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

IN THE MATTER OF:	OSPI CAUSE NO. 2020-SE-0007
	OAH DOCKET NO. 01-2020-OSPI-00980
SEATTLE SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge ("ALJ") Courtney E. Beebe via video teleconference on August 20 and August 21, 2020. The Parent of the Student whose education is at issue[1] appeared and represented herself. The Seattle School District ("District") was represented by Susan Winkleman, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parent filed a due process hearing request on January 7, 2020. The District filed a response on January 21, 2020. The parties participated in multiple prehearing conferences and on August 6, 2020, the ALJ issued a Ninth Prehearing Order establishing the issues presented for the due process hearing and setting the decision due date as thirty (30) days after the close of record. The due process hearing occurred on August 20 and August 21, 2020, and the record closed after receipt of the parties' closing briefs on September 25, 2020. The decision due date in this matter is October 25, 2020.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parent Exhibits: The following exhibits were admitted: A, B, C, G, H, I, J, K, L, M, N, O, P, Y. The following exhibits were excluded: D, E, F, Q, R, S, T, U, V, W, and X.

District Exhibits: D1, D2, D3, D4, D5, D6, and D7.

The following witnesses testified under oath. They are listed in order of appearance: Sherry Olson, Christine Chang, Mackenzie Elliott, Michelle Boske, Randall Berkey, Jessica Alire, Susan Kearney, the Mother, Rebecca Kloberdanz, and Krista LeGan.

[1] In the interests of preserving the family's privacy, this decision does not name the parents or student. Instead, they are each identified as "Parents," "Mother," "Father," and/or "Student."

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

ISSUES AND REMEDIES

The following issues were submitted for hearing:

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

   i. Failing to implement the December 2018 Individualized Education Program ("IEP") during the 2019-2020 school year, specifically failing to deliver the proper amount of occupational therapy ("OT") services in the special education setting;

   ii. Proposing to reduce the Student's OT minutes and move delivery of OT services to the general education setting in the December 2019 IEP without explanation to the Parent, and despite the Student performing below grade level and not reaching all previous IEP goals;

   iii. Developing an inappropriate IEP in December 2018 that did not include the appropriate amount and type of services in mathematics and written language to allow the Student to make educational progress;

   iv. Failure to identify and properly evaluate the Student for special education when the Parent raised concerns about the Student potentially having a learning disability during the Student's first grade year (2015-2016 school year).

b. And, whether the Parent is entitled to her requested remedies:

   i. Compensatory education for OT not delivered during the 2019-2020 school year;

   ii. Compensatory education for services that would have been delivered had the District evaluated the Student when the Parent first notified the District of the Student's potential special education eligibility; and

   iii. Or other equitable remedies as appropriate.

See Ninth Prehearing Order dated August 6, 2020.

FINDINGS OF FACT

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

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

2018 Evaluation and 2018 IEP During the 2018-2019 (Third Grade) Academic Year

1. The Student was nine years old and attended fourth grade during the (2018-2019) academic year at Bryant Elementary located in the District. (D1, pp.3-6.)

2. On October 1, 2018, the District issued a "Notification of Guidance Team Referral"[2] to the Parent, giving notice of a meeting on October 1, 2018, at 2:45 p.m. (D1, p.1.) The members of the District's guidance team included Randall Berkey (school psychologist), Mackenzie Elliott (special education teacher) and Susan Kearney (general education teacher). (D1, p.1.) The purpose of the meeting was to review the Student's district wide test performances and determine whether to evaluate the Student for special education services. (D1, p.3.) According to the October 1, 2018, referral, the District's guidance team had identified concerns about the development of the Student's academic and motor skills in the areas of reading, math, and written language as a result of the Student's standardized test scores and from teacher observations.[3] (*Id*.) The guidance team also noted that the Student "struggles with memorization, tracing details, and spelling," as well as anxiety at school. (*Id*.) The Parent did not make a written request for an evaluation.

3. On October 1, 2018, the District issued a Prior Written Notice ("PWN") proposing to evaluate the Student for special education services. (D1, p.5.) The District proposed to evaluate the Student in the following areas: general background, motor, social / behavior, cognitive, math, communication, reading, and written language. (D1, p.6.) The Parent signed a "Consent for Initial Evaluation" on October 5, 2018, adding the area of concern of "memorization." (D2, p.1.)

4. The District conducted an evaluation of the Student between October 5, 2018, and November 30, 2018 ("2018 Evaluation"). (D3, pp.1-15; Tr., pp.225-226 (Berkey); pp. 359-360

[2] The exact date that the guidance team made the referral is not part of the record.

