

**WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Tumwater School District

Docket No. 06-2023-OSPI-01936

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

Agency: Office of Superintendent of  
Public Instruction

Program: Special Education

Cause No. 2023-SE-0109

A due process hearing was held before Administrative Law Judge (ALJ) Paul Alig on October 24 through 26, 2023 and November 7, 2023, via videoconference.<sup>1</sup> The Parents of the Student whose education is at issue<sup>2</sup> appeared and were represented by Whitney Hill and Lara Hruska, attorneys at law. The Tumwater School District (District) was represented by Lynette Baisch and Megan Knottingham, attorneys at law. Also present was the Mother and Chris Burgmeier, Executive Director of Special Services.<sup>3</sup>

**STATEMENT OF THE CASE**

**Procedural History**

On June 29, 2023, the Parents filed a due process hearing request. The ALJ issued a prehearing order on July 26, 2023, and scheduled the hearing for October 24 through 26, 2023. On October 26, 2023, the parties agreed to add an additional hearing day for November 7, 2023.<sup>4</sup>

**Due Date for Written Decision**

The deadline for a written decision in this case was extended at the parties' request to thirty (30) days after the record of the hearing closes.<sup>5</sup> The hearing ended on November 7, 2023, and the record closed on January 10, 2024, when the parties

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<sup>1</sup> Throughout the hearing the ALJ used the speaker view option on full screen when observing witnesses.

<sup>2</sup> To ensure confidentiality, names of parents and students are not used. Instead, they are each identified as "Parents," "Mother," "Father," and/or "Student."

<sup>3</sup> On October 25, 2023, Chris Halladay, Executive Director of Special Services, was also present.

<sup>4</sup> See, Notice of Hearing dated October 27, 2023.

<sup>5</sup> See, Prehearing Order dated July 26, 2023.

timely filed their post-hearing briefs. The due date for a written decision is February 9, 2024.

### **EVIDENCE RELIED UPON**

#### **Exhibits Admitted:**

Parents' Exhibits: P1, P2, P4-P15, P17-P56, P58-P61, and P64-P72.

District's Exhibits: D1-D16

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

- Mother
- Sarah Stone, School Counselor, Tumwater Middle School
- DJ Brimer, Sixth-grade science teacher, Tumwater Middle School
- Jace Feldmeier, Physical education teacher, Tumwater Middle School
- Robert Nichols, Campus Supervisor for Student Support, Tumwater Middle School
- Keilani Backholm, Sixth-grade ELA teacher, Tumwater Middle School
- Mary Briel, Special education teacher, Tumwater Middle School
- Michael Cousino, Fourth-grade teacher, Black Lake Elementary School
- Julie Armstrong, Sixth-grade social studies teacher, Tumwater Middle School
- Kristi Wheeldon, Sixth-grade science teacher, Tumwater Middle School
- Trevor Knight, Sixth-grade math teacher, Tumwater Middle School
- Avonne Cross, District Speech Language Pathologist
- James Harper, District Band teacher
- Danielle Bentow, District School Psychologist
- Cathy McNamara, Principal, Tumwater Middle School
- Renee Cruickshank, District Health teacher, Tumwater Middle School
- Emily Weber, School Counselor, Tumwater Hill Elementary School
- Chris Burgmeier, District Executive Director of Special Services

### **ISSUES**

As set forth in the prehearing order issued July 26, 2023, the issues for the due process hearing are as follows:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:

- i. By failing continuously in its child find obligations to identify and evaluate the Student from June 2021 to present when the District had sufficient notice the Student had a disability, and the disability was causing an educational impact.
- b. And, whether the Parents are entitled to their requested remedies:
  - i. Declaratory relief finding that the District violated the IDEA.
  - ii. Declaratory relief that the District denied the Student a FAPE.
  - iii. An Order that the District shall provide compensatory education for the Student to provide the educational benefit that he would have received during the 2021-2022 and 2022-2023 school years but for the District's violations of the IDEA.
  - iv. An Order that the District shall reimburse the Parents for private evaluations and services they obtained for the Student between June 2021 to present.
  - v. ~~An Order for the District to proceed with a special education evaluation going forward;~~<sup>6</sup> and
  - vi. Or other equitable remedies, as appropriate.

### **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.

Some of the evidence presented was hearsay, which is a statement made outside of the hearing used to prove the truth of what is in the statement. In administrative hearings, hearsay evidence is admissible if, in the judgment of the presiding officer, "it

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<sup>6</sup> At the start of the hearing on October 26, 2023, the Parents clarified they were no longer seeking a special education evaluation as the District agreed to provide the evaluation after the due process hearing request was initiated.

is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.452(1). An ALJ may not base a finding of fact exclusively on hearsay evidence unless the ALJ determines that doing so “would not unduly abridge the parties’ opportunities to confront witnesses and rebut evidence.” RCW 34.05.461(4). To the extent any findings of fact are based on hearsay evidence, it is determined that such findings did not unduly abridge the parties’ opportunity to confront witnesses and rebut evidence.

## The Student

1. At the time of the hearing the Student was [REDACTED] and in seventh grade.<sup>7</sup> He is generally happy, is active in sports, and loves reading, science and history.<sup>8</sup>
2. It was undisputed that throughout the relevant period in this case the Student lived in the Tumwater School District.<sup>9</sup>
3. The Student’s Mother is a [REDACTED]  
[REDACTED]<sup>10</sup> Despite her professional training she is not be able to diagnose the Student due to their relationship.<sup>11</sup>
4. The Student was eligible for special education services beginning in the first grade.<sup>12</sup> The Student’s individualized education program (IEP) provided services in social/emotional, occupational therapy (OT), visual and motor services.<sup>13</sup>

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<sup>7</sup> P9p1, P49p3; Mother T48:10-12. Citations to the exhibits of record are by the party (“P” for Parent; “D” for District) and exhibit and page numbers. For example, a citation to P9p1 is to the Parent’s Exhibit P9 at page 1. Citations to the hearing transcript indicate who provided the testimony followed by the page number(s) and line(s) on which the testimony appears. For example, a citation to Mother, T48:10 is a citation to the Mother’s testimony at page 48 line 10 of the transcript.

<sup>8</sup> Mother T48:15.

<sup>9</sup> Mother T49:15.

<sup>10</sup> Mother TT47:8.

<sup>11</sup> Mother T50:13.

<sup>12</sup> P56p10; Mother T81:22.

<sup>13</sup> P56p10; Mother T82:19.

5. Beginning in first grade, the Student received tutoring in math from Sylvan Learning Center.<sup>14</sup> Sylvan Learning Center is a private tutoring program that conducts evaluations and provides school-based instruction in specific subjects and helps students with homework.<sup>15</sup>

### Third and Fourth Grade School Years

6. The Student was in third grade in the 2019-2020 school year and attended Tumwater Hill Elementary School. At the start of third grade, over the Mother's objection, the Student was exited from special education services. The Mother understood that the reason the Student was exited was that the IEP was only meant to address non-academic developmental issues prior to age nine.<sup>16</sup>

7. On February 2, 2020, the Mother sent an e-mail to school employees including Emily Weber.<sup>17</sup> Ms. Weber was the Section 504 plan (504 plan) coordinator for Tumwater Hill Elementary School.<sup>18</sup> The Mother requested a 504 plan for the Student due to her belief he was stalling in math for three months during his third-grade year.<sup>19</sup> A 504 plan identifies a student's disabilities and the accommodations provided within the school and classroom. A 504 plan differs from an IEP that provides for special education services.<sup>20</sup>

8. On March 5, 2020, the Student was determined eligible for a 504 plan to address anxiety and Attention Deficit Hyper-Activity Disorder (ADHD).<sup>21</sup> Ms. Weber was assigned as the Student's 504 plan coordinator.<sup>22</sup>

9. On November 17, 2020, an OT evaluation of the Student was conducted through Therapeutic Beginnings, LLC by Fiona Jones, Registered and Licensed

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<sup>14</sup> P65pp1, 2; Mother T85:17, 107:3.

<sup>15</sup> Mother T85:10.

<sup>16</sup> P56p10; Mother T83:21.

<sup>17</sup> Ms. Webber is a Tumwater Elementary School counselor. She has been in this position for ten years. She has seventeen years' experience as a school counselor. She previously worked for the Franklin Pierce School District. Weber T633:1-10. Ms. Weber has a bachelor's degree in psychology from the University of Puget Sound in 2002. She obtained a master's degree in education from Seattle Pacific University in 2007. Weber T633:13-22.

<sup>18</sup> Weber T634:20.

<sup>19</sup> P6p1; Mother T87:3, Weber T634:24.

<sup>20</sup> Weber T683:18-640:11.

<sup>21</sup> P7, P11p1; Mother T51:25, 60:6, Weber T634:25.

<sup>22</sup> Weber T634:20, 642:19.

Occupational Therapist (OTR/L).<sup>23</sup> The evaluation was initially referred by the Parents for concerns related to ADHD, anxiety, fine motor skills and activities of daily living (ADL).<sup>24</sup> The evaluation included standardized assessments and clinical observations. The evaluation determined six to eight months of weekly OT intervention was medically necessary to address fine motor sequencing and emotional regulation concerns.<sup>25</sup> The Student began private in-person OT intervention services around the time of this evaluation.<sup>26</sup> The Parents did not provide this evaluation to the District until October 27, 2022.<sup>27</sup>

10. On March 18, 2021, the Student's fourth-grade teacher emailed the Student regarding his i-Ready report. The i-Ready scores reflected that his reading and math scores had dropped. Both tests were flagged as going down too quickly.<sup>28</sup> An i-Ready report is an online diagnostic test that provides an estimate of a student's performance on the skills and knowledge in math and English Language Arts (ELA). The results of i-Ready testing are only one way to know how students are doing in ELA and math, the test results alone should not be used to make any instructional or program decisions for students.<sup>29</sup>

11. On March 26, 2021, the Student's 504 team reviewed his 504 plan.<sup>30</sup> The Student struggled with handwriting because he became overwhelmed with processing many things at once.<sup>31</sup> The 504 plan listed accommodations, delivered in all locations as needed, to support the Student's learning. These included: advanced notification of changes to routine (when possible); avoid timed tests (when possible); flexible seating to allow for movement; opportunities to work as a helper (e.g. running errands, office deliveries); nonverbal signaling with classroom teacher to indicate need for a break; preferential seating to minimize visual distractions; separate testing locations; speech-

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<sup>23</sup> P8p1. The District objected to the admission of Exhibit P8, the November 17, 2020, OT evaluation as being outside the time period relevant to this hearing. Exhibit P8 is referenced on page 1 of the District's Exhibit D16 which is an updated assessment of the Student's progress in OT dated March 3, 2022. Therefore, Exhibit P8 was admitted as it provides a baseline and context for Exhibit D16.

