5<sup>th</sup> grade/beginning 6<sup>th</sup> grade level text he read 111 wpm with 95% accuracy but only 40% comprehension. [The Student's] main struggle is to slow down and understand what he is reading. On the fifth grade common core reading skills checklist, [the Student] has demonstrated 9/44 (20%) of the required skills." D16p2. The fifth grade reading checklist contains objectives such as "compare and contrast two or more characters," and "in literary text, analyzes impact of word choice on meaning and tone." D8P9.

40. Ms. Garrison's progress report on January 25, 2019, stated: "The Student has been struggling with reading comprehension. On a 4<sup>th</sup> grade reading level, [the Student's] comprehension is at 40%. His reading rate is around 83 wpm with 90%-100% accuracy." D16p2.

41. In February 2019, the Mother was concerned about regression and asked the District to reevaluate the Student's reading comprehension. Garrison T839, 844-45; D22p16. Ms. Garrison and Mr. Hardy did not believe testing would show anything they did not already know because the Student already qualified for SDI in reading. Garrison T845; 869. Ms. Garrison reassured the Mother that progress sometimes ebbed and flowed and she was "confident that by the end of the year [the Student] will be reading at a 5<sup>th</sup> grade level and working on improving his comprehension at a 5<sup>th</sup> grade level." D22 p16; Garrison T869.

42. By the end of March 2019, the Student “read a mid-fourth grade level text at 109 wpm with 98% accuracy and 100% comprehension. On a beginning fifth grade level text he read 107 wpm with 99% accuracy and 100% comprehension.” D16p2.

*June 2019 Reevaluation and IEP Team Meeting*

43. On June 4, 2019, the reevaluation team met to discuss the results of the Student’s communication reevaluation. P20p1. The Parents attended, along with Ms. Garrison, two general education teachers, Ms. Atkinson, and a District administrator. P20p5. Ms. Atkinson did not obtain the Parents’ written consent to reevaluate the Student and did not administer any formal tests. Atkinson T367; P20p6. She did not believe any standardized or formal assessments were necessary because “[h]e was progressing very well towards his goals” and therefore informal measures seemed sufficient. Atkinson T376.

44. Although the Student’s articulatory competency had improved from the baseline of 70% to 80%, he had not met his IEP goal to increase his articulatory competency to 90% accuracy or better in conversational speech. Atkinson T368. Nonetheless, Ms. Atkinson believed the Student no longer required SDI in speech because he was able to communicate with those around him effectively. Atkinson T379; T385.

45. The team discussed discontinuing SDI in speech. Atkinson T375. Ms. Atkinson believed the Student no longer required SDI based on her review of service logs that showed he was making progress and because of observations indicating he was doing well in conversational speech. Atkinson T375. By observations she meant “watching him in the therapy room, maybe how he talks to his friends, as you’re walking to and from therapy, how teachers perceive it.” Atkinson T375, 385. Ms. Atkinson did not provide the service logs for review during the reevaluation meeting. Atkinson T381.

46. Ms. Atkinson asked the Mother for her opinion on dismissing the Student from special education services in speech. Ms. Atkinson testified that the Mother thought this was “a good thing” and Ms. Atkinson could not recall the Mother expressing concerns. Atkinson T373-74. However, the Mother’s testimony was that she expressed concern that the Student sometimes had difficulty finding a word to express what he was thinking, and she did not think Ms. Atkinson understood this concern. Mother T544-45. During the hearing, the Parents did not ask Ms. Atkinson whether she understood the concern at the time. Based on the record, I find the Parents have not established by a preponderance of the evidence that Ms. Atkinson did not understand the Mother’s concern.

47. None of the team members, including the Parents, indicated the Student should be formally assessed prior to discontinuing his speech instruction. Atkinson T375, 377-78. The Mother “assumed they [assessments] had been done.” Mother T544. None of the Student’s teachers expressed any concerns about discontinuing speech services or concerns that the Student’s speech was negatively impacting his education. Atkinson T374; 377. Ms. Garrison was aware that the Student struggled with “Rs and things like that, but for the most part, he was easy to understand.” The Student never seemed to have a problem conveying thoughts to her and she never observed his communication impacting

his education. Garrison T848-49. None of the Student's IEP team members, including the Parents, disagreed with the decision to discontinue SDI in communication. Atkinson T375; Garrison T849. The Mother did not express disagreement because "it's what the specialists – those that know what they're doing – recommended." Mother T545.

48. The reevaluation summary stated that the Student is "over 80% accurate with target sounds across multiple settings and has mastered all skills on communication checklists." P20p2. This refers to the communication checklist found in Exhibit P16, page 5. Atkinson T370-71. The reevaluation report later stated that the Student "is over 80% accurate with target sounds and has mastered over 80% of items on communication checklists measuring his expressive language." P20p3. There is no explanation in the record as to the inconsistency within the report, which stated both that the Student had "mastered over 80% of items on communication checklists," and that he had "mastered *all* skills on communication checklists."

49. In a PWN dated June 4, 2019,<sup>18</sup> the same date as the reevaluation team meeting, the District notified the Parents that it was proposing to dismiss the Student from SDI in communication. P20p6. That same date, the IEP team met to develop an IEP for the period from June 4, 2019, through June 4, 2020. D8p1. The Parents attended the meeting. D8p10.

50. The IEP team reviewed the Student's present levels of performance and concluded that communication, motor, social, behavior, and life/adaptive skills were within normal limits. The team considered whether the Student's behavior negatively impacted his learning or the learning of others and determined that it did not. D8p3.

51. With respect to reading, the team considered that the Student, who was at the end of his sixth grade year, demonstrated 25/44 or 57%, of the skills on the fifth grade reading checklist. D8p2. The Student "was able to read texts in the 4<sup>th</sup> to 6<sup>th</sup> grade level range," and "continues to improve his comprehension." Reading fluency and pronunciation were within normal limits. D8p2.

52. The Student had progressed from mastering 20% of the skills on the fifth grade checklist in November 2018 to mastering 57% of the skills on the fifth grade checklist in June 2019. Garrison 889. Ms. Garrison felt this showed the Student was reading at a fifth grade level by the end of sixth grade. Garrison T885; 889.

53. The results of the Smarter Balanced Assessment (SBAC), a state-wide assessment, in English Language Arts for the spring of 2019 indicated that the Student did not meet grade level expectations for sixth grade students. Booth T191; P18p1. In determining whether a student is making progress, Ms. Booth generally relies more on a student's MAP scores, the results of the Woodcock-Johnson, and the student's work in the classroom, rather than the SBAC. Booth T192. The record does not establish what, if any, consideration the IEP team gave to the Student's MAP scores for the 2018-2019 school year. The Student's MAP score of 186 in the fall of 2018 had increased to 202 in the spring of 2019.

---

<sup>18</sup> The meeting invitation, the reevaluation report and the PWN are all dated June 4, 2019. P20pp1,4,6. The Parents' Complaint does not raise this as an issue and it is not addressed.

Additionally, the score of 202 in the spring of 2019 had increased from the score of 199 in the spring of 2018. D18p1. The Parents did not provide any evidence for understanding what these increases mean in context.

54. The IEP that resulted from the June 2019 meeting continued to provide 690 minutes per week of SDI in reading to be delivered by special education staff in a resource room, with the Student spending 60% of his time in the general education setting. D8pp6-7.

55. The team set one reading goal as follows: The Student “will understand and increase reading skills in the areas of Key Ideas & Details; Craft & Structure, and integration of Knowledge and Ideas from 24/44 (57%) to 44/44 (100%) as measured by the 5<sup>th</sup> grade common core reading skills checklist” by June 3, 2020. D8p8. Key Ideas & Details, Craft & Structure and integration of Knowledge and Ideas are listed as headings on the checklist, with tasks listed for each area. For example, under the area of Craft & Structure, the checklist states “Determines the meanings of words as they are used in text.” D8p9. This goal would be measured by “Teacher data of student work and performance, rubrics/checklists.” D8p8. The team discussed the reading checklist during the meeting and the Mother asked questions about it. Garrison T850. The Mother did not express disagreement with the number of minutes of reading SDI or the reading goal and did not ask how the goal would be measured. She trusted the District’s opinion. Mother T552-53.

#### *2019-2020 School Year – 7<sup>th</sup> Grade*

56. At the start of the 2019-2020 school year, Ms. Booth became the Student’s case manager. Booth T192. Ms. Garrison was the Student’s general education history teacher. The Student was “a completely different kid” than he had been in sixth grade. His attitude had changed from “`I can try, I will try. I’ll do my best’ to `No. I’m not going to do that, and you can’t make me.” These behaviors started several weeks after the start of the 2019-2020 school year and became progressively worse, with the Student starting to become angry and combative with other students. Garrison T851-53.

57. Regina Marie McPeak,<sup>19</sup> the Student’s ELA special education teacher during the 2019-2020 school year, delivered the Student’s reading SDI of 690 minutes per week. D8p6; McPeak T897-98. One way Ms. McPeak worked on reading comprehension with the Student and others in the class was by doing book studies. Students read and talked about inferences, character, setting and perspective. They did writing assignments associated with this as well. The class also wrote in a daily journal about their “SSR” books, referring to sustained silent reading time books, and did reading and writing projects throughout the year. McPeak T899.

58. On September 10, 2019, the Student received a two-day in-school suspension after he put his hand down his pants and two students saw his penis. When he returned to class, he was “really struggling a lot.” P24 p1-3; Booth T202-203. The Mother sent an email to Vice Principal Dan Meyer

---

<sup>19</sup> Ms. McPeak has a bachelor’s degree in elementary and special education and a master’s degree in secondary reading. She has a certificate to teach K-8 elementary education and K-12 special education. She has been teaching for seven years. McPeak T897.

stating that she had spoken to the Student's outside counselor and that his medications were being adjusted. As requested by the Mother, Mr. Meyer sent a group email to notify the Student's teachers about the medication change. P24 p6-7.

59. On September 17, 2019, the Student was sent to the office again after his teacher observed him with his hands up his shorts. The Student stopped when his teacher shook her head. After a security officer spoke to him, the Student returned to class. P24 p9. This type of behavior, in the middle of class, is not typical of boys this age. Garrison T876.

60. That same day, the Student swore and walked out of Ms. Booth's class. He swore at a student in Ms. Garrison's class. P24p11. This behavior was not typical for the Student. Ms. Booth spent most of the period trying to calm the Student down and help him to process his behavior. Booth T203-204. As the seventh grade year progressed, this became typical behavior for the Student. Garrison T877.

61. On September 26, 2019, the Mother notified Mr. Meyer by email that the Student had been admitted to Seattle Children's Hospital. P25p1. She informed him that the Student's hospitalization was "helping him cope with abandonment issues at 4yrs." P25p2. She also noted the Student would have a lot of work to make up after missing 1.5 weeks of school, and that his IEP team would need to be on board. P25p1.

62. Mr. Meyer responded that he and staff were happy to help in any way, and copied Mr. Hardy, Mr. Schuldheisz, Ms. Booth, and Katherine Patterson,<sup>20</sup> a counselor who was new to Desert Hills that year. P25p1. Before she received Mr. Meyer's email, Ms. Booth was aware the Student had been hospitalized because other teachers had told her. Booth T205. Additionally, Ms. Booth knew that he had been hospitalized because of a suicidal episode at home. Booth T205. Ms. Booth's testimony indicates that she learned of the hospitalization from other teachers; it is not clear from her testimony, however, how or from whom she learned the reasons for the Student's hospitalization. Booth T205.

63. Mr. Hardy, Mr. Schuldheisz, Ms. Garrison, and Ms. McPeak were aware that the Student had been hospitalized but did not know he had been hospitalized due to suicidal ideations. Hardy T783; Schuldheisz T667; Garrison T854; 891; McPeak 914. Nurse Isley was not aware of the Student's hospitalization. Isley T163; 174. The Parents did not contact Mr. Hardy to report concerns about suicidal ideation or to discuss the hospitalization. Hardy T821. There is no evidence in the record that the District asked the Parents to provide any documentation about the Student's stay at Seattle Children's Hospital. Additionally, there is no evidence in the record that the Parents ever provided any documentation to the District concerning the Student's hospitalization. Hardy T721; 773.