[3] During the Student's second grade year in the Fall of 2016 the Student scored in the 63rd percentile on the reading portion of the district-wide "Measures of Academic Progress" ("MAP") assessment and the 56th percentile on the math section. (D1, p.3.) Later the in the Spring of 2017, the Student scored in the 66th percentile in reading on the MAP, and in the 35th percentile on the math section of the MAP. (*Id*.) The Student's end of year report card for her second grade year reflected that in the areas of "demonstrating grade level conventions of capitalization, punctuation and spelling when writing," "writes letters and numbers legibly," and "fluently adds and subtracts within 20," and the Student scored in "below performance expectations at this time." (PG, pp.1-3; Tr., pp.374-37(LeGan).) The Student was graded at "approaching performance expectations at this time" and "meeting performance expectations at this time" in all other areas. (*Id*.) During the Student's second grade year, the Parent and the Student's second grade teacher discussed the Student's potential for writing fatigue, as well as the Student's participation in private occupational therapy services. (Tr., pp.373-375 (LeGan).) During the Student's third grade year in the Spring of 2018, the Student scored at the 32nd percentile on the math section of the Smarter Balanced Assessment ("SBA") and the 65th percentile on the English language arts section. (D1, p.1; PI, p.1; PJ, p.1.) The general education teacher reported the Student's end-of-year math score as follows: "with 1:1 guidance on several problems . . . 88/90. Adjusting for what [the Student's] score would be without 1:1 guidance, [the Student's] score is 66.5/90." (PH, p.1.)

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

(Kloberdanz).) The evaluation team, consisting of Susan Kearney[4] (general education teacher), Rebecca Kloberdanz[5] (occupational therapist), Randall Berkey[6] (school psychologist), the District's speech and language pathologist, a District administrator, and the Parent, met to review the evaluation on November 30, 2018 ("Evaluation Team"). (D3, p.4.) The assessments revealed that the Student had a specific learning disability in the area of math calculation skills and that the Student "presented with a written language disorder characterized by significant difficulty with writing conventions (spelling, capitalization, punctuation) and written organization which warrants immediate intervention." (D3, p.2; Tr., pp.225-227 (Berkey).) The Evaluation Team determined that the Student was eligible for specially designed instruction ("SDI") in the areas of math calculation skills and written language. (D3, pp.1-3 pp.225-226 (Berkey); pp. 359-360 (Kloberdanz).)

5. The Evaluation Team also concluded that the Student was eligible for occupational therapy ("OT") as a related service because the Student:

> *had difficulty with fine motor coordination, motor planning of new tasks, and bilateral coordination, scoring in the below average range in manual dexterity (speed of manipulating small objects), and upper limb coordination (ball skills). She scored in the far below average range in bilateral coordination skills (total body rhythmic coordination for jumping jacks, scissor jumps, etc.) . . . [The Student's] health impairment[7] interferes with her involvement with and progress in the general education curriculum . . . [The Student] has motor delays that impact her math and written language skill development, and she requires occupational therapy support to fully participate in her general and special education interventions.*

[4] Ms. Kearny received a Bachelor of Arts degree in cultural anthropology from the University of Washington and a teaching certificate from Antioch University. (Tr., pp.289-290 (Kearny).) Ms. Kearny is certificated to teach in the State of Washington. (*Id*.)

[5] Ms. Kloberdanz received a Bachelor of Science degree in occupational therapy from the University of Washington and a Master's Degree in public health. (T., pp.357-358 (Kloberdanz).) Ms. Kloberdanz is a licensed occupational therapist and has worked for the District since 2014. (*Id*.)

[6] Mr. Berkey received a Master's Degree in psychology and a Master's Degree in philosophy, as well as a Juris Doctorate, and has worked as a school psychologist for 30 years. (Tr., p.324 (Berkey).)

[7] The Student's vestibular deficit appears to be clinically undiagnosed. According to the record, the Student received private OT services from Calie Hynes, a private provider, during the 2016-2017 (second grade) year to assist her with motor skills, but she did not testify at the hearing. (D3, p.10; Tr., pp.297, 381-382 (Mother).) Sherry Olsen, a vestibular therapist at Cascade Dizziness and Balance Physical Therapy, who specializes in vestibular rehabilitation, evaluated the Student at the private clinic in January 2020 and determined that the Student has a vestibular deficit, a disorder that impacts the Student's balance. (Tr., pp.50-55; 72 (Olsen).) Ms. Olsen did not make a clinical diagnosis of the Student's vestibular function. (Tr., p.72 (Olsen).) The Student receives treatment for balance and vestibular deficits at Ms. Olsen's clinic. (*Id.*) As part of the Student's treatment, Ms. Olsen has reviewed the Student's 2019 IEP but has not consulted with District personnel or observed the Student in the educational environment. (Tr., pp.74-75 (Olsen).)

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

(D3, pp.10-12; Tr., pp.340-344, 360-361 (Kloberdanz).) The Evaluation Team determined that the Student needed OT as a related service to support "[the Student's] ability to write letters and numbers with correct size and orientation." (*Id*.)

6. The Evaluation Team, including the Parent, signed the 2018 Evaluation. (D3, p.4; Tr., p.359 Kloberdanz); pp.390-391 (Mother).) On November 30, 2018, the District issued a PWN seeking to initiate an IEP. (D3, p.15.)