<sup>24</sup> P8p1, D16p1; Mother T91:13.

<sup>25</sup> P8pp2-4.

<sup>26</sup> Mother T91:15.

<sup>27</sup> Stone T234:12.

<sup>28</sup> P1p8, P10p1; Mother 91:3.

<sup>29</sup> P72p1; Bentow 506:25.

<sup>30</sup> P11p2; Mother T93:14.

<sup>31</sup> P11p7; Weber T645:24.

to-text; and support with multi-step directions (e.g. repeated directions, scaffolding, simplified directions).<sup>32</sup>

### **Fifth Grade; 2021-2022 School Year**

12. The Student attended Tumwater Hill Elementary School during the 2021-2022 school year for fifth grade.<sup>33</sup>

13. On September 23, 2021, the Student scored 404 overall on i-Ready assessments in math. This score was three or more grade levels below standard. As a single point of information, considered in a non-holistic analysis, the Student's i-Ready score in math was concerning.<sup>34</sup>

14. October 21, 2021, the Student's technology teacher, Michael Cousino,<sup>35</sup> emailed the Mother following up on a conversation about the Student blurting out and interrupting class. Mr. Cousino reported the Student had improved on that behavior. He shared that the Student had received his second warning for playing games during class and the next time he would lose technology privileges.<sup>36</sup>

15. On March 3, 2022, Tiffany Macrina OTR/L updated the Student's November 17, 2020, OT evaluation.<sup>37</sup> The updated OT assessment identified the Student's disabilities of ADHD and anxiety. In addition, it noted difficulties with multi-step ADL completion, emotional regulation, and handwriting. It was based on standardized assessments and clinical observations. The updated assessment noted the Student's family had followed through with the OT's recommendations. It stated the Student continued to have difficulty with identifying triggers that cause emotional dysregulation and with implementing self-regulation strategies in moments when needed. The updated assessment noted these difficulties result in continued episodes of hitting, throwing or growling behaviors. The Student's dysregulation was often related to completion of self-care tasks. The updated assessment recommended continued weekly skilled, direct, OT treatment to further address the Student's skill development. The update recommended reassessment after 6 more months of the recommended

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<sup>32</sup> P11p3, 8; Mother T93:14, Weber T645:4, 652:15-23.

<sup>33</sup> Weber T634:2.

<sup>34</sup> P1p5, P72p2; Bentow T508:22-509:9.

<sup>35</sup> Mr. Cousino is a fourth-grade teacher in his first year at Black Lake Elementary School. Prior to that he taught fourth and fifth grade at Tumwater Hill Elementary School for seven years. He was a substitute teacher prior to that and began teaching in 2006. Mr. Cousino received a bachelor's degree from the University of California Santa Cruz. He obtained his teacher's certificate in 2006 from St. Martin's University in 2006. Cousino T364:21-365:16.

<sup>36</sup> P13p1; Cousino T368:4.

<sup>37</sup> D16p1.

OT treatment.<sup>38</sup> The Parents did not provide this OT assessment to the District until October 27, 2022.<sup>39</sup>

16. On March 10, 2022, the Student's 504 plan team met and reviewed his plan. The team included the Parents, the Student's teachers and his guidance counselors Ms. Weber and Kacy Adams.<sup>40</sup> The team discussed adding the diagnoses of [REDACTED]. The District was alerted the Student would have a sleep study in July.<sup>41</sup> The Parents reported the Student was plucking his eyelashes and receiving OT services.<sup>42</sup>

17. On May 24, 2022, the Student's overall score in math of 442 on the i-Ready was below grade level.<sup>43</sup>

18. At the end of the Student's fifth grade year, his report card reflected that he had not met standards in the language and writing skill of "applies writing conventions" and "using the process of revising, editing, organizing, and publishing."<sup>44</sup> In science the Student was not meeting standard in the area of "understands structure and properties of matter." In math the Student was approaching or met standards in all areas his teachers could assess.<sup>45</sup>

19. On August 18, 2022, the Mother emailed Sarah Stone<sup>46</sup> and Cathy McNamara<sup>47</sup> and shared that the Student had a new diagnosis of [REDACTED]. The Mother requested that [REDACTED] be added as a diagnosis to the Student's 504 plan.

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<sup>38</sup> D16pp1-4.

<sup>39</sup> Stone T234:12.

<sup>40</sup> P15p1; Weber T647:15.

<sup>41</sup> P15p9; Weber T648:12.

<sup>42</sup> P15pp9, 10; Weber T649:16, 650:23.

<sup>43</sup> P1p6, Bentow T508:4.

<sup>44</sup> P5p1.

<sup>45</sup> *Id.*

<sup>46</sup> Ms. Stone is a school counselor for the District. She began working at Tumwater Middle School in 2019. Prior to working for the District, she worked at Centralia Middle School from 2016 to 2019. Prior to that, she was a job coach for Morningside, a vocational service provider. She was a school detention coordinator for the North Thurston School District for a school year prior to leaving to work at Morningside. Ms. Stone obtained a bachelor's degree in 2010 from William Penn University and a master's degree in school counseling from Saint Martin's University in 2016. Stone T177:21-189:4.

<sup>47</sup> Ms. McNamara is in her fourth year as Principal at Tumwater Middle School. Prior to this position Ms. McNamara was an Assistant Principal at Black Hills High School and Tumwater Middle School. Ms. McNamara obtained an endorsement in ELA K8 in 1984 and Principal credentials from Central Washington University in 1986. In addition to working for the District she has worked for the University Place and Olympia school districts. McNamara T597:2-598:5.



The Mother stated the Student was in OT treatment and that the provider recommended the Student be evaluated for receptive and social issues. The Mother also stated that Student may need an IEP evaluation.<sup>48</sup>

20. Ms. Stone was the Student's 504 plan case manager during the 2022-2023 school year.<sup>49</sup> Prior to taking over as the Student's case manager she spoke with the Student's prior counselor, Ms. Weber, and reviewed his 504 plan.<sup>50</sup> Ms. Stone did not recall how she responded to the portion of the Parents' August 18, 2022, email with respect to an IEP evaluation for the Student. Her regular practice was to forward the evaluation request to the school psychologist after clarifying if a parent was making an immediate request or seeking an evaluation after the student had some time in a new academic setting.<sup>51</sup>

21. On August 22, 2022, Ms. McNamara respond to the Mother's email and indicated that the District would hold a meeting of the Student's 504 plan team to review the diagnosis and request for additional accommodations.<sup>52</sup>

22. On August 25, 2022, the Student's 504 team reviewed the Student's 504 plan. The Mother shared that the Student had [REDACTED] and was using fidgets, talking, and squirming to stay awake during the day. The team determined that the District would notify the Student's teachers about his 504 plan and [REDACTED].<sup>53</sup> The focus of the meeting was on the Student's 504 plan. The District did not separately address the Mother's suggestion that the Student may need a special education evaluation.<sup>54</sup> Ms. McNamara did not interpret the Mother's e-mail as a formal request for an evaluation rather as a suggestion of something that may possibly need to be discussed.<sup>55</sup> Because of this she did not refer the Student to the school psychologist for a special education evaluation.<sup>56</sup> Ms. McNamara did not confirm with the Parents whether they were making a formal request for a special education evaluation through the Mother's August 18, 2022 email.<sup>57</sup>

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<sup>48</sup> P17p1, P18p1; Stone T192:22.

<sup>49</sup> Stone T183:10.

<sup>50</sup> Stone T188:18-189:17; Weber T651:7.

<sup>51</sup> Stone T195:4-196:1.

<sup>52</sup> P19p1; McNamara T601:2-602:14.

<sup>53</sup> P64p1; Stone T189:25, 197:21.

<sup>54</sup> McNamara T602:22.

<sup>55</sup> McNamara T603:16.

<sup>56</sup> McNamara T604:15.

<sup>57</sup> McNamara T604:18-21.

## Sixth Grade; 2022-2023 School Year

23. During the 2022-2023 school year, the Student was in the sixth grade and attended Tumwater Middle School. His teachers at the start of the year were Kristi Wheeldon,<sup>58</sup> home room; Juile Armstrong,<sup>59</sup> social studies; Keilani Backholm,<sup>60</sup> ELA; Trevor Knight,<sup>61</sup> math; DJ Brimer,<sup>62</sup> science; James Harper,<sup>63</sup> band; and Jace Feldmeier,<sup>64</sup> physical education (PE).

24. On September 8, 2022, another student grabbed the back of the Student's head and kneed him on the back of the head. The Student reported the incident to, Mr. Brimer.<sup>65</sup> Robert Nichols<sup>66</sup> was the campus supervisor who investigated the incident.<sup>67</sup> His investigation indicated that the Student was playfully bothering another

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<sup>58</sup> Ms. Wheeldon is a sixth-grade science teacher and part-time special education teacher at Tumwater Middle School. She has been in each of these position for three years with the District. She has a total of thirty years of experience teaching, twenty-five of those years with the Kelso School District. She has a bachelor's degree in elementary education and a master's degree in curriculum instruction and administration. She also has a special education endorsement. Wheeldon T404:7-23.

<sup>59</sup> Ms. Armstrong is sixth grade social studies teacher at Tumwater Middle School and has worked in this position for ten years. She is in her thirtieth year in teaching. She has worked for the District for twelve years. She has also worked for the Tenino School District and Nooksack Valley School District. She received a bachelor's degree in elementary education from Western Washington University in 1994. She obtained a master's degree in curriculum and instruction in 1996 from a local program of City University, New York. Armstrong T378:8-379:5.

<sup>60</sup> Ms. Backholm is in her third year of teaching. Backholm T315:13-17. She completed her undergraduate degree at Grand Canyon University and has a master's degree from Western Governor's University. Backholm T315:19.