64. On or about October 4, 2019, the IEP team met to address the Mother's concern about missed homework assignments and decided that all or most assignments would be excused. There were no changes to the Student's IEP at that time. D23p23; McPeak T915; 918; P50p10.

---

<sup>20</sup> Ms. Patterson has a bachelor of science degree in elementary education and a master's degree in school counseling. Patterson T635.

65. Ms. Booth talked to Mr. Hardy and a District behavior analyst following the Student's hospitalization about supporting the Student. Between September 2019 and April 2020, however, the Student's IEP team did not review his IEP to determine what, if any, additional supports were required. Booth T205-206.

66. Ms. Garrison responded to the Student's behaviors by talking with him, trying to coax him into a better mood, and offering to sit and work with him. She spoke with the Mother, other teachers, Mr. Hardy and Mr. Meyers because she was at a loss as to how to help him be successful in class. Garrison T854.

67. Early on October 10, 2019, the Mother emailed the Student's teachers, Mr. Meyer, and Mr. Hardy because the Student's ADHD medication had changed. P26p3. Later that morning, the Student was upset and crying during Ms. McPeak's class. During the afternoon, the Student became upset during Ms. Booth's class. He was crying and crawled under a table and stayed there until he was able to calm down. P26p2; Booth T206.

68. On or about October 24, 2019, the Student became frustrated and started crying hysterically and hitting his head against the wall. He left the room and banged his head on the wall in the hallway until Ms. Booth coaxed him to return. He then crawled under a table. Booth T210; P26p8. This behavior was not developmentally appropriate. Booth T210. Ms. Booth had not seen this type of behavior from the Student during the 2018-2019 school year. Booth T239.

69. In October and November 2019, Ms. Booth received reports the Student was breaking down and crying in other classes as well. Booth T211; 249; P27p1. These behaviors previously had been seen only at home. P26p9; Hardy T810. When teachers called Mr. Schuldheisz in response to the Student's behaviors, Mr. Schuldheisz would take the Student out of class and talk with him as they went for a walk in the hallway. Schuldheisz T660-62. The Student was usually frustrated with the amount of work in a certain class. If he had a big homework assignment due, he would get overwhelmed thinking he would not be able to complete it. Once they talked about steps the Student could take to address the situation, he would be ready to return to class. Schuldheisz T680-81.

70. Following the Student's hospitalization, the Mother sent an email to the Student's teachers stating the Student was participating in intensive outside counseling. The Student's outside counselor was copied on the email. Garrison T893-94. Additionally, the Mother was open about changes to the Student's medications. Garrison T891. These factors led to some hesitation in referring the Student for an FBA because teachers were "waiting just to see if those med changes might improve his behavior." Garrison T891; 893. Because the Mother copied the Student's counselor on her email, the Student's teachers informed the counselor when they saw behaviors in the classroom, and the counselor responded with feedback and suggestions. The record does not establish which outside counselor was involved in these e-mail communications, which included the Mother. Garrison T893-94.



71. On November 20, 2019, Ms. Booth referred the Student for an FBA by sending an email to Mr. Hardy, with a copy to Mr. Meyer and Ms. McPeak, but she did not recall receiving any response to her email. Booth T204, 214; Exhibit P27p4. Based on a review of the evidence in the record, I find it more likely than not the District did not take any action in response to Ms. Booth's referral for an FBA.

72. After his stay at Seattle Children's Hospital, the Student was referred to the Recovery and Wellness Center of Eastern Washington (Recovery and Wellness) for treatment for depression and anxiety. Klute T425. Katie Klute<sup>21</sup> is the director of Recovery and Wellness. P49. The Student participated in the intensive outpatient program run by Sloan Fuller, a licensed mental health counselor, between December 9, 2019, and January 30, 2020. Klute T430. The Student then participated in individual therapy with Ms. Klute between February 4, 2020, and August 7, 2020. Klute T429; 432. Within 15 minutes of starting each therapy session, the Student became restless and upset. Klute T454. Therapy sessions initially lasted 90 minutes but the time per session decreased to 30 minutes over time as it became harder to keep the Student engaged. Klute T 456.

73. During three therapy sessions, Ms. Klute worked on the Student's health homework with him. Klute T433. He struggled with staying focused and quickly became overwhelmed. Klute T 435. When Ms. Klute read something to him, he would say, "I don't understand what you're talking about." Klute T435. Ms. Klute observed the Student exhibiting significant aggression, frustration and anger concerning homework. Klute T442; P48p4.

74. As the 2019-2020 school year progressed, the Student requested to talk to Ms. Patterson more frequently. Patterson T635-37. The Student sometimes came to see Ms. Patterson at lunch because he loved to chat. Patterson T642. Her first significant contact with the Student occurred in January 2020 when the Student was having suicidal thoughts. Patterson T639-40. Ms. Patterson addressed the situation as an emergency and recommended the Mother follow protocol calling for a student with suicidal ideation to receive crisis counseling and evaluation. The Mother declined because the Student was already seeing an outside counselor. The Mother wanted the school counselors to help calm the Student but she did not want them to get too involved because he was already engaging in a significant amount of therapy. The Mother and Ms. Patterson agreed that the school counselors would calm the Student down and communicate with the Mother, but that they would not see him regularly or pull the Student from class. Patterson T641; Schuldheisz 683.

75. Ms. Patterson also received calls when the Student was upset in class; she responded by "running upstairs" to his class, which took less than one minute. Patterson T642. Between January and March 2020, Ms. Patterson was called to assist on two occasions. On one occasion, she responded to Ms. Garrison's class, but the Student was already calm when she arrived, despite her

---

<sup>21</sup> Ms. Klute is an agency-affiliated counselor, which she defined as a counselor certified by the state of Washington who can practice counseling under the license of an agency. Her certification allows her to provide group and individual therapy, but not to assess or diagnose. Klute T445. Ms. Klute does not have a bachelor's degree. She obtained continuing education credits to become qualified as an agency-affiliated counselor. Klute T446; P49.

quick response. Another time she responded to the Student's math class, and again found the Student calm and working. Patterson T643-44.

76. On January 11, 2020, the Mother requested a formal FBA of the Student. P28pp3-4. The Mother stated she would be fine with adding it to the Student's three-year reevaluation in February/March. D10pp5. Mr. Hardy responded that the District would plan on adding one to the reevaluation. D10p4.

77. On January 22, 2020, the Mother emailed Mr. Hardy, Ms. McPeak, Ms. Booth, and Ms. Sloan to notify them that she had met with Scott Grewe, PhD, who would be conducting a psychological assessment of the Student. The Mother had first contacted Dr. Grewe about an evaluation at the beginning of the 2019-2020 school year. Mother T560. The email stated that Dr. Grewe would be waiting until June to conduct the assessment. He strongly agreed with conducting an FBA, which the Mother asked to schedule. D10p3. The next day, January 23, 2020, Mr. Hardy responded that the three-year reevaluation was due by April 15, 2020, but he would initiate it earlier because of the request for an FBA and the Student's "current difficulties." D10p2. Mr. Hardy stated: We will work as quickly as we can, I know [the Student] is having a really difficult time." D10p1.

78. Ms. McPeak tracked the Student's reading progress during the 2019-2020 school year. The progress note for November 18, 2019, provided: "Not Mastered. [The Student] has increased his score on the reading skills checklist from 25/44 to 30/44." The progress note for January 30, 2020, provided: "Mastered. [The Student] has increase [sic] his score on the common core reading skills checklist 5<sup>th</sup> grade from 30/44 to 32/44. He does well when he chooses to." D16p3.

79. During the 2019-2020 school year, the Student visited the health room 11 times between September 13, 2019, and December 18, 2019. He visited the health room 7 times between January 7, 2020, and March 16, 2020. Visits ranged from 1 minute to 8 minutes, except for one visit for a headache that lasted 42 minutes. In total, the Student spent 93 minutes in the health room during the 2019-2020 school year. P35pp2-11.

### *March 2020 Reevaluation*

80. Mr. Hardy initiated the Student's triennial reevaluation early because the Student was exhibiting at school some of the emotional behaviors and executive functioning difficulties he had been demonstrating at home for some time. Hardy T810; 823. On February 9, 2020, the Parents consented to a reevaluation of the Student in the areas of health, cognitive, academic, emotional/social/behavioral development, FBA, and executive functioning. D11p3. The Parents did not request that the Student be evaluated in any additional areas. Hardy T725.

81. Mr. Hardy administered the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) to measure the Student's cognitive ability. Hardy T726. A standard score of 90 to 110 is in the average range. Hardy T727. The Student's full scale IQ measured 86, or 18<sup>th</sup> percentile. His verbal comprehension score of 71 indicated that this continued to be an area of difficulty, consistent with

past assessments administered by Dr. Stewart in 2012 (full scale IQ of 79; verbal comprehension of 77) and in 2014 (full scale IQ of 86 or 18<sup>th</sup> percentile; verbal comprehension of 71 or 3<sup>rd</sup> percentile). Hardy T760; P4pp-43; P29pp1-2.

82. Ms. Booth administered the Woodcock-Johnson IV “over a period of 5 days a couple of tests at a time. [The Student] had enough patience for 1-3 tests at a time.” D12p11. Ms. Booth administered the test in small sections because the Student’s attention span was approximately fifteen minutes. She wanted to give the Student the best chance possible to demonstrate what he knew. Both T222. It is not typical for this test to be administered in this manner. Grewe T84; Booth T222.

83. At the time of the testing, the Student was 13 years, 8 months old, and in seventh grade. His score for written expression was equivalent to a student age 10 years, 5 months. P29p8; D12p13; Booth T223. With respect to reading comprehension, his scores were equivalent to a student age 8 years, 10 to 11 months old, with a grade equivalency of 2.6. P29p10; D12p13; Booth T223; P14p4. These scores were concerning and indicated that the Student still required SDI in this area. Booth T224; Hardy T763-64. The reevaluation report noted: “Because [the Student] is performing in the very limited to limited average range in all areas of reading it may not be beneficial for him to be in a general education setting without accommodations or modifications. [The Student] may require specially designed instruction in all areas of reading.” D12 pp3-4; 11.

84. During the hearing, Ms. Garrison opined that she did not think the Student’s reading scores during the 2020 reevaluation necessarily suggested that she was wrong in her judgment that the Student was making progress in reading comprehension during the 2018-2019 school year. She stated: “[t]hese are just one snapshot on one day in time. He could have had a bad day on testing. He may not do well testing. But from what I saw in class and the – level of text that he was reading to me, I stand by that I was confident – he was reading fourth, fifth, and sixth grade texts with little difficulty, and his comprehension was well [sic].” Garrison T881-82.

85. Ms. McPeak and a general education teacher filled out rating scales for the Behavior Assessment System for Children-Third Edition (BASC-3), which assesses both internalizing behaviors, such as behaviors associated with anxiety and depression, and externalizing behaviors, such as conduct issues and hyperactivity. Hardy T728. T-scores of 50 to 60 are in the average range, with scores of 70 and higher, which are two standard deviations above, indicating an area of difficulty. Hardy T732. Ms. McPeak’s rating scales indicated T-scores of 87 for overall behavioral symptoms, 110 for internalizing problems, and 74 for externalizing problems. D12p4; Hardy T732. The general education teacher’s rating scales were lower but were still concerning. These indicated T-scores of 67 for overall behavioral symptoms, 79 for internalizing problems, and 65 for externalizing problems. The team concluded that these results indicated “significant concerns regarding [the Student’s] emotional and behavioral adjustment,” and that the Student “exhibits very significant deficits in the areas associated with internalizing problems.” D12p19. Accordingly, the team recommended adding social-emotional goals to his IEP. D12p18.

86. Ms. Garrison administered the BRIEF-2 to measure the Student's executive functioning. T-scores of 50 are average with a standard deviation of 10. Hardy T733. The Student's emotional regulation index T-score was 90. His global executive composite T-score of 81 ranked greater than the 99<sup>th</sup> percentile. D12pp5, 9. These scores indicated "very severe deficits across all areas of executive functioning," and that the Student "is significantly impacted by these deficient areas." The reevaluation team recommended adding executive functioning goals. D12p18-19.

87. Nurse Isley conducted a nursing assessment. Based on the Student's frequent health room visits, conversations with school counselors, and emails from teachers, Nurse Isley concluded that the Student's diagnoses of ADHD, Anxiety and ODD were impacting him at school. Isley T173-74; D12p17.

88. Mr. Hardy also performed an FBA. D12p22. Hardy T737. The Student was "experiencing significant difficulties in the school setting" and was "prone to getting emotional (crying, whining, tantrums, etc.), arguing when he doesn't get his way, displays of anger, has destroyed property, and makes negative statements (including talk of `suicidal thoughts'.)" D12p2.

89. In the section of the FBA entitled "Summary/Recommendations," Mr. Hardy listed items for the IEP team to discuss, rather than making specific recommendations, because the Student's situation was complicated. D12 p23; Hardy T739-40. The Student was fairly capable academically but had difficulty with reading and comprehension in particular. He struggled with social/emotional skills and Mr. Hardy felt he could benefit from working with Tony Larsen, the District Mental Health Counselor. Mr. Hardy suggested the IEP team "consider additional time in the general education setting. He appears to [behave] more appropriate [sic] in that environment. Of course, he needs to possess the skills to be successful in that arrangement." D12p23. All team members agreed with the idea of weighing the Student's academic need in reading with his emotional state. Hardy T743.

90. On March 12, 2020, the reevaluation team met to discuss the reevaluation results. D12p1. In attendance were the Mother, Ms. Booth, a general education teacher, Nurse Isley, Mr. Hardy, Ms. Patterson, Ms. McPeak and Mr. Larsen. D12p21.

91. In addition to discussing the reevaluation results, the team discussed and ultimately recommended continued SDI in reading, along with adding goals in executive functioning and social-emotional adjustment. The team also recommended that the Student talk with Mr. Larsen. D12pp18, 24; Hardy T735, 744. The Mother participated in the discussion. No one on the team expressed any disagreement with the eligibility determination, and the signature page does not indicate any dissenting opinions. Hardy T735-37; D12p21. During the meeting, Mr. Larsen offered to support the Student. Patterson T645.

92. On March 17, 2020, District schools closed to in-person instruction pursuant to an order issued by Washington Governor Jay Inslee to slow the spread of COVID-19. D14p1; Hardy T810. Following the school closure, the District prepared a school closure tracking form for the Student. D14p1. The form, which is not dated, indicated that between March 30, 2020, and June 18, 2020,

Ms. Booth would provide the Student with SDI via Zoom class meetings in the areas of reading, social and executive functioning in the amount of 41 minutes per week in each area. D14p1.<sup>22</sup>

93. After the school closure led to remote learning, Ms. Klute observed that when the Mother assisted the Student with his work, his anger and frustration were directed at the Mother. Klute T443. The Parents contacted the District because they needed help and guidance on how to work with the Student at home. Mother T534. During the hearing, Ms. Klute opined that the Student's behaviors impacted his ability to learn and access his education. She also believed the Parents required training to assist the Student with doing his homework, and that the Student would benefit from counseling by someone who has experience with trauma and attachment issues. Klute T443-44; P48pp4-5. Ms. Klute does not have any education, training or experience as a teacher or in providing academic instruction. She has never observed the Student in a school setting or spoken with his teachers. Klute T447. Accordingly, I give no weight to her opinion that the Student's behaviors impacted his ability to access his education or that the Student requires therapy to access his education. However, I give significant weight to her observations as to how the Student behaved when working on homework with her and with his Mother. Ms. Klute knows the Student well through therapy, has also worked on school work with him, and has observed the Mother working on school work with him. Based on these observations, along with the testimony of the Mother, Mr. Hardy and Ms. Garrison, I find the Student's behaviors interfered with his ability to work on and complete his school work at home. I further find that the Mother, despite her efforts, was unable to assist the Student with this work.

#### *April 2020 IEP*

94. On April 21, 2020, the Student's IEP team met by Zoom video conference to develop the Student's annual IEP. D13p1.<sup>23</sup> Ms. Booth used the reading checklist for sixth grade<sup>24</sup> to assess the Student's present levels of performance because he was working on the skills listed on that checklist in class. The IEP stated: "[The Student] scored 19/46 (41%). [The Student] is showing growth in citing evidence from text to support knowledge of text, analyzing impact of word choice for meaning and tone, and he can compare/contrasts [sic] written vs live versions of text to show similar/differences [sic] in the story." D13p2. Ms. Booth could not explain why she did not include the Student's scores on the Woodcock Johnson IV, which had just been administered as part of his reevaluation. Booth T225. The team discussed the results of the Woodcock Johnson IV, and was thus aware these results indicated the Student was reading at a 2.6 grade level. Booth T252.

---

<sup>22</sup> The Parents' Complaint and issue statement do not include any issues concerning the implementation of the Student's IEPs. Accordingly, no findings of fact are made as to whether or the extent to which the Student's IEPs were implemented.

<sup>23</sup> The Mother attended along with Ms. Booth, Nurse Isley, Ms. McPeak, Mr. Schuldheisz, two general education teachers, Mr. Hardy, and a District administrator. D13p16.

<sup>24</sup> The record does not indicate precisely when the District switched from using the fifth grade reading checklist to the sixth grade reading checklist. Neither party included the sixth grade reading checklist in the documents submitted for the hearing and it is not part of the record.

95. The team set one reading goal as follows: The Student “will understand and increase reading skills in the areas of Key Ideas & Details; Craft & Structure, and integration of Knowledge and Ideas from 19/46 to 46/46 (100%) as measured by the Common Core Reading Skills Checklist 6<sup>th</sup> Grade” by April 20, 2021. D13p2.

96. The IEP team also reviewed the Student’s present levels of performance in social/emotional. The Student needed help managing his emotions and learning social skills concerning those emotions. The Student’s teachers had filled out social skills rating scales created by the District, contained in Exhibit D13p14; McPeak T919-20. The social skills rating scales measured skills such as “asks for help,” and “works cooperatively.” D13p14. The Student achieved a mean score of 2.21. The team set the following goal: “On the social skills rating scale, [the Student] will increase his score on displaying self-control/expressing his feelings appropriately from 1.5 to 1.75 by 4/21/2 [sic].” D13p3.

97. The team also reviewed the Student’s present levels of performance in executive functioning by noting that teachers had completed the executive function skills rating scale created by the District, contained in Exhibit D13p15; McPeak T919-20. The executive function skills rating scale measured objectives such as “organization of materials,” and “self-control.” D13p15. The Student achieved a mean score of 1.67. The team set the following goal: “[The Student] will increase his score on the executive functioning rating scale from 1.67 to 1.72 by working specifically on independent seat work and problem solving, he will accomplish this by 4/21/21.” D13p4. During the hearing, when asked why the Student’s present levels of performance in executive functioning and social skills had not been based on his recent reevaluation, Ms. McPeak explained that having the teachers fill out the District checklists would provide a “starting rubric” for measuring progress toward his goals. McPeak T920-21.

98. The team also considered that the Student was taking ADHD medications along with mood stabilizer medication, and that the Student’s behavior was negatively impacting his learning or the learning of others. D13p5. Accordingly, the team developed a behavioral intervention plan (BIP) for the Student D13p13.

99. The IEP team provided SDI in reading for two different time periods. For the first time period, between April 21, 2020 through June 19, 2020, the Student would receive 672 minutes per week. D13p8. This decision was based on scheduling, and indicated that the Student was in a two-period resource room class. Booth T227; 253. The IEP provided that during this time period, the Student would spend 61% of his time in the general education setting. D13p9.

100. There are four levels of ELA classes at Desert Hills. The resource room offers special education. The next level up is the general education reading lab, referred to simply as “ELA lab.” The next levels are the regular general education and honors level classes. McPeak T926.

101. The IEP provided that for the second time period, between September 1, 2020 and April 20, 2021, the Student’s reading SDI would be reduced from 672 minutes per week to 76 minutes per week. The Student would be placed in the general education ELA lab, rather than the resource room.

D13p8; Booth T253-54; McPeak T926-27. The Student's 76 minutes of reading SDI would be delivered in the support lab. McPeak 925; D13p8.

102. The team's decision to reduce the Student's minutes of reading instruction was based primarily on concerns related to his behaviors in the resource room. The team considered the Student's difficulties with other students in the resource room and his improved behavior in a general education setting. Booth T233-34; 249; McPeak 905; 918; Mother T478. The team thought it was "best . . . to be in a group that was away from some of his peers" in the special education class. McPeak T934. During the hearing, Mr. Hardy emphasized that although it appeared that the Student's SDI had been drastically reduced, "[n]ot one individual [on the team] planned on taking any reading services or support or specially designed instruction away from [the] Student But how those services were delivered and exactly what it looked like - these minutes - it gets confusing, because - but the supports - we were not going to take supports away from him." During the hearing, Mr. Hardy was asked if he meant that "specially designed instruction was being provided, but it's not actually reflected in the IEP?" Mr. Hardy responded, "Yes. Absolutely." Hardy T831.

103. The plan was to work with the Student in the support lab to provide him about 15 minutes per day in reading SDI and to work "with his general education teachers to support, to do whatever we could to complete assignments, help pick out books, rework [sic] on those things in the reading lab support class time." McPeak T925. The plan was that the Student would do the work that all of the other students in the general education ELA lab would be doing, that the general education teacher would modify his work as needed, and that the general education teacher and Ms. McPeak would work together on modifications or shortening the assignments or allowing him extra time to complete his work. McPeak T936. Ms. Booth admitted during the hearing that when the IEP was developed, she did not think it was necessary to reduce the Student's reading SDI to meet the Student's needs. Booth T230.

104. Between September 1, 2020 and April 20, 2021, the IEP also provided for 74 minutes per week in behavior, which included executive functioning, and 74 minutes per week in social/emotional. D13pp8-9; Hardy T827. The IEP provided that during this time period, the Student would spend 87% of his time in the general education setting. D13p9.

105. The IEP did not provide any services in behavior or social/emotional between April 20, 2020 and June 19, 2020.<sup>25</sup> Additionally, the IEP did not specify that Mr. Larsen would work with the Student. Mr. Larsen contacted the Mother prior to the 2020-2021 school year, but the Mother declined his offer to work with the Student because of the pending due process hearing and because instruction was still online. Mother T574-75.

---

<sup>25</sup> As discussed above, the school closure tracking form indicated that the Student would receive 41 minutes per week of SDI in social and executive functioning. Because the Parents have not challenged the implementation of any of the Student's IEPs, no findings of fact are made as to what services the Student actually received following the school closure.

*Assessment by Dr. Grewe in June 2020*

106. Scott D. Grewe,<sup>26</sup> PhD, of Sageview Youth Psychology, conducted a neuropsychological assessment of the Student in June 2020. P36; Grewe T59. Dr. Grewe met the Student on June 17, 2020, and spent approximately 1 to 1.5 hours interviewing him. Grewe T103; 114. Dr. Grewe also interviewed the Mother, but did not interview anyone from the District. Grewe T110-12. He has never observed the Student in a school setting. Grewe T104.