<sup>61</sup> Mr. Knight has nineteen years of experience teaching in the District in different schools. Prior to joining the District, he taught for two years in Longview School District. He has a bachelor's degree in elementary education and minor in special education from Central Washington University. He has a master's degree from City University of Seattle in curriculum and instruction. He holds a certification in elementary education up to the eighth grade. Knight T422:1-423:13.

<sup>62</sup> Mr. Brimer is a sixth-grade science teacher at Tumwater Middle School. He has been in this position since 2017. Prior to that he taught fifth grade science in Clover Park School District. He has a bachelor's degree in English and a teacher's certification from Western Washington University. He has a master's degree in curriculum and instruction from Western Governor's University. Brimer T253:10-254:8. Mr. Brimer has a total of 24 years of experience as an educator. Brimer T260:12.

<sup>63</sup> Mr. Harper was the Student's sixth and seventh grade band teacher. He teaches fifth through eighth grade students at Tumwater Middle School, in addition to other District schools. He has been in this position for thirteen years. Harper T483:5-22.

<sup>64</sup> Mr. Feldmeier is a physical education (PE) teacher at Tumwater Middle School. Feldmeier T284:6. He receive a degree in PE from Western Washington University and a master's degree from Western Governor's University. Feldmeier T283:24.

<sup>65</sup> P20p1; Brimer T273:20.

<sup>66</sup> Mr. Nichols has worked in this position for nine years. Mr. Nichols is a military retiree. He has an associate degree from the Air Force. Nichols T303:11.

<sup>67</sup> Nichols T304:18.

student who responded physically.<sup>68</sup>

25. On September 9, 2022, Ms. McNamara emailed the Student's teachers and notified them the Student had a 504 plan. She told them the Student had a new diagnosis of [REDACTED] in addition to ADHD and anxiety disorder. Ms. McNamara stated the Student tends to do well at school but then falls apart at home, struggles with ELA and writing, loves history, and is in speech therapy. She further alerted the teachers the Student liked to chew things including hair and pencils and will chew gum to avoid this.<sup>69</sup> The purpose of Ms. McNamara's email was to relay information to the teachers from the Parents to help them support the Student.<sup>70</sup>

26. The District developed a prior written notice (PWN) dated September 15, 2023, regarding the Student's 504 plan. The PWN stated the District would continue the Student's 504 plan noting the diagnoses of social pragmatic disorder, anxiety disorder, [REDACTED] and ADHD.<sup>71</sup>

27. On September 19, 2022, the Mother informed Ms. McNamara and Ms. Stone that in connection to issues on the bus the Student ripped out ninety percent of his eyelashes in the health room.<sup>72</sup> The Mother's testimony, that the Student was plucking his eyelashes, was supported by Mr. Harper, who observed the Student missing eyelashes during the 2022-2023 school year.<sup>73</sup>

28. On or about September 21, 2022, the Student's 504 team met and reviewed his accommodations.<sup>74</sup> Ms. Armstrong, Ms. Backholm, Ms. Wheeldon, Ms. McNamara, Mr. Brimer, Mr. Harper, Mr. Feldmeier, and the Mother attended the meeting.<sup>75</sup> Ms. Armstrong stated the Student was successfully taking notes in her class.<sup>76</sup> The team noted the Student's diagnoses of anxiety disorder, [REDACTED] ADHD, and Social Pragmatic Communication Disorder. The team added the accommodation of the use of a fidget tool. The team did not discuss the Parents' suggestion of a special education

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<sup>68</sup> Nichols T305:6.

<sup>69</sup> P21p1; P22p1; Stone T199:2, 201:11, McNamara T605:10.

<sup>70</sup> McNamara T605:23-606:2.

<sup>71</sup> D3p6; Stone T208:21 – 209:8.

<sup>72</sup> P23p1; Mother T126:24; McNamara T606:8.

<sup>73</sup> Harper T484:9.

<sup>74</sup> P27p4.

<sup>75</sup> P64p2; Stone T202:7.

<sup>76</sup> D2p11; Armstrong T393:7.

evaluation.<sup>77</sup>

29. On October 11, 2022, the Mother shared with Ms. Stone that the Student was holding off on using the restroom until he got home, and this had caused him to experience a [REDACTED]. The Mother wanted the Student to have accommodation to access the bathroom since in the past a teacher had told the Student he could not use the bathroom. Ms. Stone told her that if there was a specific health need in place the District could look at a health plan. She referred the Mother to the school nurse and provided her with the District special education referral form the following day.<sup>78</sup>

30. On October 12, 2022, the Student's overall scores on IXL screening in math was 380.<sup>79</sup> IXL testing is used three times per year to determine a student's skills in math and ELA.<sup>80</sup> The IXL uses six different subsets in math. The Student scored more than one grade level below standard in all subsets other than Algebra and Algebraic thinking. His overall score was more than one grade level below standard placing the Student at the end of the third-grade level.<sup>81</sup> IXL is one indicator of a student's performance level, but a score below grade level does not mean the student cannot do grade level work.<sup>82</sup> This was the first time the Student took the math IXL as i-Ready was used in elementary school.<sup>83</sup> The Student's overall October 2022 IXL scores in ELA were at grade level.<sup>84</sup>

31. On or about October 14, 2022, the Student received a failing grade in a math unit.<sup>85</sup>

32. On October 16, 2022, the Mother emailed Mr. Knight, Ms. Stone, and Ms. McNamara. The Mother reported the Student was struggling in math class and had trouble putting into words what his problem was. She stated that this was the reason the Student had started speech therapy to go with his OT therapy. She noted the Student was unable to request the accommodation he was supposed to receive in

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<sup>77</sup> P27p6; P64p2; Stone T201:23 - 203:13, Bentow T505:5.

<sup>78</sup> D5pp1-3, P64p5; Stone T713:25-718:22.

<sup>79</sup> P1p1; Knight T432:21.

<sup>80</sup> Backholm T332:5.

<sup>81</sup> Knight T433:13-434:9, Bentow T503:15.

<sup>82</sup> McNamara T506:25.

<sup>83</sup> Knight T432:23, Bentow T502:17.

<sup>84</sup> D2p18; Backholm T332:20.

<sup>85</sup> P25p1; Knight T427:10.

math class and during testing. She stated he was, therefore, not receiving those accommodations. She stated further:

[T]he fact that he is no longer passing a class also gives grounds and need for an IEP evaluation as it shows that one or many of his diagnosis are having significant impact on his learning whether it is because his 504 is not fully being followed or needs more accommodations. I will send his speech evaluation from earlier this month over to aid in this process and expect in the next 90 business days for it to be complete and would like a copy of the report prior to meeting about it.<sup>86</sup>

33. At the time, Mr. Knight was surprised to learn the Student was uncomfortable talking with him about his need for accommodations as they would have conversations in class and Mr. Knight was not concerned the Student needed an IEP in class. At the beginning of sixth grade, it is not uncommon for student to not do well for the first few math tests until they get used to what grade level tests are like.<sup>87</sup> Ms. McNamara did not consider the Mother's email to be a formal request for a special education evaluation and did not forward it to the school psychologist.<sup>88</sup>

34. On October 20, 2022, the Mother provided Ms. Stone with a Speech and Language Evaluation the Parents privately obtained of the Student through Therapeutic Beginnings, LLC. Documentation of the evaluation was logged into the District's database.<sup>89</sup> The reason for the evaluation was that the Student was experiencing [REDACTED]

[REDACTED] The evaluation was conducted by a speech language pathologist (SLP) holding a certificate of clinical competence (CCC), Leora Crompton. The Student presented with concerns with interrupting skills, and difficulties in the area of perspective thinking as it relates to communication. The Student demonstrated the ability to respond to cues and implement communication strategies during the evaluation setting.<sup>90</sup>

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<sup>86</sup> P26p1; Mother T130:21-131:12, Knight T428:9-22, McNamara T606:24.

<sup>87</sup> Knight T429:4-432:12, T440:7.

<sup>88</sup> McNamara T607:15-21.

<sup>89</sup> P24pp1-3, P28p1; P29p1, Stone T212:4.

<sup>90</sup> P24p1; Cross T462:23, 463:16, 467:4.

35. Ms. Crompton's evaluation was reviewed by a District SLP, Avonne Cross,<sup>91</sup> Ms. Crompton conducted the evaluation through in-person observation of the Student and an interviews of him and his Father. The evaluation noted the Student's ADHD, anxiety disorder, and social pragmatic communication disorder diagnoses. Ms. Crompton identified goals to repair communication breakdowns; gain attention appropriately; use auditory memory strategies; increase understanding during a communication breakdown; and identify and audit the Student's own socially unexpected behaviors.<sup>92</sup> Ms. Crompton recommended the Student receive skilled language intervention to improve his functional ability to participate in meaningful communication and lesson communication breakdowns, which cause him to experience frustration and overstimulation. She identified a treatment plan of speech intervention one to two times per week.<sup>93</sup> She determined that Student would benefit from ADHD informed care addressing hyper fixations, impulse control, big picture thinking, summarization/working memory, establishing needs and expectations and perspective taking.<sup>94</sup>

36. The areas of concern noted in Ms. Crompton's speech evaluation could impact the Student at school because the Student needs to be able to participate effectively with peers, self-advocate, and repair conversation breakdowns during structured settings.<sup>95</sup> These areas of concern could be addressed though an IEP at school.<sup>96</sup>

37. Ms. Crompton's evaluation did not include use of any standardized assessments in communication and was based on observation, interview, and child therapy.<sup>97</sup> Considering the teacher's reports that the Student was able to access the general education environment, Ms. Cross did not see specific communication concerns or standardized assessments that indicated a significant deficit.<sup>98</sup>

38. On October 21, 2022, Ms. Armstrong, noted the Student was playing video games and watching videos when he was supposed to be working on his comic

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<sup>91</sup> Ms. Cross is a speech language pathologist (SLP) that works for the District. She has been in this position for three years. Prior to her employment with the District Ms. Cross worked for the Steilacoom School District for five years. She is certified under the American Speech-Language-Hearing Association (ASHA) and certified through the State of Washington. Cross T462:23-464:3; 465:16-467:13.

<sup>92</sup> P24pp1-3; Cross T475:8.

<sup>93</sup> P24pp1-3; Cross T468:7-11.

<sup>94</sup> Cross T467:25.