107. Dr. Grewe reviewed Dr. Stewart's psychological assessments conducted in 2012 and 2015. Of note to him was the Student's history of adverse childhood experiences; the Student was adopted, had purportedly experienced physical and verbal abuse, and had a family history of depression, anxiety, ADHD, and learning problems. Grewe T61. The Student also displayed social awkwardness and behavioral challenges. Grewe T62. The 2012 assessment "revealed a mild discrepancy favoring nonverbal over verbal abilities, with relative deficits in alphabet writing fluency. In contrast, other basic academic skills were generally secure." P36p2.

108. Dr. Stewart's 2015 assessment, when the Student was nine years old, "revealed a more significant discrepancy favoring his nonverbal over verbal abilities, as well as related deficits in expressive language." P36p2. With respect to verbal comprehension, 97 percent of children the Student's age performed better than he did. Grewe T72. In the 2015 assessment, Dr. Stewart recommended further evaluation by an SLP to assess the Student's expressive language deficits. Grewe T74. Dr. Grewe did not speak with Dr. Stewart, who is retired, about how he performed the evaluations or to discuss his conclusions. Grewe T106.

109. Dr. Grewe reviewed the District's 2017 reevaluation, including the Student's reading comprehension score of 79 on the Woodcock-Johnson IV, indicating that he was reading at a second grade level when he was in fourth grade. Grewe T76; D2p5. He also reviewed the District's March 2020 triennial reevaluation. He did not conduct his own academic assessment of the Student because the District had just completed its triennial reevaluation. Grewe T110. Dr. Grewe incorporated the District's test data into his assessment and considered it in the context of the Student's history and previous evaluations. Grewe T91-92.

110. The Student's triennial reevaluation in March 2020 revealed a persistent discrepancy, evident in his prior psychological evaluations, favoring the Student's nonverbal over verbal abilities, meaning that the Student struggled with language-based activities that required putting thoughts and ideas into words. P36p6; Grewe T79; Hardy T791.

---

<sup>26</sup> Dr. Grewe has a PhD in school psychology, with specialization in neuropsychology and counseling psychology. He is certified by the American Board of Professional Psychology in clinical neuropsychology. In addition to experience as a school psychologist, Dr. Grewe has been in private practice at Sageview Youth Psychology since 1999. Executive functioning and ADHD are areas of study and expertise for Dr. Grewe, who often contracts with school districts to perform evaluations. P37; Grewe T55-58. He does not conduct speech evaluations, but because the areas of neuropsychology and speech language pathology overlap, he does conduct assessments involving receptive and expressive language and verbal learning. Grewe T102.



111. The Student's score of 75 on the Woodcock-Johnson IV reading comprehension index indicated he was "still in a very low range of academic skill in the reading realm, particularly reading comprehension." Grewe T78, 81-82; P29p10. The Student's reading comprehension skill, at age 13, was equivalent to a child who was eight years and ten or eleven months old. Grewe T87. Dr. Grewe believed it would be difficult for the Student to keep up with the general education demands in eighth grade because the Student struggled to decode words and did not have a strong vocabulary or comprehension. Grewe T81-82.

112. In Dr. Grewe's opinion, the District's triennial reevaluation "revealed persistent deficits in reading decoding and comprehension." P36p6. During the hearing, when Mr. Hardy was asked if he agreed with this assertion, he stated, "No. I would not. That wasn't part of my evaluation. Those are Dr. Grewe's words." Hardy T791.

113. Dr. Grewe also conducted a thorough language assessment of the Student. Grewe T95. In accordance with standard procedure, Dr. Grewe's psychometrist administered the actual assessments. These included the Clinical Evaluation of Language Fundamentals-Fourth Edition (CELF-4) and the California Verbal Learning Test-Children's Version (CVLT-C), along with others noted in his report. P36pp1-2. Dr. Grewe met with the psychometrist after the testing to discuss it. He then interpreted the test results and wrote his report. Grewe T116.

114. Dr. Grewe concluded that the Student has a "pretty significant language disorder and language-based learning struggles" and his "profile is consistent with a receptive-expressive language disorder and a language-based learning disorder, or developmental dyslexia." Grewe T95; T36p6. When asked during the hearing if he agreed with this conclusion, Mr. Hardy noted that this was outside the scope of his job and training. Hardy T794.

115. Dr. Grewe used multiple assessment tools to measure the Student's executive functioning, and behavior, emotional, and social adjustment, which incorporated parent ratings, teacher ratings, and ratings by the Student. Grewe T90; P36p5 (listing assessment tools and test results). Mr. Hardy was not surprised by Dr. Grewe's conclusion that the Student's profile was consistent with generalized anxiety disorder, noting that they had seen this as an area of difficulty for the Student during the months prior to the school closure in March 2020. Hardy T796.

116. Dr. Grewe also reviewed the Student's April 2020 IEP, which was adopted before he had met and evaluated the Student. Grewe T87. In his professional opinion, the Student's April 2020 IEP did not provide adequate services to address the Student's deficiencies in expressive and receptive language. He also opined that the Student required speech/language services in school delivered through his IEP, as well as more academic intervention and behavioral supports than his IEP provided. Grewe T95-97. Dr. Grewe did not understand the rationale for reducing the Student's reading instruction from approximately 11 hours per week between April 21 through June 19, 2020 to only 76 minutes per week starting September 1, 2020. Grewe T88-89; 112. The March 2020 reevaluation did not support a reduction in reading minutes because the Student requires a significant increase in SDI in language-based academics. Grewe T88-89.

117. Dr. Grewe considered the reading checklists a “phenomenal” tool for progress monitoring but noted it was difficult for an outside observer or professional to understand from the District’s checklists what was happening in the classroom. Grewe T123. To the extent that the Student’s progress as reported in his IEPs indicated growth, Dr. Grewe drew a distinction between showing growth on IEP goals and closing the gap with respect to his academic deficits. In other words, although the Student was not regressing and was making some progress on some of the skills he was working on, Dr. Grewe believed that the Student demonstrated a bigger academic deficit in 2020 than he had in fourth grade. Grewe T125-26.

118. Dr. Grewe explained that “what we see from the standardized assessments that were done in 2017 and 2020 is that he’s not closing the gap. So I said, ‘I’m pretty confident he’s not regressing. He’s not losing skill. But he’s just not progressing at the same rate as his classmates.’ . . . That’s what those checklists don’t speak to. They show us these are the skills we’re working on and he’s making some progress. But if we step back and look at the forest and don’t get lost in the trees, I think what we see is sort of a different pattern of academic growth.” Grewe T123-24.

119. In Dr. Grewe’s opinion, the Student requires formal reading intervention to build basic phonological and reading decoding skills. Grewe T99, 137; P36p7. He recommended a substantial increase in time dedicated to this area in his IEP for the 2020-2021 school year, with a focus on ensuring that core foundational reading skills are firmly established. P36p7. Dr. Grewe also recommended that the Student, his Parents, and the District “formally incorporate the expertise of private tutors outside of school,” a recommendation he rarely makes. The rationale for the recommendation was “the persistent severity of [the Student’s] language and language-based academic struggles while receiving specially designed instruction, all in the context of the limited instructional time available for foundational skill development as students move through middle and into high school.” P36p8; Grewe T98-100.

120. Dr. Grewe also opined that the Student’s behavioral and emotional struggles interfered with his learning and noted that “given [the Student’s] various psychiatric diagnoses and emotional struggles, it is a nearly foregone conclusion that he is struggling emotionally more than the adults at school are aware.” Grewe T100; P36p7. He recommended “regularly scheduled access to his school intervention specialist, counselor, and/or another adult, to ‘mentor’ him and monitor his general adjustment . . . This individual can also collaborate with his parents and [his outside counselor] to insure they are using consistent approaches across settings.” P36p7.

121. During the hearing, when questioned about what SDI the Student required that was not provided in his IEP, Dr. Grewe stated that the goals and services provided in the Student’s IEP were a good starting point, but that the Student requires more SDI to develop core phonological skills and reading vocabulary and comprehension skills, formal intervention because his expressive language and language-based learning are significantly impaired, and mental health support. Dr. Grewe did not provide specific information about the appropriate amount of SDI in any of these areas. Grewe T135-38.

### *Request for a Comprehensive IEE*

122. On July 9, 2020, Becca Anderson, District Director of Special Education Services, offered the Parents an IEP team meeting to review Dr. Grewe's report to make a decision about what SDI the Student required, including the potential for one-on-one tutoring. Anderson T417-18. The Mother declined the IEP team meeting, however, because of the pending due process hearing. Anderson T418. The IEP team has not met since the issuance of Dr. Grewe's report. Anderson T420.

123. On July 27, 2020, the Parents requested an IEE at public expense because they disagreed with the District's March reevaluation of the Student. P40p1. On July 30, 2020, the District issued a prior written notice (PWN) proposing to initiate an IEE and agreeing to fund the IEE. P40p2. The District provided the Parents with a list of providers, but did not provide District criteria concerning IEEs. Anderson T399.

124. On September 28, 2020, the Mother sent an email to Ms. Anderson asking the District to reimburse the Parents for the cost of Dr. Grewe's evaluation, which amounted to \$3,290 as part of the IEE. P44p1; Anderson T411. Dr. Grewe is on the District's list of approved IEE providers. Anderson T409. The record does not establish whether the District responded to the Parents' request for reimbursement for Dr. Grewe's evaluation at that time. During the hearing, the District argued that Dr. Grewe's evaluation does not constitute an IEE because the Parents contacted Dr. Grewe to "initiate" the evaluation before the District completed its triennial evaluation. T402. Dr. Grewe completed his evaluation in late June 2020. P36p1.

125. Although the Parents' insurance covered the \$3,290 for Dr. Grewe's evaluation, the Parents hope to "pay back [their] insurance company and get back that benefit," in the event that the Student requires an additional evaluation. Mother T526. There is no evidence in the record as to whether the Parents' insurance company would permit the Parents to pay them back or whether that would reinstate the ability to obtain an additional evaluation.

126. The Mother's email on September 28, 2020, also stated that the Parents had selected the Winston Center for Attention, Learning and Language (Winston Center) to conduct the speech language portion of the IEE, and had already made an appointment for the assessment. With respect to the FBA portion of the IEE, the Parents were still considering options and had not yet decided. Parent T587; P44p2. Ms. Anderson contacted the Winston Center to set up a contract regarding payment but had not yet received an invoice for payment. Anderson T412; Mother T589-90.

127. When the District receives a private report diagnosing a student with dyslexia, Ms. Anderson suggests a comprehensive evaluation if one had not been done recently and suggests that "[the District] look at all areas of academics, including reading, writing, math, as well as cognitive skills." Anderson T416.

128. Lissa Power-deFur,<sup>27</sup> PhD, testified during the due process hearing as an expert witness in speech language pathology. Dr. Power-deFur reviewed some of the Student's education records, including Dr. Grewe's report (P36); the District's April 2017 reevaluation (P7); the District's June 2019 reevaluation summary (P20); and summaries of speech-language test results from an IEE of the Student conducted by Hannah Fant, who is employed by the Winston Center. The IEE is dated September 29, 2020.<sup>28</sup> P7; P20; P45; Power-deFur T316; 320; P46p1. Dr. Power-deFur has never met the Student and has never observed him in an academic setting. She has not spoken to any of the Student's teachers or service providers. Power-deFur T314-16; 323-24.

129. When Dr. Power-deFur sees a psychological report showing a discrepancy between an individual's verbal skills and nonverbal skills, as with the Student, it suggests the need for a comprehensive evaluation of oral and written expressive and receptive language skills, especially when the discrepancy persists over time. Power-deFur T308, 339; P46p2. Similarly, many children who have oral problems very frequently have reading problems, suggesting the need for evaluation. An SLP should also be aware of behavioral challenges, which can also suggest a need for evaluation of a child's language skills. Dr. Power-deFur T333, 338-39; P46p2. Given the Student's history, Dr. Power-deFur believed that "a detailed evaluation should have been done at an earlier age to plan for his future." Power-deFur T307.

130. Dr. Power-deFur did not believe that the District's 2017 communication evaluation was a comprehensive speech/language evaluation. Power-deFur T282, 339. With respect to the District's 2019 reevaluation, Dr. Power-deFur explained that because the District's communication checklists are not a standard measure, it is hard to know what Ms. Atkinson meant when she said the Student had "Mastered all skills on communication checklists." Power-deFur T275. She acknowledged that the communication checklists do address expressive language skills. Power-deFur T323; 332. In Dr. Power-deFur's view, the Student should not have been exited from special education services in communication in 2019, noting that "he was dismissed based on his performance for production of two speech sounds [/r/ and /th/], with no detailed discussion about his performance on a rather significant language problem." Power-deFur T332; P41p1. Dr. Power-deFur was not certain as to what expressive language services were in fact provided to the Student. Power-deFur T282, 285, 331-32.

131. Dr. Power-deFur also testified about the results of an IEE of the Student by Hannah Fant of the Winston Center, contained in Exhibit P45. Exhibit P45 was admitted to ensure a complete record in this case, but no findings are made and no weight is given to Ms. Fant's IEE. The record establishes that the Parents arranged for Ms. Fant to conduct a speech/language assessment of the Student, and that the Parents provided a copy of the report to the District. Mother T525. Ms. Fant also met with the

---

<sup>27</sup> Dr. Power-deFur has a PhD in speech-language pathology. She has held her certificate of clinic competence from the American Speech-Language-Hearing Association since 1977. Dr. Power-deFur has worked as a speech and language pathologist in a clinical setting, taught at the university level for over twenty years, and worked for the Virginia Department of Education in the Division of Special Education and Student Services for eighteen years. Power-deFur 269-271; P47 pp1-2.

<sup>28</sup> The record is unclear as to whether Dr. Power-deFur also reviewed the Student's June 2019 IEP. Power-deFur T319-320.

Parents to go over the report. Mother T527. But because the Winston Center will not participate in legal proceedings, there is no evidence in the record to establish Ms. Fant's education, training or experience, how Ms. Fant conducted the evaluation, or whether she followed test protocols. Power-deFur T287; 323. Dr. Power-deFur looked up Ms. Fant in the directory of American Speech/Language Hearing Association and saw that she is a speech/language pathologist who holds the CCC, but that is the extent of the evidence in the record as to Ms. Fant's credentials. Power-deFur T323. Moreover, Dr. Power-deFur acknowledged during the hearing that some pages from the report in Exhibit P45 were either missing or not in order, indicating that it is not a complete report. Power-deFur T328. Additionally, Ms. Fant's report was not subject to cross-examination. For all of these reasons, I give no weight to Ms. Fant's evaluation and, therefore, give no weight to Dr. Power-deFur's testimony based on that evaluation. Because Dr. Power-deFur's conclusion that the Student has a language impairment is largely premised on this report and forms the basis for her recommendation that the Student requires compensatory services, I also give no weight to those recommendations as detailed in her report. Power-deFur T311; P46p3.

132. As of the time of the hearing in late October 2020, the Student currently had an F in his ELA lab class. McPeak T927. He was "pretty much failing every single class" except P.E. Mother T485; P50p20.

133. The Mother believes that the District knew the Student had a language-based learning disorder and did nothing to address it. When asked what she meant by "language-based disorder," the Mother clarified "that's the term that Dr. Grewe used in saying that [the Student] has an issue with expressive and receptive language that affects all areas of reading." Mother T564-65. She pointed to the Student's failure to improve in reading and that he was still reading at the level of an eight-year-old, to argue that the District did nothing to address the diagnosed disorder. Mother T565.

134. The Parents believe compensatory services are required; they have contacted multiple places, including the Winston Center, Learning Ladder, Sylvan Learning, and Lindamood Bell, concerning reading tutoring. Based on Dr. Grewe's report, the Winston Center estimated that the Student would require 18 months to two years of intensive work, four days per week for thirty minutes, to address his deficits. There is no evidence in the record as to how the Winston Center determined this amount of time. The Winston Center charges \$125 per session, which is commensurate with most of the providers the Parents contacted. If the Winston Center were to provide tutoring to the Student, it would cost \$500 per week, for a total cost of \$36,000 for 18 months or \$48,000 for two years. Mother T537. When the Mother testified at the hearing, the Student had been working with a reading tutor for about one week and was excited about it at that point. Mother T537.

## 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.*

#### *Statute of Limitations and Jurisdiction*

8. Under WAC 392-172A-05080, a due process hearing request must be made “within two years of, and allege a violation that occurred not more than two years before, the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint . . . .” The Parents filed their due process complaint on July 27, 2020. In a prehearing conference on October 5, 2020, the Parents clarified that they are not seeking to extend the look-back period. Accordingly, there is no dispute that the complaint is limited to actions that occurred after July 27, 2018.

9. As discussed in footnote 5 of this order, an ALJ does not have jurisdiction over claims relating to the provision of a plan for the Student under Section 504 of the Rehabilitation Act. Any evidence concerning a 504 plan was considered for contextual purposes only.

#### *Claims Not Raised in the Complaint*

10. A party requesting a due process hearing may not raise issues during a due process hearing that were not raised in the complaint unless the other party agrees. WAC 392-172A-05100(3); 20 U.S.C. § 1415(f)(3)(B). “Administrative and judicial review in IDEA cases is specifically limited to the

issues raised in the due process complaint, unless the parties agree otherwise.” *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 \*34-35 (W.D. Wash. May 8, 2019) (upholding ALJ’s refusal to address claims raised for first time in post-hearing brief where Parents cited no evidence that parties agreed to expand scope of due process hearing). This is consistent with Washington administrative law requiring that a notice of hearing include a statement of the issues (RCW 34.05.434) and that prehearing orders identify all issues and provide an opportunity to object. WAC 10-80-130. An exception to this rule is when an issue was actually tried by the parties at an administrative hearing. *M.C. v. Antelope Valley Union High School Dist.*, 858 F.3d at 1196; *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); see also *Issaquah Sch. Dist.*, at \*37 (holding that parents failed to show any of claims not considered by ALJ were tried by consent, contrasting with *Antelope Valley*: “[b]oth sides in *Antelope Valley* ‘presented extensive evidence,’ including witness testimony, regarding the omitted claim”). In this case, the Parents have not shown that an exception applies, as discussed below. The issues to be addressed remain those identified in the prehearing order and starting at page 2, above.

#### *Did the District Fail to Use Evidence-Based Tools to Measure the Student’s Progress?*

11. An IEP must contain a statement of measurable annual goals, including academic and functional goals designed to meet a student’s needs to enable him to be involved in and make progress in the general education curriculum. WAC 392-172A-03090(1)(c); 34 § CFR 300.320(a)(3).

12. The Parents contend that progress monitoring “is supposed to be a scientifically based practice assessing a child’s academic progress and evaluating the effectiveness of instruction.” PB24.<sup>29</sup> They argue that the District used internally made checklists to set present levels of performance and to chart progress, and contend that these checklists “resulted in baselines that were not related to the Student’s actual functional performance.” PB24. In other words, the Student’s scores on the checklists did not correlate to his scores on standardized testing. For example, in March and April 2020, the Student successfully completed 41% of the tasks on the sixth grade reading checklist, yet his score on the Woodcock-Johnson IV indicated that his reading comprehension was equivalent to a child aged 8 years, 10 or 11 months.

13. The Parents have not provided any authority to support their claim that progress monitoring is inappropriate unless tied to standardized test scores. They have not provided any authority prohibiting a District from using internal checklists or rubrics and have not provided evidence to demonstrate that the checklists themselves were inappropriate. Dr. Grewe, the Parents’ expert witness, drew a distinction between measuring a Student’s progress toward IEP goals versus standardized assessments to indicate a student’s overall growth. He testified that the reading checklists were a “phenomenal” tool for IEP progress monitoring.

14. The Parents rely on *Jefferson Cty. Bd. of Educ. v. Lolita S.*, 581 F. App’x 760 (11th Cir. 2014). In that case, the court concluded that a student’s IEP was not individualized because his reading goal

---

<sup>29</sup> Citations to the closing briefs are as follows: PB9 refers the Parents’ brief at page 9; DB9 refers to the District’s brief at page 9.



was set at a ninth grade level without evidence showing that the student's reading comprehension had increased from a first-grade level to a ninth grade level during the prior school year. In this case, however, the evidence demonstrates that by January 2020, the Student had mastered the skills on the fifth grade checklist. When the IEP team met to develop his IEP in April 2020, he had progressed to working on the sixth grade reading checklist and had achieved 19/46 (41%) of the skills. The Parents did not provide any testimony to establish that the Student could not make progress by working on the skills listed on the sixth grade reading checklist. Additionally, the Parents did not provide any testimony to establish that the skills addressed on the sixth grade reading checklist failed to target the Student's reading needs.

15. The Parents further contend that the District's checklists are not an objective standard. A similar claim was rejected in *Kuszewski v. Chippewa Valley Sch.*, 51 F. Supp. 2d 812 (E.D. Mich. 1999), in which the court held that a student's IEP "clearly provides measurable goals and objectives. For instance, the IEP states, among other objectives, that Brian will recall four story events in sequence after a reading, that Brian will use appropriate punctuation and capitalization in sentences, and that Brian will make correct change up to \$ 1.00. All of these are concrete examples of the measurable objectives Brian's parents claim the IEP lacks." The reading checklist in this case contains similar objectives, such as "compare and contrast two or more characters," and "in literary text, analyzes impact of word choice on meaning and tone." Similarly, the District's internal social skills rating scale measured objectives such as "asks for help," and "works cooperatively." The executive function skills rating scale measured objectives such as "organization of materials," and "self-control." The communications checklist measured objectives such as "describes objects with one attribute (e.g., color object)," and "explains how two concrete items are the same."

16. The Parents bear the burden of proof on this issue. They have not provided legal authority requiring the use of standardized test scores to measure progress toward IEP goals and have not shown that any of the District's checklists, rubrics or rating scales were not an objective or appropriate tool for measuring the Student's progress. Accordingly, the Parents have not met their burden of proof on this claim.

*Whether the District denied the Student a free appropriate public education (FAPE) from July 27, 2018 by failing to provide IEPs for the 2018-2019, 2019-2020 and 2020-2021 school years that contained sufficient specially designed instruction in the areas of social/emotional, behavior, reading, speech and communication to enable the Student to make progress in light of his circumstances.<sup>30</sup>*

17. The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry that must focus on the unique needs of the student at issue. As the U.S. Supreme Court has made clear, "[a] focus on the particular child is at the core of the IDEA," and an IEP must meet a child's "unique needs." *Endrew F.*, 137 S. Ct. at 999 (emphasis in original). "An IEP is not a form document," and the "essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.* "Above all, an IEP team is charged with developing a 'comprehensive

---

<sup>30</sup> As discussed above, the Parents' Complaint and issue statement do not raise any issues concerning the implementation of the Student's IEPs.

plan' that is 'tailored to the unique needs of a particular child.'" *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834, \*67 (W.D. Wash. May 8, 2019) (quoting *Andrew F.*, 137 S. Ct. at 994).

18. "Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Andrew F.*, 137 S. Ct. at 999 (emphasis in original). However, a reviewing court may fairly expect school district authorities "to be able to offer a cogent and responsive explanation for their decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1002.

19. WAC 392-172A-03110(1) requires an IEP team, in developing an IEP, to consider the student's strengths; the student's most recent evaluation results; the academic, developmental, and functional needs of the student; and the parents' concerns for enhancing the student's education. An IEP must include a statement of the special education and related services to be provided to the student to enable the student to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students, including nondisabled students. WAC 392-172A-03090(1)(d); 34 CFR §300.320.

20. An IEP Team must "revise the IEP, as appropriate, to address: (i) Any lack of progress toward the annual goals . . . ; (ii) the results of any reevaluations; (iii) information about the student provided to, or by, the parents, as described under WAC 392-172A-03025." WAC 392-172A-03110.