<sup>95</sup> Cross T467:16.

<sup>96</sup> Cross T468:16.

<sup>97</sup> Cross T474:12-16.

<sup>98</sup> Cross T477:5.

assignment.<sup>99</sup> This was a common problem for the Student during unstructured activity.<sup>100</sup>

39. On October 27, 2022, the Mother provided Ms. Stone with the Student's November 17, 2020, OT evaluation and March 3, 2022, OT update.<sup>101</sup> Receipt of the evaluation and treatment notes was entered into the District database.<sup>102</sup>

40. On October 31, 2022, the Mother again emailed Mr. Knight, Ms. Stone and Ms. McNamara. The Mother reiterated her request for a meeting with the Student's 504 team stating his accommodations clearly were not working in math class. She stated the Student was receiving failing grades, and his anxiety was up. She reported he was stabbing his math book due to frustration from the amount of writing and time restrictions. The Mother reported further the Student was receiving tutoring three hours per day outside of school from Sylvan Learning Center and still falling behind in his homework.<sup>103</sup>

41. Beginning November 1, 2022, in addition to the tutoring from Sylvan Learning Center, the Student began receiving private tutoring sessions approximately twice per week at a cost to the Parents of twenty dollars per session.<sup>104</sup>

42. On November 2, 2022, the Student's 504 team met again. The Mother, Ms. Armstrong, Ms. Backholm and Ms. McNamara attended the meeting. The team again reviewed his need for accommodations and noted the Student's diagnoses.<sup>105</sup> Ms. Armstrong shared she did not have a concern with the Student's note taking and he was engaging in her class with some room for growth.<sup>106</sup> The Mother reported the Student had stabbed holes in his notebook. She shared that he was engaging in self-sabotage, and supervision anxiety about math. The Mother shared the Student had an anxiety appointment scheduled in December to adjust his medication. She also shared that he was receiving tutoring, OT, and speech services in social pragmatics.<sup>107</sup>

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<sup>99</sup> P30p1; Armstrong T380:10.

<sup>100</sup> Armstrong T380:15.

<sup>101</sup> P42p1; Mother T116:11, Stone T224:21, 234:12.

<sup>102</sup> P31p1, P42p1; Stone T217:1.

<sup>103</sup> P32p2; Mother T134:16.

<sup>104</sup> P68pp1-7.

<sup>105</sup> P32pp 4, 6; Stone T219:2.

<sup>106</sup> D2p18; Armstrong T395:20.

<sup>107</sup> P64p7; Mother T134:19, Stone T223:8.

43. On November 7, 2022, Ms. Backholm referred the Student to a peer counseling group run by a counselor within the school. Ms. Backholm made the referral due to his anxiety and ADHD.<sup>108</sup>

44. The Parents submitted a written referral dated November 14, 2022, for a special education evaluation of the Student. She used a District form to submit her written referral.<sup>109</sup> The referral was reviewed by District school psychologist Daniel Bentow.<sup>110</sup> Ms. Bentow determined the Parents made a request for a special education evaluation. The reasons for the Parents' referral included math basic skills/readiness, math reasoning, written language basic skills/readiness, written expression, eye-hand coordination, visual perception, receptive language, oral/expressive language, medical health, behavior, and adaptive/self-help skills. After submitting the written referral, the Mother met with Ms. Bentow who added information about the Student's needs after the Parents submitted their written referral.<sup>111</sup> The written referral explained the Student's diagnoses, noting that he was in speech therapy, OT therapy, and receive private tutoring. It stated he was struggling with being overwhelmed, has an aversion to writing, struggles with perceiving what others are telling him at time. The referral further stated the Student missed school for medical appointments and therapy appointments but stays up with his schoolwork. The referral stated fine motor, writing, and hearing others are the Student's biggest struggles.<sup>112</sup>

45. On December 6, 2022, the Student's science class was conducting a lab experiment that required heating of water in a large one-liter beaker. During the lab, the Student held a magnifying lens directly on a hot plate burner to try to melt the plastic lens. When he placed it on the burner, the Student looked directly at Mr. Brimer. On three separate occasions, while holding the magnifying glass to the burner he looked at it on the burner to watch it begin melting and then he turned to make sure Mr. Brimer was watching. Based upon this, Mr. Brimer concluded the Student's conduct was willful and intentional in addition to being outside of lab safety precautions.<sup>113</sup> Mr. Brimer quietly asked the Student to put down the magnifying lens, gather his materials and wait in the hallway outside of the classroom. He then

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<sup>108</sup> P33pp1, 2; Backholm testimony

<sup>109</sup> P34p1; Mother T137:22.

<sup>110</sup> Ms. Bentow is a District school psychologist. She has been in this position since 2017. She has an educational specialist degree and bachelor's degrees in psychology, Egyptian studies, and women's studies from Eastern Washington University. She is a nationally and state certified school psychologist. Bentow T495:15-496:22, 512:21.

<sup>111</sup> P34pp1-7; Mother T138:13, Bentow T513:17-514:17.

<sup>112</sup> P34pp1-3; Mother T139:7, Bentow T514:1, 517:25.

<sup>113</sup> P35pp2-4; Brimer T258:1-260:6.



contacted student support consistent with school protocols.<sup>114</sup> Because Mr. Brimer referred the incident to the office for student support it was up to office personnel to enter the incident into the Skyward the student records management system.<sup>115</sup> Mr. Brimer considered it a serious behavioral incident.<sup>116</sup> The Mother reported that while waiting in the hallway the Student plucked his eyelashes.<sup>117</sup> The Student was no longer permitted to participate in science labs for the remainder of the unit.<sup>118</sup> The Student was subsequently transferred to another science class.<sup>119</sup>

46. After the incident in Mr. Brimer's classroom, Ms. Stone spoke with the Student and encouraged him to go to a counselor or to her when feeling unsafe. The Student explained he was told to stay in the hallway. He told her he was feeling frustrated by either the communication with the teacher to him in class or feeling as though the other student were doing things, he wasn't able to do.<sup>120</sup>

47. On December 9, 2022, the District convened a team to review the Parents' written referral for a special education evaluation of the Student.<sup>121</sup> A District SLP and OT provider did not attend this meeting.<sup>122</sup> The meeting was attended by Mary Briel,<sup>123</sup> Mr. Feldmeier, Ms. McNamara, Ms. Bentow, Ms. Stone, Ms. Wheeldon, Ms. Armstrong, Ms. Backholm, and the Mother. The team considered the Student's progress on his 504 plan, input from his teachers, his IXL scores, and his current grades. The Mother provided information about her concerns and the support the Student was receiving in SLP, OT and tutoring services.

48. Ms. Wheeldon, and Mr. Feldmeier noted the Student could have difficulty during unstructured times. Mr. Feldmeier explained the Student opened his Chromebook in the locker room and required constant reminders not to do so. He also explained the

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<sup>114</sup> P35p4, Brimer T260:9.

<sup>115</sup> Brimer T262:2-263:6; Weber T640:20, 641:4.

<sup>116</sup> Brimer T263:11, Stone T703:5.

<sup>117</sup> P64p8; Mother T140:4, Stone T228:1.

<sup>118</sup> P35p2; Mother T140:15.

<sup>119</sup> P35p2, P37p1; McNamara T608:23.

<sup>120</sup> P64p9; Stone T229:2-230:1524.

<sup>121</sup> P39p1, D6p1; Bentow T525:25, T526:15.

<sup>122</sup> Bentow T518:7, 533:14.

<sup>123</sup> Ms. Briel is a special education teacher assigned to the Tumwater Middle School. She has worked for the District since 2013. She has been teaching for twenty-three years. Prior to working for the District, she worked for East Middle School, Lolo Middle School and Target Range Middle School in Montana. Ms. Briel has a bachelor's degree in elementary education and psychology from Ohio Wesleyan. She has a Kindergarten through Eighth grade (K8) certification and an endorsement in special education from the University of Montana. Briel T349:1-350:13.

Student would sometimes get distracted by peers when he is supposed to be walking outside to start class and blurt out answers at inappropriate times. Ms. Wheeldon made her comment because the Student would refuse to put away his Chromebook when lining up or whenever her attention was diverted. Ms. McNamara reported the Student had not had any negative interactions to her knowledge.<sup>124</sup> Ms. Armstrong also noted some concerns during unstructured time but stated that otherwise the Student was doing well.<sup>125</sup> The Student had a C+ in Math and As in all his other classes.<sup>126</sup> The team looked at many modalities to see if there was reason to suspect an educational impact including: absences, grades, assessments, work samples, and teacher observations of student progress over time.<sup>127</sup> The team concluded that they needed to check in with Mr. Knight to make sure math assignments are being turned in.<sup>128</sup> The Student's teachers did not identify any concerns in the areas of communication and fine motor and, therefore, the teachers did not identify a need for speech or OT services.<sup>129</sup> The Student's behavior during unstructured times did not rise to the level for Ms. Briel to suspect he required special education because middle school students typically are off task and struggle during unstructured times.<sup>130</sup> She also believed the Student had not shown a lack of success academically or with discipline.<sup>131</sup>

49. The District developed a PWN documenting its decision not to initiate a special education evaluation of the Student. The reason for the District's decision was that the Student was doing well with regards to school, self-advocacy for accommodations, and the teacher reported progress. The District decided to check back in after the first semester and meet in February 2023 before finalizing decisions on the Parents' referral for an evaluation of the Student.<sup>132</sup> After the meeting the District provided information about the Student to the District OT, Tammy Schultz but there was not any follow up discussions as the plan was to review the referral again in February 2023.<sup>133</sup>

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<sup>124</sup> P40p1, D6p1; Feldmeier T286:7, 287:22, 296:4, Briel T354:7, Wheeldon T406:9, 408:9, Bentow T526:23, McNamara T610:11.

<sup>125</sup> D2p34; Armstrong T396:18.

<sup>126</sup> P34p6.

<sup>127</sup> Bentow T530:5, 17.

<sup>128</sup> P39pp2, 3; Bentow T520:15.

<sup>129</sup> Bentow T533:7.

<sup>130</sup> Briel T355:9.

<sup>131</sup> Briel T357:24-358:8.

<sup>132</sup> P39pp1, 7, P64p10; Mother T140:21, Stone T232:5; Briel T350:24, 356:15, Bentow T529:17, 531:18.