21. The educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole. See, e.g., *Karl v. Bd. of Educ. of Geneseo Cent Sch. Dist.*, 736 F.2d 873, 877 (2<sup>nd</sup> Cir 1984); *Palo Alto Unified Sch. Dist.*, 118 LRP 21969 (CA SEA 2018) (citing *J.M. v. New York City Dep't of Education*, 171 F. Supp. 3d 236, 247-48 (S.D.N.Y. 2016) ("An IEP must be considered as a whole; its individual parts cannot be judged in isolation.") This requires an assessment of whether the Student's IEPs for the 2018-2019, 2019-2020, and 2020-2021 school years, are appropriate for the Student.

#### *June 2018 IEP*

22. The Parents allege that the District failed to provide the Student with an IEP for the 2018-2019 school year that enabled him to make progress in light of his circumstances. The District argues that any issues related to the development of the June 2018 IEP are barred by the statute of limitations, which precludes consideration of events that occurred prior to July 27, 2018. As discussed previously, the Parents have stated they are not seeking to extend the statutory look-back period. Accordingly, their challenge to the development of the June 2018 IEP is barred by the statute of limitations and is not considered.

### *August 2018 IEP Amendment*

23. The Parents argue that the August 2018 IEP amendment changed the Student's reading SDI for scheduling purposes, rather than to meet his individual needs, increasing his reading SDI from 150 minutes per week to 690 minutes per week. Ms. Garrison amended the IEP because reading services were delivered using a pullout model at Cottonwood whereas at Desert Hills, reading services were provided during a two-period special education ELA class. This resulted in a significant increase in the Student's reading SDI and decreased the Student's general education time from 90% to 60%.

24. An amendment based *solely* on scheduling, rather than on a student's individual needs, does not comport with WAC 392-172A-03110, which mandates that an IEP team focus on a student's unique needs in developing, reviewing, and revising an IEP. The Parents have not articulated, however, why the increase in the Student's reading SDI is inappropriate and does not meet the Student's needs. To the contrary, one of the Parents' main arguments throughout the hearing was that the District failed to provide the Student with sufficient SDI in reading to meet his needs. The record supports the need for significant SDI to address the Student's ongoing struggle with reading comprehension. The record also demonstrates that the Parents ultimately agreed to and signed the IEP amendment. Moreover, there is no evidence in the record that the Parents disagreed with the Student's placement in the special education ELA class, even though it decreased his time in the general education setting. The August 2018 IEP amendment did not change either of the Student's reading goals. The only change was to increase the amount of SDI, which is consistent with the Student's needs. Accordingly, the Parents have not shown that the amount of reading SDI in the August 2018 IEP amendment, or the resulting decrease in the general education setting, was inappropriate or did not meet his needs.

25. The Parents also contend that the August 2018 IEP amendment was made outside the IEP process, and without parental participation or proper prior written notice. The Parents' Complaint did not raise any of these claims and the District did not agree to expand the issue statement. WAC 392-172A-05100(3). The Parents have not provided any argument as to why these claims should be considered despite not having been raised. *Tehachapi Unified Sch. Dist.*, 2019 U.S. Dist. LEXIS at \*15-16; *Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS at \*37. Accordingly, these claims are not considered.

26. The Parents also claim that the District failed to provide the Student with an IEP for the 2018-2019 school year that contained specialized instruction or related services in executive functioning, social/emotional and behavior. The record does not support this assertion for several reasons. First, the IEP for the 2018-2019 school year was developed on the basis of the Student's reevaluation in April 2017, which determined that the Student required SDI in reading and communication and did not recommend SDI or related services in other areas. See WAC 392-712A-03035(1)(d). The Parents' suggestion in their post-hearing brief that the 2017 reevaluation was not appropriate or comprehensive is not considered because it is barred by the statute of limitations and was not raised in the complaint. Moreover, a careful consideration of the evidence in the record shows that in August 2018, the Student was not demonstrating at school the behavioral, social and executive functioning issues that later surfaced. Accordingly, the Parents have not shown by a preponderance of the

evidence that the Student required SDI or related services in the areas of executive functioning, social/emotional or behavior to make progress in light of his circumstances.

27. With respect to communication, when the team developed the Student's IEP in June 2018, they considered that the Student had made significant growth with his speech and language skills. The IEP set two goals, one to address articulation and one to address expressive language, and provided 30 minutes of SLP services per week. This amount of SDI did not change when the IEP was amended in August 2018. The Parents have not articulated why this amount of SDI was inappropriate at the time of the amendment. Additionally, a comprehensive review of the evidence of record does not demonstrate that the amount of communication SDI in the August 2018 IEP amendment was inappropriate.

28. After careful review of the evidence, it is concluded that the Parents have not proven by a preponderance of the evidence that the District failed to provide an IEP for the Student for the 2018-2019 school year that contained sufficient SDI or related services to enable the Student to make meaningful progress. Accordingly, the Parents have not shown that the August 2018 IEP amendment denied the Student FAPE.

#### *Request for Reevaluations in Math and Reading Comprehension*

29. The Parents' post-hearing brief claims, for the first time, that the District's September 2018 reevaluation of the Student failed to examine whether reading comprehension contributed to his math struggles, and that the District failed to issue a prior written notice after refusing the Parents' request to reevaluate the Student's reading comprehension in February 2019. The Parents' complaint did not raise either issue and the District did not agree to expand the issues in this case. WAC 392-172A-05100(3). The Parents have not provided any argument as to why either claim should be considered despite not having been raised. See *Issaquah Sch. Dist.*, at \*37. Therefore, these issues are not considered.

#### *June 2019 IEP*

30. The Parents argue that the District discontinued the Student's speech and language services without first evaluating him, making the June 2019 IEP fundamentally flawed. PB9 They raise numerous points, each of which is addressed in turn.

31. First the Parents contend that Ms. Atkinson was working as an SLP under emergency certification but did not meet state educational requirements. Ms. Atkinson has a bachelor's degree in speech language pathology and had received a two-year license from the State of Washington to work in a school setting as an SLP. In order to meet their burden of proof, the Parents must show it is more likely than not that Ms. Atkinson was not qualified to work as an SLP in a school setting, despite the State of Washington having licensed her to do so. The Parents have not introduced any evidence to support such a conclusion and have not met their burden of proof on this claim.

32. The Parents also contend that Ms. Atkinson failed to obtain parental consent before reevaluating the Student. Under WAC 392-172A-03000(4)(a)(i), however, the District was not required to obtain the Parents' consent prior to its review of existing data, which was the extent of the reevaluation here. Accordingly, the Parents have not proven this claim.

33. The Parents next claim that Ms. Atkinson did not provide progress reporting to the Parents at the June 2019 IEP meeting to support her recommendation that the Student be dismissed from speech therapy. Under WAC 392-172A-03025, as part of any evaluation or reevaluation, the reevaluation team must review existing data on the student, including evaluations, information provided by the parents, current classroom-based, local, or state assessments, classroom-based observations, and observations by teachers and related services providers. Based on that review and input from the parents, the team must then identify what additional data, if any, are needed to determine whether the student continues to be eligible for special education, whether any additions or modifications to the special education and related services are needed, and the present levels of academic achievement and related developmental needs of the Student. WAC 392-172A-03025(2)(a)(ii) and (2)(b).

34. Ms. Atkinson recommended discontinuing speech services based on her review of the Student's existing speech therapy logs, conversations with the Mother and the Student's teachers, and observations of the Student engaged in conversation. Ms. Atkinson had worked with the Student throughout the 2018-2019 school year and therefore had ample opportunity to observe him engaging in conversational speech. She considered him to be doing well in conversational speech in formal and informal settings. The Student had mastered the skills on the communication checklist and had made progress toward his articulation goal. Although he had not achieved 90% articulation of target sounds, he had progressed from 70% to 80%. The reevaluation team considered all of these factors during the reevaluation meeting as required by WAC 392-172A-03025. There is no requirement that all data considered must be distributed to team members. Additionally, no one on the team requested additional assessment of the Student. Although the Mother suggests that she did not seek additional assessment because she was relying on District expertise, the record demonstrates that she requested assessments in math and reading when she had concerns about the Student's performance in those areas.

35. To the extent that the Parents rely on the testimony of Dr. Power-deFur to support their claim that the Student's SDI in speech should not have been discontinued without further evaluation, I give more weight to Ms. Atkinson's testimony on this point. See *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1212 (9th Cir. 2008) (ALJ reasonably discounted the testimony of the parents' experts because those experts "based their opinions predominantly upon file reviews," in contrast to teachers who had observed the student's school performance). Ms. Atkinson worked with the Student throughout the 2018-2019 school year. She observed him in a variety of settings and talked with his teachers and his Parents. In contrast, Dr. Power-deFur has never met the Student or observed him in an educational setting. She acknowledged that she does not understand the District's communication checklist, but never spoke to Ms. Atkinson to ask questions about the Student or the checklist. Dr. Power-deFur reviewed only a limited number of the Student's educational records. Moreover, her conclusion that the Student should not have been dismissed from speech services in 2019 was

premised on her understanding that he was dismissed based on his performance toward his articulation goals. The record establishes, however, that the reevaluation team also considered that the Student mastered the communication checklist, which Dr. Power-deFur acknowledged addressed expressive language skills.

36. After careful consideration of the evidence in the record, it is concluded that the Parents have not shown that the District discontinued the Student's speech SDI without first evaluating him. Additionally, they have not shown that the District was required to conduct further assessments of the Student prior to discontinuing his speech services. Therefore, they have not shown that his June 2019 IEP required SDI in speech in order for the Student to make progress in light of his circumstances.

37. The Parents next claim the June 2019 IEP failed to include SDI or related services addressing the Student's social/emotional, behavioral and executive functioning needs. The record establishes that the IEP team reviewed the Student's present levels of performance and concluded that communication, motor, social, behavior, and life/adaptive skills were within normal limits. The team considered whether the Student's behavior negatively impacted his learning or the learning of others and determined that it did not. The Parents point to the Student's frequent visits to the health room during the 2018-2019 school year and argue that "there is no indication this significant information was considered during the development of the June 2019 IEP." PB10 However, it is the Parents' burden to establish this point and they have not introduced any evidence to contradict the statement in the IEP that the team considered whether the Student's behaviors negatively impacted his learning or the learning of others, or to establish what details the team did or did not consider.

38. Moreover, the Student's online health records indicate that the Student's visits to the health room had decreased over time (17 visits between September and November, 2018; 9 visits between December 2018 and June 2019), and amounted to less than two hours for the entire school year (visits ranged from 1 minute to 11 minutes, for a total of 110 minutes). Additionally, both Ms. Garrison and Nurse Isley addressed the Student's attempts to avoid work by going to the health room by communicating with the Mother and the Student's teachers. Accordingly, the Parents have not shown that it is more likely than not the Student required SDI or related services in social/emotional, behavior, or executive functioning in his June 2019 IEP in order for the Student to make progress in light of his circumstances.

39. With respect to reading SDI in the June 2019 IEP, the Parents' brief merely states "The single IEP reading goal was tied to increasing the Student's score on a District-made Common Core Reading Skills Checklist for 5<sup>th</sup> Grade." PB 10. To the extent that this sentence suggests the Parents believe the IEP should have contained another reading goal, the Parents have not articulated what that goal would be or why it would have been appropriate. Additionally, as discussed previously, the Parents have not shown that the use of the checklist was inappropriate to measure the Student's progress.

40. The evidence establishes that the team considered the Student's present levels of performance with respect to reading. At the end of his sixth grade year, the Student demonstrated

25/44, or 57%, of the skills on the fifth grade reading checklist. He “was able to read texts in the 4<sup>th</sup> to 6<sup>th</sup> grade level range,” and “continue[d] to improve his comprehension.” His reading fluency and pronunciation were within normal limits.

41. Although the results of the SBAC indicated that the Student did not meet grade level expectations for sixth grade students, the Student’s goal was to be reading at a fifth grade level by the end of sixth grade. The Student had progressed from mastering 20% of the skills on the fifth grade checklist in November 2018 to mastering 57% of the skills on the fifth grade checklist in June 2019. Ms. Garrison, who worked closely with the Student throughout the year, felt this showed the Student was reading at a fifth grade level by the end of sixth grade.

42. The IEP maintained a provision that required 690 minutes per week of SDI in reading to be delivered by special education staff in a resource room, with the Student spending 60% of his time in the general education setting. The Parents have not provided any evidence to establish that this amount of SDI was inappropriate.

43. After a comprehensive review of the evidence in the record, the Parents have not met their burden to show that the June 2019 IEP was not reasonably calculated to enable the Student to make progress in light of his circumstances.

*April 2020 IEP*<sup>31</sup>

44. The Parents argue that the April 2020 IEP was not reasonably calculated to enable the Student to make progress in light of his circumstances because the team did not fully consider the Student’s needs or his present performance levels, and the IEP did not provide appropriate reading goals, sufficient reading instruction, or specify what reading services the District would provide. As discussed above, 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. An IEP must contain “[a] statement of a child’s present levels of academic achievement and functional performance, including . . . how the child’s disability affects the child’s involvement and progress in the general education curriculum.” 34 C.F.R. § 300.320(a)(1)(i). The Parents argue that the present levels of performance did not accurately identify the Student’s needs because Ms. Booth failed to include results from the recent triennial reevaluation indicating the Student’s reading comprehension was at a 2.6 grade level. PB 19. In preparing the Student’s present levels of performance, Ms. Booth used the sixth grade reading checklist because that is what the Student was working on in class. She did not include the Student’s scores on the Woodcock-Johnson IV. During the

---

<sup>31</sup> The Parents spent significant time eliciting testimony concerning the District’s triennial reevaluation and devoted a significant portion of their brief to discussing the reevaluation. As discussed during the hearing, evidence concerning this reevaluation was admitted and considered solely for the purpose of establishing the information that the IEP team had available to it when it formulated the April 2020 IEP. As the Parents acknowledged during the hearing, the appropriateness of the reevaluation is not at issue, and was not considered, because the District has agreed to fund an IEE.

IEP team meeting, however, the team considered these scores. Accordingly, in developing the IEP, the team was aware that the Student's reading comprehension skills were commensurate with a 2.6 grade level.

46. The Parents further argue that the Student's single reading goal was inappropriate because it was tied to the sixth grade reading checklist when the Student was reading at a second grade level. PB19. As discussed previously, the Parents have not established that the District's checklist was inappropriate, or that it was an inappropriate way to measure the Student's progress.

47. The Parents next contend that the April 2020 IEP failed to provide the Student with sufficient SDI in reading to enable him to make progress in light of his circumstances.<sup>32</sup> The overwhelming evidence in the record establishes that the Student had a significant and longstanding deficit in reading, particularly in reading comprehension. All of the Student's teachers agreed that he struggled with reading comprehension and his recent reevaluation confirmed these difficulties. During the 2018-2019 and 2019-2020 school years, the Student had been making progress on the fifth grade reading checklist with 690 minutes per week of SDI in reading. There was nothing in the Student's present levels of performance to suggest that he no longer needed that amount of SDI to make progress. Ms. Booth admitted during the hearing that when the team developed the IEP, she did not think a reduction in SDI was required to meet the Student's needs. Additionally, the March 2020 reevaluation expressly noted: "Because [the Student] is performing in the very limited to limited average range in all areas of reading it may not be beneficial for him to be in a general education setting without accommodations or modifications. [The Student] may require specially designed instruction in all areas of reading." Despite the Student's significant needs, the IEP team reduced his reading minutes from 690 to 672 minutes per week for the period of April 20, 2020 through June 19, 2020, and from 672 to 76 minutes per week for the period of September 1, 2020 through April 20, 2021. Based on a comprehensive review of the evidence, the Parents have shown that both of these reductions in reading SDI did not meet the Student's needs. WAC 392-172A-03110(1).<sup>33</sup>

48. During the hearing, Mr. Hardy insisted that the Student's SDI was not being reduced for the 2020-2021 school year. He emphasized that District general education teachers and reading specialists are well-equipped to provide reading instruction and planned to provide instruction to the Student. That may be the case, but the only reading SDI documented in the Student's IEP for the 2020-2021 school year was for 76 minutes per week to be delivered in the support lab. It is well-established that an IEP is a written statement that must include a statement of the special education and related services to be provided to the student. WAC 392-172A-03090(1)(d); 34 CFR §300.320. To the extent that the District intended to provide the Student the 690 minutes per week of reading SDI he required, it failed to document it in the Student's IEP, in violation of the IDEA. See *Union Sch. Dist. V. Smith*, 15 F.3d 1519 (9<sup>th</sup> Cir. 1994).

---

<sup>32</sup> To the extent that the Parents are arguing the 2020-2021 IEP should have contained SDI in communication, the Parents have not established this claim.

<sup>33</sup> Because Dr. Grewe did not evaluate the Student until after the April 2020 IEP team meeting, his testimony and evaluation report were not considered in determining the Student's need for SDI in April 2020, when the IEP was developed.



49. Based on the results of the March 2020 triennial reevaluation, the IEP team provided SDI in social/emotional and behavior, which included executive functioning. The Parents have not introduced any credible evidence to establish that the amount of SDI – 74 minutes per week in each area – was not appropriate. They have shown, however, that the Student required that SDI between April 20, 2020 and June 19, 2020, and that his IEP team did not include such SDI in his IEP. As discussed subsequently in this order, the record establishes that the District was aware that the Student's behaviors were impeding his learning as of late November 2019. Additionally, Mr. Hardy moved up the date for the triennial reevaluation based on his recognition of the Student's difficulties in these areas. The IEP team added SDI in these areas based on the March 2020 reevaluation, which demonstrated the Student's significant needs in these areas. There is nothing in the reevaluation or the hearing record that would have supported a delay in providing this SDI in these areas. It is therefore concluded that the IEP team's decision that his IEP would not include SDI in social/emotional and behavior for the period of April 20, 2020 through June 19, 2020, did not reflect the Student's unique needs as required by WAC 392-172A-03110(1).

50. Viewed comprehensively, the evidence in the record demonstrates that the Student's April 2020 IEP was not reasonably calculated to enable the Student to make progress in light of his circumstances because it did not provide him with the reading SDI he required, and it did not provide him with the social/emotional and behavioral SDI he required from April 20, 2020 through June 19, 2020. Accordingly, the April 2020 IEP did not provide the Student with FAPE.

*Whether the District Failed to Conduct a Functional Behavioral Assessment and to Develop a Behavioral Intervention Plan Prior to January 2020*

51. The Parents contend that the District has been aware of the Student's behavioral challenges since early elementary school. They assert there were clear signs his behaviors posed significant barriers to his ability to learn, including that he cried a lot during middle school, made numerous trips to the health room, engaged in lewd conduct in the classroom, verbalized wanting to harm himself and in fact did bang his head repeatedly on the wall in front of a teacher on at least one occasion, was hospitalized for suicidal ideation, and did not get along well with peers. The Parents argue that despite these signs, the District failed to conduct an FBA until March 20, 2020, did not develop a BIP until April 20, 2020, and did not include behavior and social/emotional SDI in his IEP until April 2020. Moreover, the SDI in the April 2020 IEP was included for the period from September 1, 2020 through April 20, 2021.

52. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). A functional behavior assessment is one type of behavioral intervention or strategy that helps identify causative factors and objectionable behaviors. *J.L. v. Manteca Unified Sch. Dist.*, 2016 U.S. Dist. LEXIS 77441 (E.D. Cal. June 14, 2016); see also S

12, 2007). As the Ninth Circuit recently held in *Butte Sch. Dist. No. 1 v. C.S.*, 817 F. App'x 321 (9th Cir. 2020):

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

*Id.* at 326.

53. A behavioral intervention plan (BIP) is a plan incorporated into a student’s IEP if the IEP team determines that it is necessary for the Student to receive FAPE. WAC 392-172A-01031. At a minimum, it must describe the following:

1. The pattern of behavior(s) that impedes the student’s learning or the learning of others;
2. The instructional and/or environmental conditions or circumstances that contribute to the pattern of behavior(s) being addressed by the IEP team;
3. The positive behavioral interventions and supports to:
  - a. Reduce the pattern of behavior(s) that impedes the student’s learning or the learning of others and increases the desired prosocial behaviors;
  - b. Ensure the consistency of the implementation of the positive behavioral interventions across the student’s school-sponsored instruction or activities;
4. The skills that will be taught and monitored as alternatives to challenging behavior(s) for a specific pattern of behavior for the Student.

54. With respect to the 2018-2019 school year, the Parents argue that the Student frequently visited the nurse’s office to avoid class. They also assert the District was aware it was very difficult for the Student to do homework. Based on these behaviors, they argue the Student should have been referred for an FBA. The overwhelming evidence establishes, however, that prior to the 2019-2020 school year, there was a significant difference between the Student’s behaviors at home and at school. Additionally, despite the Mother’s concerns about the Student’s inability to do his homework, Ms. Garrison did not assign much homework and the Student was able to make up during class any homework he was unable to do at home. Ms. Garrison also devised a plan to address the Student’s work-avoidance attempts by ensuring that the Student’s teachers and the Mother were on the same page as to assignments. Nurse Isley also addressed the Student’s frequent visits to the health room by emailing the Mother and the Student’s teachers and by sometimes calling the Mother. As a result, the Student’s health room visits ranged from 1 minute to 11 minutes, for a total of 110 minutes in the health room during the entire school year. Considered as a whole, the Parents have not shown that

the Student's behaviors during the 2018-2019 school year were impeding his learning or the learning of others. Therefore, they have not shown District should have referred the Student for an FBA so that a BIP could be developed or that his IEP for the 2018-2019 school year needed to include a BIP to provide FAPE.

55. During the 2019-2020 school year, however, the Student's behaviors changed dramatically. Ms. Garrison described him as a different kid. He had no interest in helping and his attitude demonstrated an unwillingness to try. Within one month of the start of the school year, he had been disciplined for lewd conduct twice and hospitalized for suicidal ideations. The Student received a two-day in school suspension for one incident of lewd conduct and missed 1.5 weeks of school when he was hospitalized.

56. As the year progressed, the Student's emotional behaviors became more frequent. His visits to the health room increased from one in September, two in October, and three in November, to five in December. During late October 2019, the Student cried under a desk and banged his head on the wall in Ms. Booth's class. He also cried in Ms. McPeak's class. Nurse Isley, Ms. Booth, Ms. Garrison, and Ms. McPeak agreed they did not consider his behaviors typical for his age. By November 2019, the emotional behaviors seen at home were being seen at school to the extent that Ms. Booth referred the Student for an FBA. See WAC 392-172A-01031.

57. The District emphasizes that the Parents' testimony and allegations about concerns at the beginning of the school year were not consistent with what they shared with the District. Presumably, this refers to the Mother's email, which did not mention suicidal ideation, and the fact that the Parents never provided the District with any information concerning the details of the Student's hospitalization. The record establishes, however, that Ms. Booth, as the Student's case manager, was aware that the Student was hospitalized for suicidal ideations. Even so, when the Student's IEP team met on October 4, 2019, it merely excused his homework and did not consider supports to address his behavior.

58. Additionally, the Student's hospitalization was only one of many behavioral signs during the fall of 2019. Even if the District had not been aware of his hospitalization at all, the District was aware of the Student's escalating behaviors, including self-injurious behaviors such as banging his head against the wall, at school. The District also argues that it provided counseling support and involved Mr. Larsen, the District's mental health therapist. The record establishes, however, that the District did not offer support from Mr. Larsen until after it completed the March 2020 reevaluation. Additionally, while Mr. Schuldheisz and Ms. Patterson responded when the Student's behaviors escalated, those efforts did not constitute a plan to identify the Student's behaviors and address them. Mr. Hardy eventually acknowledged the importance of addressing the Student's behaviors by moving the Student's triennial reevaluation to an earlier date.