<sup>133</sup> P34p4, P41p1; Bentow T519:21, 533:22.

50. On December 15, 2022, Ms. Stone sent Ms. Bentow the Student's November 17, 2020, OT evaluation and March 3, 2022, OT updated assessment.<sup>134</sup>

51. On January 25, 2023, the Student inappropriately accessed his Chromebook during lunch.<sup>135</sup> In Ms. Armstrong's class the Student had two tabs open on his Chromebook to play videogames when he was not permitted to do so.<sup>136</sup> The Student was playing a violent video game which was not a permitted site.<sup>137</sup>

52. At the end of the first semester the Student received an A in ELA, a C in Math, a B- in science, and an A in physical education and an A in Beginning Band.<sup>138</sup>

53. On February 2, 2023, the Student's 504 plan team met. The team reviewed the Student's diagnoses and updated his accommodations.<sup>139</sup> The Student consistently performed at or above standards in social studies and Ms. Armstrong considered him a hard worker with a positive attitude.<sup>140</sup>

54. On February 3, 2023, the District reconvened the Student's referral team to review the Parents' request for a special education evaluation. The meeting participants included Ms. McNamara, Ms. Bentow, Ms. Armstrong, Mr. Feldmeier, Mr. Knight, Ms. Wheeldon, Ms. Briel, Ms. Cross, Ms. Stone, and the Mother. The team discussed the Student's IXL scores and whether he had made progress on the previous areas of concern discussed during the December 9, 2022, meeting.<sup>141</sup> The Student's teachers reported he was doing well overall.<sup>142</sup> Ms. Wheeldon noted the Student was taking a leadership role in her class.<sup>143</sup> The areas the team looked at included academic, social behavior, and communication in the educational setting. The Student's teachers indicated he was progressing consistently when compared with his peers and the only area where he was slightly struggling was in math tests although he did well on in-class "fire-up" quizzes. The team discussed updating his 504

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<sup>134</sup> P42p1; Stone T234:15.

<sup>135</sup> P43p1; Nichols T307:8.

<sup>136</sup> P2p1; Nichols T307:13.

<sup>137</sup> D15p1; Nichols T307:13, Armstrong T381:11.

<sup>138</sup> P4p2; Harper T486:6.

<sup>139</sup> P45p1, P46p3, P64p12; Briel T352:15.

<sup>140</sup> P4p2; Armstrong T389:23, 392:8.

<sup>141</sup> Stone T572:15.

<sup>142</sup> P46pp1, 9, 10; Stone T572:11.

<sup>143</sup> D9p5; Wheeldon T417:6.

accommodations to include use of a separate testing location.<sup>144</sup> Although Ms. Cross was present, the recommendations for SLP services from Ms. Crompton were not discussed.<sup>145</sup> The District issued a PWN indicating it would not initiate a special education evaluation of the Student. The PWN indicated the District would continue the Student's 504 plan based on his diagnoses of social pragmatic communication disorder, anxiety disorder, [REDACTED] and ADHD.<sup>146</sup>

55. On February 10, 2023, the Student scored 410 on the math IXL which remained below grade level.<sup>147</sup>

56. On February 14, 2023, Renee Cruickshank,<sup>148</sup> the Student's second semester health class teacher, had to tell the Student to close his Chromebook in class. This type of behavior happened multiple times over multiple days, each time the Student had to be reminded to be off his Chromebook in health class.<sup>149</sup> Although there were frequent infractions in health class, only one incident report was entered.<sup>150</sup>

57. On March 6, 2023, the Parents submitted another written referral for a special education evaluation.<sup>151</sup>

58. The District issued a PWN dated March 10, 2023, that stated the District had reviewed the Parents' March 6, 2023, referral request and was declining to proceed with an initial evaluation for special education services. The stated reason for the District's decision was the team had met twice this year regarding the Parents' request for a special education evaluation for the Student and a review of his data, grades, teacher input, and significant progress from Fall District assessments to Winter District assessments, did not demonstrate a need for a special education evaluation.<sup>152</sup> The PWN included the following relevant factors:

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<sup>144</sup> P46p10; Knight T441:1, Bentow T537:3, Stone T572:15, McNamara T614:15.

<sup>145</sup> Bentow T539:8.

<sup>146</sup> P47p3, P49p4, P64p12; Bentow T537:14, 541:8, 542:15.

<sup>147</sup> P1p1; Knight T434:16, Bentow T503:15.

<sup>148</sup> Ms. Cruickshank is a health teacher at Tumwater Middle School. Cruickshank T625:17. She has been a District middle school teacher since 2004. Prior to that she worked as a paraeducator beginning in 1999. Cruickshank T628:3. She received an associate degree from Green River Community College. She received her bachelor's degree with a focus in psychology and education from the Evergreen State College. She obtained her teaching credentials from Pacific Lutheran College in 2004. Cruickshank T628:18.

<sup>149</sup> Cruickshank T626:9-25, 627:12.

<sup>150</sup> Nichols T308:17.

<sup>151</sup> P50p3, P64p16; Bentow T543:25.

<sup>152</sup> P50p3, P64p15; Mother T148:4. Bentow T543:6.

Team/staff met with parent regarding 504 needs, at parent request on: in person on 8/25/22, 9/21/22, and 11/2/22, and 12/7/22-via phone) [sic]. Team met regarding Special Education referral on 12/9/22 and 2/3/23. Teachers reported [the Student] is demonstrating appropriate grade level academic skills within the classrooms, he is passing all classes (while grades can fluctuate between assignments and retaking tests, teachers report his progress is comparable to same age peers) and making progress from District Assessments in the Fall to Winter (progressing 1 grade level in both ELA and Math). [The Student] has had two notices of behavior in Skyward, which include using Chromebooks appropriate [sic] (on a different site than requested)- in both cases, [the Student] responded to redirection- no further action needed. Given the most recent meetings and file review- [the Student] is demonstrate [sic] overall appropriate 6th grade behavior and academic skills and a Special Education evaluation is not warranted at this time.<sup>153</sup>

The PWN included notice of the Student's procedural safeguards.<sup>154</sup>

59. On March 22, 2023, the Student told Ms. Stone about an incident he had on the bus and that he had not slept well the night before.<sup>155</sup>

60. On May 4, 2023, Ms. Stone spoke with the Mother by phone. The Mother reported the Student had his Chromebook restricted. He was having meltdowns and not sleeping. The Student had increased behaviors of plucking his eyelashes and sucking on items. She reported increased impulsivity due to anxiety and exhaustion.<sup>156</sup> On the same day Ms. Wheeldon reported the Student for unauthorized use of his Chromebook in class.<sup>157</sup> This was fairly frequent behavior as Ms. Wheeldon's class had transitioned from online to project-based work and was working on independent and small group assignments. Despite the frequency in Ms. Wheeldon's class, the Student's gameplaying behaviors were not outside the normal range. At times Ms. Wheeldon could get the Student to focus by rewarding him with game time.<sup>158</sup>

61. On May 8, 2023, the Student's Section 504 team met with the Mother. She reported the Student's attitude tanked. The Student was having anxiety, sucking on

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<sup>153</sup> P50p3; Bentow T543:3.

<sup>154</sup> *Id.*

<sup>155</sup> P64p25.; Stone T586:11-588:8.

<sup>156</sup> P64p27; Stone T591:9, 700:2.

<sup>157</sup> P2p1; P64p27; Wheeldon T409:7.

<sup>158</sup> Wheeldon T409:7-25, 411:1, 418:6.

items, and pulling on his eyelashes and eyebrows. To address his pattern of inappropriate Chromebook use, the District implemented a plan that prevented the Student from having the Chromebook during classes when it was not required. The Mother shared the Student was using his CPAP machine 12-13 hours per night for sleep apnea.<sup>159</sup>

62. On or about May 11, 2023, Ms. Armstrong, Ms. Wheeldon, Ms. Backholm and Mr. Knight completed the Vanderbilt Assessment Scales (Vanderbilt).<sup>160</sup> Ms. Backholm reported the Student had somewhat of a problem in the areas of disrupting class and organizational skills. The concerning disruptive behavior was the Student blurting out without raising his hand. The difficulty with organizational skills was keeping track of papers.<sup>161</sup> Ms. Backholm was also concerned about the Student's use of his Chromebook to play games during class. When required to close the games, the Student would express frustration and then return to his class work for a short period of time.<sup>162</sup> Mr. Knight reported that assignment completion was somewhat of a problem area.<sup>163</sup>

63. On May 23, 2023, the Student was seen at NW Pediatric Center for ADHD follow up. Among the noted concerns was that he had been plucking his eyelashes and eyebrows.<sup>164</sup>

64. In June 2023 the Parents provided a privately obtained psychoeducational evaluation of the Student to the District.<sup>165</sup> The evaluation included testing completed on May 18, 2023. The evaluation was conducted by a licensed clinical psychologist, Jennifer McDonald, PhD.<sup>166</sup> As part of her evaluation of the Student, Dr. McDonald reviewed his school records including his initial special education evaluation report of January 25, 2018; his IEP of February 22, 2018; special education exit documentation of September 12, 2019; Section 504 plans during the 2022-2023 school year; and documentation related to the Parents' referral of the Student for special education during the same school year. Dr. McDonald's review also included the Student's September 7, 2022, SLP evaluation and Ms. Crompton's treatment notes from

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<sup>159</sup> P64pp29, 30; McNamara T612:2-613:7, Stone T:704:10, 706:16-707:6, 709:16.

<sup>160</sup> P70pp3-6; Backholm T318:10.

<sup>161</sup> Backholm T318:21.

<sup>162</sup> Backholm T330:9.

<sup>163</sup> P70p4; Knight T436:11.

<sup>164</sup> P70p1; Mother T63:21.

<sup>165</sup> Mother T156:2.

<sup>166</sup> P56p1; Mother T153:3.