59. Ms. Garrison explained that teachers hesitated to take action because she and they hoped that the Student's medication issues might resolve some of his behavioral issues. Additionally, Ms. Patterson and Mr. Schuldheisz wanted to avoid interfering with the Student's outside counseling. These concerns reasonably account for some delay, but they do not reasonably explain why no one had acted on Ms. Booth's request for an FBA in late November 2019.

60. Based on a comprehensive review of the record, it is concluded that by late November 2019, the Student's behaviors were impeding his learning or the learning of others and Ms. Booth had requested an FBA to determine how to address them. As discussed above, in the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). In a case involving similar facts, the U.S. District Court for the Northern District of California rejected a school District's plea to overturn an ALJ's finding that a student's problem behaviors were sufficient to trigger the need for a mental health assessment. *Oakland Unified Sch. Dist. v. N.S.*, 2015 U.S. Dist. LEXIS 152609 \*17 (N.D. Cal. Nov. 10, 2015). Although not directly on point, *Oakland* supports the notion that once the District was on notice of the Student's significant and escalating behaviors in the school environment, it was obligated to assess those behaviors.

61. Based on a comprehensive review of the evidence in this case, the Parents have shown that the District was aware that the Student's behaviors were impeding his learning by late November 2019, yet failed to develop and incorporate a BIP into his IEP as required by WAC 392-172A-01031 until April 20, 2020. The parties have not briefed whether this is a substantive or procedural violation. In any case, the overwhelming evidence establishes that it denied the Student an educational benefit and therefore denied him a FAPE. See WAC 392-172A-05105(2); 34 CFR §300.513(a)(2).

#### *The Student's LRE*

62. The Parents argue that the District has failed to place the Student in his least restrictive environment (LRE) since April 20, 2020. The gravamen of the Parents' claim is that a student's placement should be based on the student's needs as identified in the IEP; a choice in setting should not define the amount of instruction a student receives. PB27. The Parents contend that the amount of reading SDI provided in the Student's April 2020 IEP was based on building schedule and the belief that the Student behaved better in a general education setting, rather than on his academic needs, in violation of the LRE mandate.

63. School districts must ensure that special education students are served in the "least restrictive environment." WAC 392-172A-02050. This means students should be served "(1) to the maximum extent appropriate in the general education environment with students who are nondisabled; and (2) special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*

64. WAC 392-17A-02060(1) and (2) require that an IEP team, including the parents, make a decision about the educational placement of a student after formulating the IEP and based on the following criteria:

- (a) the Student's IEP;
- (b) the least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070 . . .;
- (c) the placement option(s) that provide a reasonably high probability of assisting the student to attain his or her annual goals; and
- (d) a consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

See 34 CFR 300.116(b)(2).

65. 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 (9<sup>th</sup> Cir. 1996).

66. When the IEP team met in April 2020, the team considered that the Student continued to struggle with reading comprehension. The team also considered that he was struggling with significant behavioral issues, which impeded his learning, and that his recent reevaluation indicated he tended to behave better in a general education setting. Accordingly, the team weighed his need for reading instruction against the belief that his behavioral needs would be better served in a general education setting. They decided to place him in a general education setting for the 2020-2021 school year, with the idea that his general education teachers would provide some reading support that was not formalized in the IEP or elsewhere defined.

67. This procedure does not comport with the required procedure in WAC 392-17A-02060(1) and (2), which required the IEP team to define what SDI the Student required in order to be able to make an informed placement decision. Here, instead of defining what SDI the Student required, and then determining whether the Student's needs could be met in the general education setting with appropriate supports, the IEP team weighed his need for reading SDI against his improved behaviors

in the general education setting. The Student's need for reading SDI got lost in the balance. To the extent that the IEP considered the factors set forth in *Rachel H.*, the record is clear that when the team considered the behavioral benefits of placing the Student in a general education setting, they did not consider what formal reading supports he required and whether those could be provided in a general education setting. See *Vashon Island Sch. Dist.*, 337 F.3d at 1137 (first *Rachel H.* factor requires analysis of 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).

68. The Parents have shown that the District's decision to place the Student in a general education setting for the 2020-2021 school year without first defining the SDI he required and without considering what formal supports he required to make progress in that setting denied the Student FAPE.

### Summary of Violations

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

- i. failing to provide sufficient SDI in reading in the Student's April 2020 IEP (COL 50);
- ii. failing to provide sufficient SDI in social/emotional and behavior in the Student's April 2020 IEP for the period from April 20, 2020, through June 19, 2020 (COL 50);
- iii. failing to have a BIP in place from late November 2019 through April 20, 2020 (COL 61); and;
- iv. placing the Student in a general education setting for the 2020-2021 school year before determining what SDI he required in reading and without considering what formal supports he required to make progress in a general education setting (COL 68).

The Parents have not otherwise proven a denial of FAPE.

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

### *Remedies*

71. 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).

72. Within 15 school days of issuance of this order, the District shall convene an IEP team meeting to develop an IEP for the Student. It is appropriate for the District to pay Dr. Grewe's professional rate for up to five hours so that he can attend the IEP team meeting or meetings to develop an appropriate

IEP for the Student. Dr. Grewe's attendance is necessary so that he may answer questions about his report and recommendations. This is also appropriate because Mr. Hardy has acknowledged that he does not have expertise in the area of dyslexia, and Dr. Grewe does.

73. Under WAC 392-172A-01155 (h), related services include parent counseling and training, which is defined as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP." The record supports the need for parent counseling and training. The testimony of Mr. Hardy and Ms. Garrison, coupled with Ms. Klute's testimony, established the Student's longstanding difficulties with homework and the Mother's inability to work with him successfully. The Parents request an award of four hours per month of counseling and training by a certified behavior specialist to be included in the Student's IEP. Four hours per month, or one hour per week, is reasonable and supported by evidence in the record establishing that the Student would benefit from training that enables his Parents to work with him more effectively. The District shall amend the Student's IEP to include four hours per week of parent counseling and training to be provided by a District behavior specialist.

74. The Parents have shown that mental health counseling would benefit the Student. The District offered for a District mental health counselor to work with the Student, but did not incorporate it into the Student's IEP, and the Parents did not accept that offer because of the pending due process hearing. The Parents have not established that the Student requires an outside counselor to enable him to make educational progress. Accordingly, the District shall amend the Student's IEP to include one hour per week of counseling by a District mental health counselor. The counseling shall be provided outside of regular school hours to ensure that it does not interfere with the Student's academics. At the District's discretion, the District may contract with a mental health counselor not employed by the District to provide this service.

75. Due to the potentially contentious relationship between the District and the Parents, the IEP team meeting shall be facilitated by a Sound Options Group facilitator, which shall be arranged by the District.

76. The Parents have not shown the need for training for teachers and aides on effective classroom management strategies.

77. "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.

78. The overwhelming evidence in the record establishes the Student's need for reading instruction, not just with respect to comprehension, but with respect to building foundational skills. It is appropriate to provide the reading instruction that the April 2020 IEP failed to provide. Additionally, it is appropriate to provide this instruction by way of private tutoring so that the Student does not miss additional academic instruction at school. Outside tutoring is also appropriate because the District reduced the Student's reading instruction despite its awareness of his longstanding difficulties with reading. The Student has started private tutoring and is excited about it. Accordingly, the District shall pay for 167 hours of tutoring in reading by a provider selected by the Parents who has the required education, training and experience to serve the Student's needs, at a maximum rate of \$125.00 per hour. The District shall contract with the chosen provider, so long as the provider is available and willing to provide this service, and the tutoring shall be available to the Student within 10 days of issuance of this order. The services will be delivered 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 provider. If the provider bills the District for time the Student failed to appear for scheduled tutoring sessions under the provider's billing policy, that time shall count toward this compensatory education award. The award is calculated as follows:

18 minutes per week of reading instruction (690 minutes as provided during the 2019-2020 school year minus 672 minutes as provided between April 20 to June 19, 2020) X 9 weeks (number of weeks from April 20 to June 19, 2020) = 162 minutes/60 minutes per hour = 2.7 hours, plus

614 minutes per week of reading instruction (690 minutes as provided during the 2019-2020 school year minus 76 minutes to be provided between September 1, 2020 and April 2021) X 16 weeks (number of weeks from September 1, 2020 to date of this order) = 9,824 minutes/60 minutes per hour = 163.73 hours

163.73 hours plus 2.7 hours = 166.43 hours, rounded up to 167 hours of tutoring.

79. Although a compensatory award of private tutoring is sometimes reduced to account for the fact that students generally progress more rapidly with one-on-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 has a significant reading problem, and that remedying such a problem at the Student's age of 14 can be very difficult. Given the Student's age, the reduction in reading instruction in the April 2020 IEP at this point in the Student's education was significant.

80. The evidence in the record further shows that the Student's behavior was impeding his learning by late November, 2019, when Ms. Booth referred the Student for an FBA. Ultimately, the Student's IEP provided SDI of 74 minutes per week in social and 74 minutes per week in behavior, for a total of 148 minutes per week, but the IEP did not provide for this SDI until September 1, 2020. The evidence in the record supports an award of 65 hours of compensatory education in the areas of social and behavior, calculated as follows: 148 minutes per week X 26 weeks (number of weeks of school from December 1, 2019 through June 19, 2020) = 3,848 minutes/60 minutes per hour = 64.13



hours, rounded up to 65 hours. These services shall be provided by a District behavior specialist or, at the District's discretion, a contracted behavior specialist. The services shall be provided within two calendar years after the entry of this decision at the duration and frequency determined appropriate by the Parents and the District. Once a schedule is set, the Student shall, except in the case of emergency, provide 24 hours advance notice of the need to miss a scheduled session. Without such advance notice, and in the absence of an emergency, the session will count toward the compensatory education award.

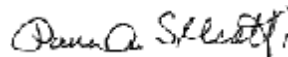
*Request for a Comprehensive IEE*

81. The Parents disagreed with the District's evaluation and requested a comprehensive IEE at public expense, which the District agreed to provide. Based on this representation, the Parents withdrew their claim challenging the appropriateness of the District's reevaluation. The evidence establishes that the District does not consider Dr. Grewe's evaluation an IEE and therefore does not intend to reimburse the Parents for it. The evidence also establishes that the District intends to pay for the IEE conducted by the Winston Center once it receives an invoice and intends to pay for an FBA once the Parents identify a provider. Based on the District's representations during the hearing, it is reasonable to expect that it will follow through, although it had not done so at the time of the hearing. The Parents now seek a comprehensive IEE at public expense, arguing that "the District reneged on its promise to fund an IEE." PB 29. Because the Parents complaint does not allege that the District failed to keep its promise to fund a comprehensive IEE, that issue is not properly before this ALJ. Accordingly, the Parents have not shown that such a remedy is appropriate.

ORDER

1. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education as set forth in Conclusions of Law 50, 61 and 68.
2. The Parents have not otherwise established that the District denied the Student a free appropriate education.
3. The District is ordered to provide compensatory education and other relief as set forth in Conclusions of Law 71 through 81.
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  
c/o Feeney Law Office PLLC  
MacHunter Bldg  
1177 Jadwin Avenue, Ste. 104  
Richland, WA 99352

Becca Anderson  
Kennewick School District  
1000 W Fourth Ave.  
Kennewick, WA 99336-5601

Kerri W. Feeney  
Feeney Law Office PLLC  
MacHunter Bldg  
1177 Jadwin Avenue, Ste. 104  
Richland, WA 99352

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

Nicholle S. Mineiro  
Cassady Mineiro PLLC  
810 Third Avenue, Suite 500  
Seattle, WA 98104

Dated December 30, 2020, at Seattle, Washington.

---

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

cc: Administrative Resource Services, OSPI