September 3, 2022. Dr. McDonald reviewed the Student's March 3, 2022, OT evaluation and Ms. Macrina's treatment notes through October 20, 2022. As part of the Student's evaluation, she conducted a comprehensive battery of psychological and educational testing, in addition to completing behavior assessment and ratings based on parent reporting.<sup>167</sup> Dr. McDonald diagnosed Attention-Deficit/Hyperactivity Disorder, predominately hyperactive/impulse type; Specific Learning Disorder with impairment in written expression (dysgraphia; mild); and Generalized Anxiety Disorder.<sup>168</sup> Dr. McDonald made specific education recommendations with respect to individualized instruction and accommodations and in the areas of reading, math and writing. She also recommended accommodations and interventions in the learning environment as a whole. These included specific, direct, and explicit instruction in executive functioning skills through a consistent, daily planning or study period with a list of examples of skills to scaffold and support the Student.<sup>169</sup> Explicit instruction means using a wide variety of ways in which a qualified professional would meet with a student and give them specific instruction on that one task and provide explicit teaching, utilizing a planner to input information and check for understanding.<sup>170</sup> Providing direct, explicit instruction could include specially designed instruction (SDI).<sup>171</sup> The Parents' total expenses in obtaining Dr. McDonald's evaluation of the Student was \$2,500.00.<sup>172</sup>

65. On June 6, 2023, the Student was playing a game on his Chromebook in Mr. Harper's class when he was supposed to be participating in class activities. The Student used an unnamed tab to hide what he was doing. When his Chromebook was confiscated, the Student refused to participate until threatened with removal by student support.<sup>173</sup> Mr. Harper talked to the Student about this more than a few times.<sup>174</sup> In total, the Student had four separate discipline referrals entered in the Skyward database for inappropriate Chromebook usage from January through June 2023. Mr. Nichols testified that this number of discipline referrals was not outside the ordinary for sixth grade students.<sup>175</sup> Mr. Nichols did not consider the fairly frequent redirections

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<sup>167</sup> P56pp10, 11, 13, 14; Mother T154:4.

<sup>168</sup> P56p1; Mother T155:14, Bentow T550:18, 553:1-9.

<sup>169</sup> P56pp6, 7; Mother T155:25; Bentow T551:3-25.

<sup>170</sup> Bentow T552:2-10.

<sup>171</sup> Bentow T552:12.

<sup>172</sup> P69p1; Mother T167:11.

<sup>173</sup> P2p1; Nichols T309:20, Harper T488:7.

<sup>174</sup> Harper T489:13.

<sup>175</sup> P4p2; Nichols T311:22.

from teachers such as Ms. Cruickshank and Ms. Wheeldon that were not entered into the Skyward system.<sup>176</sup>

66. On June 16, 2023, the Student scored a 430 on the math IXL which was below grade level, and a concerning data point but also reflected growth.<sup>177</sup> Mr. Knight estimated that there were “handfuls” of students in his class that had lower IXL scores.<sup>178</sup>

67. Dr. McDonald wrote a later dated June 17, 2023, that identified the diagnoses listed in her evaluation report. The letter reinforced her recommendation of explicit, direct instruction in executive functioning skills and writing. The letter stated the Student needed help learning how to consistently plan, organize, start, and complete tasks.<sup>179</sup>

68. At the end of the 2022-2023 school year the Student received a C+ in ELA, C in math, A+ in science, B+ in Health, A- in Social Studies and D+ in Beginning Band. The Student’s grade in science reflected a modified curriculum and expectations.<sup>180</sup> In Beginning Band, the Student did not consistently stay on task.<sup>181</sup> Mr. Harper estimated the Student was off task at a frequency of every other day or every three days.<sup>182</sup> The Student’s decreased grade in ELA was given after the class started essay writing which holds a heavy weight in grading.<sup>183</sup> Ms. Backholm noted the Student’s efforts in ELA had improved. She did not have any concerns about the Student moving on to seventh grade general education work.<sup>184</sup>

69. At the end of the 2022-2023 school year the Student completed Smarter Balance testing. His summative ELA score of 2284 was a level one, which was below

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<sup>176</sup> Wheeldon T409:7.

<sup>177</sup> P1p1, Knight T434:5-435:8.

<sup>178</sup> Knight T438:5, Bentow 503:15.

<sup>179</sup> P58p1; Bentow T552:13.

<sup>180</sup> Wheeldon T407:10.

<sup>181</sup> P4p1, D14p2; Harper T486:11, 22.

<sup>182</sup> Harper T487:9-20.

<sup>183</sup> Backholm T322:24.

<sup>184</sup> Backholm T335:10-21.



standard and an academic concern.<sup>185</sup> The Student scored 2477 in math, which was level 2, which was nearing but still below standard.<sup>186</sup>

70. On June 29, 2023, the Parents filed this due process hearing request.<sup>187</sup>

### **2023-2024 School Year**

71. At the start of the 2023-2024 school year the Parents provided a copy of Dr. McDonald's evaluation to Ms. Stone.<sup>188</sup>

72. On September 8, 2023, the Parents' attorney provided the attorney for the District a copy of an evaluation of the Student from pediatric neuropsychologist Evan Lima, PhD.<sup>189</sup> Dr. Lima conducted an initial consultation, neurobehavioral status exam, records review, and integrated interpretation of longitudinal data on the dates of July 18, 2023, and August 14, 2023.<sup>190</sup> Dr. Lima ruled out a diagnosis of Autism for the Student. He confirmed the diagnoses identified by Dr. McDonald. Dr. Lima made a number of additional recommendations to be incorporated into an IEP for the Student. These recommendations were primarily accommodations.<sup>191</sup> The Parents' expenses from Dr. Lima's evaluation were \$129.07.<sup>192</sup> The Parents provided the District with Dr. Lima's and Dr. McDonald's evaluations through Chris Burgmeier,<sup>193</sup> Executive Director of Special Services.<sup>194</sup>

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<sup>185</sup> P1p2, P61p1; Backholm T323:24.

<sup>186</sup> P61p1; Bentow T510:25.

<sup>187</sup> Complaint.

<sup>188</sup> Mother T156:14.

<sup>189</sup> P59pp1, 2; Mother T158:7.

<sup>190</sup> P59p1; Mother T159:1.

<sup>191</sup> P59pp2-6; Bentow T554:5-13.

<sup>192</sup> P71p1; Mother T751:7.

<sup>193</sup> Dr. Burgmeier has been in her current position for two years. Prior to that she was an Assistant Director of Special Services with the Bethel School District. Prior to that she was a school psychologist with the University Place School District, the Steilacoom School District, and the Eastmont School District. Burgmeier T655:24-656:24. Dr. Burgmeier received her bachelor's degree from the University of Texas in psychology in 1990. She received a master's degree in psychology from Southern Methodist University in 1992. She received her doctorate from the University of Iowa in 1994. She received her master's in special education from the University of Washington in 2016. Burgmeier T657:6.

<sup>194</sup> Burgmeier T727:8.

73. On September 18, 2023, Ms. Bentow emailed the Mother and informed her that after reviewing the outside evaluations for the Student the District decided to evaluate the Student for special education eligibility.<sup>195</sup>

## CONCLUSIONS OF LAW AND REQUESTED REMEDIES

### **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 under these provisions, 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.<sup>196</sup> The Parents are seeking relief and bear the burden of proof in this case. The U.S. Supreme Court and Washington courts have generally held that the burden of proof in an administrative proceeding is a preponderance of the evidence.<sup>197</sup> 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."<sup>198</sup>

4. In *Rowley*, the U.S. Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. The first question is whether the state has complied with the procedures set forth in the IDEA. The second question is whether the individualized education program (IEP) developed under these procedures is reasonably calculated to enable the child to receive educational

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<sup>195</sup> P60p1; Mother T161:6, Bentow T548:23.

<sup>196</sup> *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

<sup>197</sup> *Steadman v. SEC*, 450 U.S. 91, 102 (1981); *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797 (1999); *Hardee v. Dep't of Social & Health Services*, 172 Wn.2d 1, 4 (2011).

<sup>198</sup> *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197 n.21, 200-201 (1982).

benefits. “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.”<sup>199</sup>

5. Procedural safeguards are essential under the IDEA, particularly those that protect the parent’s right to be involved in the development of their child’s educational plan.<sup>200</sup> 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.<sup>201</sup>

6. “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.”<sup>202</sup>

### **Issue and Remedies**

Whether the District violated the IDEA and denied the Student a FAPE by failing continuously in its child find obligations to identify and evaluate the Student from June 2021 to present when the District had sufficient notice the Student had a disability, and the disability was causing an educational impact.

7. WAC 392-172A-02040 is relevant and provides in part:

(1) School districts shall conduct child find activities calculated to reach all students with a suspected disability for the purpose of locating, evaluating, and identifying students who are in need of special education and related services, regardless of the severity of their disability. The child find activities shall extend to students residing within the school district boundaries whether or not they are enrolled in the public school system; except that students attending approved nonprofit private elementary or secondary schools located within the school

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<sup>199</sup> *Rowley*, 458 U.S. at 206-07.

<sup>200</sup> *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001).

<sup>201</sup> 20 USC §1415(f)(3)(E)(ii); WAC 392-172A-05105(2); 34 CFR §300.513(a)(2).

<sup>202</sup> *Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017).

district boundaries shall be located, identified, and evaluated consistent with WAC 392-172A-04005. School districts will conduct any required child find activities for infants and toddlers, consistent with the child find requirements of the lead agency for Part C of the act.

(2) Child find activities must be calculated to reach students who are homeless, wards of the state, highly mobile students with disabilities, such as homeless and migrant students and students who are suspected of being a student with a disability and in need of special education services, even though they are advancing from grade to grade.

8. As stated in *E.S. v. Conejo Valley Unified Sch. Dist.*, 72 IDELR 180 (C.D. Cal. 2018):

Whether a school district had reason to suspect that a child might have a disability must be evaluated in light of the information the district knew, or had reason to know, at the relevant time, not exclusively in hindsight. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993). However, some consideration of subsequent events may be permissible if the additional data provide[s] significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date. *E.M. v. Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 1006 (9th Cir. 2011) (quoting *Adams*, 195 F.3d at 1149).

9. In the current case, the District's post-hearing brief urges a two-step analysis to determine when a its child find obligation is triggered conditioned upon the school district having reason to both suspect a child has a disability and suspect the child has need of special education services, relying on, *Dep't of Educ. v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194 (D. Haw. 2001).<sup>203</sup> The Parents argue for a one step approach triggered when a school district identifies that a child has displayed symptoms of a covered disability, citing *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9<sup>th</sup> Cir. 2016), *cert. denied*, 137 S. Ct. 1578.<sup>204</sup> Under both tests once a school district's child find obligation is triggered it must conduct an initial evaluation in all areas of suspected disability.

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<sup>203</sup> District's Post-Hearing Brief pp 3-6

<sup>204</sup> Parents' Post-Hearing Brief p 23.

10. In *Timothy O.*, the Ninth Circuit instructed that a school district's duty to evaluate is triggered when:

[A] disability is "suspected," and, therefore, must be assessed by a school district, when the district has notice that the child has displayed symptoms of that disability. In *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796 (9th Cir. 1996), for example, we held that the "informed suspicions of parents, who may have consulted outside experts," trigger the requirement to assess, even if the school district disagrees with the parent's suspicions because "[t]he identification [and assessment] of children who have disabilities should be a cooperative and consultative process." *Id.* at 802. Once either the school district or the parents suspect disability, we held, a test must be performed so that parents can "receive notification of, and have the opportunity to contest, conclusions regarding their children." *Id.*<sup>205</sup>

11. In *Northshore School District*, 121 LRP 34551 (SEA WA 2021), the ALJ concluded that based upon the facts of that case it was not necessary to resolve whether the *Cari Rae S.* or *Timothy O* test was applicable when the school district's child find obligation is triggered under each of the tests.<sup>206</sup>

12. In this case, beginning June 2021 and through the entire 2021-2022 school year, the Student's fifth grade year, a number of factors arose relevant to the question of child find. These factors included the Student's i-Ready scores in math and his increased behaviors including blurting out in class. However, these factors taken as a whole were not sufficient to create a suspicion that the Student was displaying symptoms of his disabilities at school beyond what was already being addressed through his 504 plan. Therefore, even applying the less rigorous, single step *Timothy O* test, the Parents did not meet their burden to prove that the District failed in its child find obligations from June 2021 through July 2022.

13. On August 18, 2022, the Parents notified the District of the Student's new [REDACTED] diagnosis and suggested through an email, that the Student *may* need to be evaluated for an IEP. The District responded by incorporating the Student's new

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<sup>205</sup> 822 F.3d at 1119-20; see also, *J.K. v. Missoula Cnty. Pub. Sch.*, 713 F. App'x 666, 667 (9th Cir. 2018).

<sup>206</sup> The law is not clear as when a school district's child find obligation is triggered, as the Ninth Circuit Court of Appeals in *G.M. v. Saddleback Valley Unified Sch. Dist.*, 583 F. App'x 702, 703-04 n.1 (9th Cir. 2014), recognized "[w]e have not yet articulated a test for when the child find obligation is triggered."

diagnosis into his 504 plan and reviewing his need for modified accommodations within the 504 plan. At that time, the addition of the Student's [REDACTED] to his disability profile did not demonstrate symptoms of his disability beyond what could be addressed within his existing 504 plan.

14. In the first months of the 2022-2023 school year, the Student's sixth-grade year, the District became aware of several red flags that the Student may be showing symptoms of his disabilities at school that could require special education services. The Mother reported the Student was struggling and was unable to self-advocate to receive accommodations in math class. She alerted the District he was using fidgets and squirming to stay awake due to his [REDACTED] and was chewing things. The Mother reported that due to an incident on the school bus in September the Student ripped out ninety percent of his eyelashes in the health room. The Mother also requested the District provide accommodation in allowing the Student to access the bathroom because he was holding off on using the restroom until he got home, and this had caused him to experience a [REDACTED]. The Student's overall IXL math score in October was more than one grade level below standard, placing him at the end of the third-grade level. In the middle of October, the Student received a failing grade in a math unit, his anxiety was up, and his Mother reported to the District he was stabbing his math book in frustration. The Student was experiencing these struggles in math despite receiving three hours per day in private tutoring.<sup>207</sup>

15. The Mother's October 16, 2022, email stated that the Student needed an "IEP evaluation" and she expected the evaluation report and meeting to be completed. The Mother stated further that she would provide the Student speech's evaluation to aid in the evaluation process. The Mother submitted the speech evaluation on October 20, 2022. Through her email the Mother clearly requested an initial evaluation for special education services. She provided the promised private speech evaluation four days later. The regulations require that a parent's referral be in writing unless they are unable to do so. Use of a school district referral form is optional but not required. Therefore, the Parents completed a request for an initial evaluation for special education services through the Mother's email which triggered referral timelines consistent with WAC 392-172A-03005. The District was required to act on the Parents' request by following the procedures under WAC 392-172A-03005(2) including deciding within twenty-five school days whether or not to evaluate the Student and providing PWN explaining the decision to the Parents. The Parents proved that the

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<sup>207</sup> Low district-wide assessment scores, declining academic performance and parental reports of displayed symptoms of disability may also be evidence of suspected disability under the *Timothy O* test. *West Valley School District*, 120 LRP 17296 (October 23, 2019).

District did not initiate referral timelines responsive to the Mother's October 16, 2022, email and treat her email as a request for an initial evaluation, although it was required to do so.

16. On December 9, 2022, when the District conducted its review of the Parents referral it was aware of the conclusions and recommendations in the Student's speech evaluation, conducted by Ms. Crompton, the OT evaluation conducted by Ms. Jones and the updated OT assessment from Ms. Macrina. Regarding the Student's communication needs Ms. Crompton identified goals to address the Student's needs connected to his ADHD, anxiety disorder, and social pragmatic communication disorder. She recommended speech therapy including skilled language intervention to improve his functional ability to participate in meaningful communication and reduce communication breakdowns. As explained by Ms. Cross the goals and treatment recommendations from Ms. Crompton could be delivered to the Student through an IEP. The needs identified through Ms. Crompton's speech evaluation evidenced symptoms of the Student's disabilities impacting his communication needs. Ms. Crompton's treatment plan consisted of bi-weekly speech therapy to deliver ADHD informed care addressing hyper fixations, impulse control, big picture thinking, summarization/working memory, establishing needs and expectations and perspective taking. There was reason to suspect Ms. Crompton's recommended treatment plan could be addressed through special education services as the plan was based on the Student's individual needs. Therefore, Ms. Crompton's assessments and recommendations were reasons for the District to suspect the Student had a disability and suspect the Student required special education services. Under both the *Cari Rae S.* and *Timothy O* tests the District's receipt of Ms. Crompton's speech evaluation was sufficient to trigger the District's child find obligation as it was provided a private evaluation from a credentialed speech therapist that recommended the Student receive speech therapy that could be delivered as individualized instruction through special education services. The fact that Ms. Crompton's speech evaluation did not include standardized assessments did not invalidate the report for the purpose of creating suspicion of the need for special education services to address the Student's disability. As stated by the *Cari Rae S.* hearing officer, the threshold for suspicion is a relatively low bar.<sup>208</sup> Therefore, the Parents established that both prongs of the *Cari Rae S.* test were met to trigger the District's child find obligations. The District's receipt of Ms. Crompton's evaluation on its own was sufficient evidence to trigger the District's child find obligation.

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<sup>208</sup> *Cari Rae S.*, at 1196-1197.

17. Similarly, the updated OT assessment conducted by Ms. Macrina identified the Student's ADHD and anxiety continued to impact his ADL completion. Her assessment indicated his disabilities created difficulty with identifying triggers that cause emotional dysregulation and with implementing self-regulation strategies in moments when needed and was often related to completion of self-care tasks. Ms. Macrina recommended continued weekly skilled, direct, OT therapy to further address the Student's skill development. Ms. Macrina's assessment evidenced that the Student's disabilities may also be manifesting symptoms that could occur at school and that the Student may benefit from special education services to address the needs identified through her updated OT assessment. Therefore, the District's receipt of Ms. Macrina's updated OT assessment, and the original assessment conducted by Ms. Jones were sufficient evidence on its own to trigger its child find obligations under both the *Timothy O* and *Cari Rae S.* tests.

18. As explained above, the Parents proved, beyond a preponderance of the evidence, the District should have suspected the Student had a disability and suspected her needed special education services, upon receipt of the Student's speech evaluation and, independently, upon receipt of his OT assessments. The fact that the Student was receiving multiple accommodations through a 504 plan does not alter the conclusions that the District's receipt of the speech and OT evaluations were independent reasons to suspect the Student had disabilities and needed special education services. The District's knowledge of the additional red flags occurring during the first few months of the 2022-2023 school year, as related above, further compounded the need for the District to conduct an initial evaluation.

19. Moreover, when the District convened the special education referral meeting on December 9, 2022, it had obtained additional information that gave further reason to suspect the Student had a disability. Based on the testimony of Mr. Brimer, the incident in his classroom three days prior to that meeting demonstrated the Student had willfully and intentionally behaved in a manner that undermined the safety of the classroom creating a serious behavior incident. The Mother alerted the District the Student plucked his eyelashes when removed from the classroom to the hallway, a self-harming behavior. During the meeting Mr. Feldmeier and Ms. Wheeldon reported the Student inappropriately accessed his Chromebook and Ms. Armstrong noted concerns during unstructured times. The District's conclusion that the Student should not be evaluated for special education services at that time because he was doing well with regards to school, self-advocacy for accommodations, and the teacher reported progress, ignored the recommendations of the speech and OT evaluations. The District did not have an OT or SLP attend the December 9, 2022, meeting, and the fact that the Student's teachers did not identify communication and fine motor needs in the



Student did not discount the symptomology and recommendations for SLP and OT services reflected in those evaluations.

20. It is not necessary to identify the exact date by which the District first had clear notice that it should have suspected the Student had a disability and initiated an evaluation.<sup>209</sup> However, for purposes of analyzing this case the District's obligation to conduct an evaluation was triggered no later than December 9, 2022, when the District convened a referral team for the Student, having received of the Parents written referrals on October 16, and November 14, 2022, received the speech and OT evaluations, and the District's knowledge of the additional red flags at the referral meeting. As analyzed in the paragraphs below, the District did not receive any additional information, after that date to alleviate it of the need to conduct an initial evaluation as it continued to have information that the Student was suspected of having a disability consistent with the *Cari Rae S.* and *Timothy O* tests through the remainder of the 2022-2023 school year.

21. When the District reconvened the Student's team on February 3, 2023, factors had not changed to indicate that the reasons to suspect that the Student had a disability as previously discussed had abated. Although the Student's teachers reported he was doing well overall. His performance in his math had slipped to a C+. He was continuing to access his Chromebook inappropriately, in a manner that disrupted his learning, and had repeatedly been disciplined for doing so. During the February 3, 2023, meeting, Ms. Cross did not discuss the Student's speech evaluation from Ms. Crompton. While Ms. Cross testified the speech evaluation did not include standardized assessments, she had not conducted her own evaluation of the Student and, therefore, her testimony did not discredit the Parents' suspicions as informed by Ms. Crompton's direct assessment and observations of the Student. Moreover, the Student's updated OT assessment from Ms. Macrina was based on standardized assessment further supporting the Parent's suspicions and the conclusion that the District's duty to evaluate remained through the February 3, 2023, review.<sup>210</sup>

22. On March 10, 2023, the District convened the Student's team to review the Parent's third written request for a special education evaluation in the school year. The factors the District team relied on were that the Student was demonstrating appropriate grade level skills, making progress on District assessments, and had two notices of behavior in Skyward for inappropriate Chromebook usage. As reflected in the PWN, the District concluded the Student was demonstrating overall appropriate

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<sup>209</sup> *Sumner-Bonney Lake School District*, 2021-SE-0161 (WA SEA 2022).

<sup>210</sup> *Timothy O.*, 1119-20, *relying upon, Pasatiempo v. Aizawa*, *supra*.

sixth-grade behavior and academic skills. Based on this the District's team did not fully consider the Student's inappropriate Chromebook usage which was pervasive throughout the school year in multiple classes at multiple times despite interventions. The District's Skyward database did not fully reflect the extent of the Student's inappropriate Chromebook use as it only documented formal discipline reports made by teachers and not the frequent in class redirects the Student's teachers made to address this behavior. Additionally, the PWN failed to mention consideration of the Student's speech and OT assessments, the Mother's reports of inappropriate toileting, his self-harm through plucking his eyelashes and eyebrows, or that the Student's IXL assessments in math were three grade levels below standard. As discussed above, these additional factors, taken together, and the evaluations on their own, were sufficient to provide the District reason to suspect the Student had a disability and suspect he needed special education services. Therefore, the Parents established that the District continued to be obligated under its child find obligations to conduct an evaluation of the Student responsive to the Parents' March 6, 2023, referral.

23. At the end of the 2022-2023 school year the Student's circumstances had not changed to alleviate the District of the obligation to conduct an initial evaluation of the Student. The Student remained unable to use his Chromebook appropriately and a plan had to be implemented to restrict his use at school. Despite this plan he received additional discipline referrals and redirection from teachers for inappropriate use of his Chromebook. The Mother reported increased behaviors of plucking his eyelashes, chewing, or sucking on items, anxiety, and exhaustion. Teacher responses to the Vanderbilt assessment indicated he had problems in the area of disrupting class by blurting out without raising his hand, the area of organizational skill by keeping track of papers, and the area of assignment completion. They also confirmed he would express frustration and need a break before continuing with classwork when redirected from playing games during class. The Student's Smarter Balance scores in ELA at the end of the school year indicated scores two levels below standard and he was below standard in math. His IXL score in math continued to be below grade level, and although his IXL scores in math were trending up, the low scores remained a concerning data point. Considering all of this evidence, combined with the red flags previously mentioned and consistent with the legal analysis detailed above, the Parents established that the District should have suspected that the Student had a disability beginning December 9, 2022, through the end of the 2022-2023 school year.

24. District's witnesses testified consistently throughout these proceedings that the Student's passing grades were a significant reason the District determined not reason to evaluate the Student. WAC 392-172A-02000 provides that FAPE must be made available to eligible students "even though the student has not failed or been retained

in a course or grade and is advancing from grade to grade.” Similarly, WAC 392-172A-02040(2) provides that child find activities must be calculated to reach students who are suspected of being a student with a disability and in need of special education services even though they are advancing from grade to grade. Taken together the clear implication of these regulations is that a student does not have to fail classes in the general curriculum as a prerequisite to be evaluated for special education. In the current case, as discussed above there was ample reason for the District to suspect the Student had a disability and needed special education services, despite the fact that he was passing classes and advanced from sixth to seventh grade.<sup>211</sup>

25. The Parents have proven that the District failed to comply with child find and referral procedures during the 2022-2023 school year as detailed in conclusions of law 14 through 24 above. The District’s failure to act on its child find obligation and conduct an initial evaluation of the Student during his sixth-grade year delayed the process for many months, preventing the Parents from obtaining vital information about whether the Student was eligible for special education in a timely manner. These procedural violations significantly impeded the Parents’ ability to participate in the decision making for the Student and resulted in a denial of FAPE. The Parents requested compensatory education in the form of reimbursement for private tutoring and reimbursement for private evaluations they obtained and provided to the District.

26. Compensatory education is a remedy designed “to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.”<sup>212</sup> Compensatory education is not a contractual remedy, but an equitable one. “Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.”<sup>213</sup> Flexibility rather than rigidity is called for. Compensatory education is an equitable

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<sup>211</sup> See, *District of Columbia Pub. Schs.*, 123 LRP 1265 (SEA DC October 27, 2022) (Because the District of Columbia was aware of a student's long history of severe depression, anxiety, and suicidal ideation, its decision to hold off on a special education referral constituted a violation of its child find duty.); *N.N. v. Mountain View-Los Altos Union High Sch. Dist.*, 122 LRP 26190 (N.D. Cal. August 4, 2022) (District had a duty to evaluate a high school student with anxiety and depression when it became aware of her privately obtained diagnosis or her disability, and decline in academic performance despite development of a Section 504 plan for the student.); *N.G. v. District of Columbia*, 556 F.Supp.2d 11, 25 (D.D.C. 2008) (The child find duty extends even to children who are suspected of being a child with a disability even though they are advancing from grade to grade.)

<sup>212</sup> *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005), cited with approval in *R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9<sup>th</sup> Cir. 2011).

<sup>213</sup> *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994).

remedy, meaning the tribunal must consider the equities existing on both sides of the case.<sup>214</sup>

27. In the current case the Parents did not establish that the Student is eligible for special education services. Therefore, similar to the court's holding in *J.N. v. Jefferson County Bd. of Educ.*, the Parents did not provided evidence to establish that the Student lost education services due to the failure to develop an IEP.<sup>215</sup> Dr. McDonald recommended direct, explicit, instruction in the area of writing. However, her conclusions and recommendations, as presented at hearing, were not reviewed through an IEP team. The Parents, therefore, did not establish that reimbursement for tutoring services is warranted as an equitable remedy to provide educational benefits that the Student likely would have accrued from special education services had the District conducted an initial evaluation without delay.

28. However, unlike *J.N. v. Jefferson County Bd. of Educ.* a loss of educational opportunity occurred in this case as the District did not agree to an initial evaluation of the Student until September 2023, after the Parents filed this due process hearing seeking an initial evaluation and provided the District with the private evaluations conducted by Dr. McDonald and Dr. Lima. In cases where a school district has delayed conducting an initial evaluation in a manner that significantly impeded the parents' ability to participate in decision making for a student, reimbursement of expenses for privately obtained evaluations may be an appropriate remedy.<sup>216</sup> As stated in conclusion of law 20 above the District should have initiated an initial evaluation no later the December 9, 2022. Therefore, the District delayed the start of the evaluation of the Student in excess of nine calendar months. This was not a harmless error. The extended delay deprived the Parents of vital information about the Student's needs and an ultimate determination as to the Student's eligibility for special education services. To refuse reimbursement of the Parents' evaluation expenses would leave the Parents without relief for the District's unreasonable delay in evaluating the Student.<sup>217</sup> Even if the final outcome of the evaluation process is that the Student is not eligible for special education services and an IEP unwarranted; the delay the Parents experienced prevented them from timely receiving information so that they could make critical decisions about the Student's education. Further, the District only agreed to start the evaluation process after the Parents incurred expenses of

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<sup>214</sup> *Reid v. District of Columbia*, *supra*, 401 F.3d at 523-524.

<sup>215</sup> 12 F.4<sup>th</sup> 1355, 1366 (11<sup>th</sup> Cir. 2021).

<sup>216</sup> *Sumner Bonney Lake School District*, *supra*; *West Valley School District*, *supra*; *N.N. v. Mountain View-Los Altos Union High Sch. Dist.*, *supra*.

<sup>217</sup> *See, Forrest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 241 (2009).

\$2,500.00 in obtaining an evaluation from Dr. McDonald and \$129.07 for Dr. Lima's evaluation. Therefore, the Parents are awarded reimbursement of their evaluation expenses for Dr. McDonald and Dr. Lima totaling \$2,629.07.

**ORDER**

1. The Tumwater School District School District violated the IDEA and denied the Student FAPE during the 2022-2023 school year by violating its child find obligation and failing to evaluate the Student as described in conclusions of law 14 through 24.
2. The Parents are awarded the remedy of reimbursement for private evaluation in the amount of \$2,629.07 as described in Conclusion of Law 28.
3. All other remedies requested by the Parents are denied.

SERVED on the date of mailing.



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Paul Alig  
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 the 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, Legal Services, PO Box 47200, Olympia, WA 98504-7200. To request the administrative record, contact OSPI at [appeals@k12.wa.us](mailto:appeals@k12.wa.us).

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that true copies of this document were served upon the following as indicated:

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

via E-mail  
lara@cedarlawpllc.com  
whitney@cedarlawpllc.com  
emma@cedarlawpllc.com

Lynette M. Baisch  
Megan Knottingham  
Porter Foster Rorick LLP  
601 Union Street, Ste 800  
Seattle, WA 98101

via E-mail  
megan@pfrwa.com  
lynette@pfrwa.com  
cyndi@pfrwa.com  
cindy@pfrwa.com

Parents

[REDACTED]

via First Class Mail and  
via E-mail

[REDACTED]

Chris Burgmeier  
Chris Halladay  
Tumwater School District  
621 Linwood Avenue SW  
Tumwater, WA 98512

via E-mail  
chris.halladay@tumwater.k12.wa.us  
chris.burgmeier@tumwater.k12.wa.us

Dated February 5, 2024, at Olympia, Washington.

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Representative  
Office of Administrative Hearings  
P.O. Box 42489  
Olympia, WA 98504-2489

cc: Administrative Resource Services, OSPI