7. The District convened an IEP team consisting of the following individuals: the district representative, Ms. Kearney, Ms. Klobertdanz, Ms. Elliott[8] (special education teacher), a physical education / health teacher, and the Parent ("2018 IEP Team"). (D4, p.1; PB, p.1; Tr., pp.166-167 (Elliott).) The 2018 IEP Team met on December 17, 2018, to review a draft IEP for the Student. (D4, p.2; PB, p.2; Tr., p.388 (Mother).) The 2018 IEP Team considered the Parent's concerns, Parental input, the Student's performance on general state and district wide assessments, the Student's present levels of educational performance, input from the Student's teachers, OT and administration personnel, as well as the 2018 Evaluation results. (D4, pp.1-3, 16; PB, pp.1-3, 16; Tr., pp.165-168 (Elliott); pp.362-363 (Kloberdanz); pp.388-389 (Mother).) The 2018 IEP Team proposed the following "measurable annual goals" for the Student:

> *Written Language: by 12/17/2019, when given a 4th grade level writing prompt [the Student] will use appropriate capitalization, punctuation, sizing, and spelling improving her ability to use writing conventions from 30% accuracy to 80% accuracy as measured by student writing samples.*
>
> *Math: By 12/17/2019, when given a multiplication fluency sheet with numbers 0-10 [the Student] will solve the problems improving multiplication fluency from 30% accuracy to 80% accuracy as measured by systemic teacher observation and data.*
>
> *Math: By 12/17/2019, when given 4th grade level work problems involving addition, subtraction, multiplication and division [the Student] will write the number sentence and solve, improving ability to solve word problems from 40% accuracy to 80% accuracy as measured by systemic teacher observation and data.*

(D4, p.9; PB, p.9; Tr., pp.167-173 (Elliott).) The 2018 IEP Team also proposed that the Student receive OT as a related service to support the Student's written language goal and second math goal. (D4, p.7; PB, p.7; Tr., p.362 (Kloberdanz).) Ms. Elliott, Ms. Kloberdanz, and Ms. Boske, were all of the opinion that the 2018 IEP was appropriate because it established appropriate goals that were reasonably calculated to enable the Student to make progress (Tr., pp.168-78 (Elliott); pp.363-364 (Kloberdanz); pp.201, 211-212 (Boske).)

8. The 2018 IEP Team proposed that the Student receive 30 minutes per week of SDI in the areas of written language and math in the special education environment in order to "really hone in and figure out what works and doesn't work for the student and what she really needs." (D4,

[8] Ms. Elliott has a Bachelor's Degree in special education with an endorsement in learning disabilities from the University of Michigan and is certificated as a teacher by the State of Washington. (Tr., p.164 (Elliott).) Ms. Elliott also earned a Bachelor's Degree from the University of Michigan, with an endorsement in autism spectrum disorder.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

p.13; PB, p.13; Tr., p.170 (Elliott).) The 2018 IEP Team also proposed 30 minutes per week of SDI in the area of math in the general education environment in order to assist the Student in seeing "the bigger picture and make connections and be able to be in their least restrictive environment with that additional support." (*Id*.)

9. The 2018 IEP Team also proposed that the Student receive 800 minutes annually of OT in the special education environment delivered by a certified occupational therapy assistant ("COTA"). (D4, p.13; Tr., p.363-364 (Kloberdanz).) After much discussion with the Parent, the IEP team described the OT related services as follows:

> *[The Student] will benefit from occupational therapy as a related service, in the amount of 800 minutes per year, to support her math and written language specially designed instruction. The amount of service is reported annually because [the Student] has the potential to respond quickly to OT intervention, and will benefit from more service initially with tapering off of services, and less missed class time, as the IEP year progresses. Occupational therapy as a related service is a continuum service, required for a student to benefit from special education, that may include both direct and indirect services. Direct services may include 1:1, small group, or whole class intervention. Indirect service may include collaboration with the educational team, program development, equipment, materials development, and management, implementation or recommendation for accommodations or modifications, skilled observation and consultation, and/or other necessary services on behalf of the student.*

(D4, p.7; Tr., pp.267-27 (Alire); pp.363-364 (Kloberdanz).) In addition, the IEP Team identified that the Student would "benefit from sensory-based handwriting instruction to improve fluency and legibility of number and letter writing so her math and writing is legible to herself and others." (*Id.*) The 2018 IEP Team anticipated that the Student would receive approximately 80 minutes per month of OT related services based on a ten-month school year. (Tr., pp.274-275 (Alire); pp.363-364 (Kloberdanz).) The Parent expressed confusion about the format of the 800 minutes and "how it would work." (Tr., p.389 (Mother).) Ms. Kloberdanz answered the Mother's questions. (Tr., p.390 (Mother).)

10. The 2018 IEP Team also identified and proposed fourteen accommodations for the Student. (D4, pp.11-12; PB, pp.11-12.) The IEP Team agreed that the Student "has the potential to respond quickly to OT intervention, and will benefit from more service initially with tapering off of services, and less missed class time, as the IEP year progresses." (D4, pp.11-12; PB, pp.11-12.)

11. The 2018 IEP Team, including the Parent of the Student, signed the 2018 IEP on December 17, 2018. (D4, p.1; Tr., pp.379-381 (Mother).)

12. The Student's 2018 IEP was scheduled to begin on December 18, 2018. (*Id*.) However, the Parent declined to give consent because the Parent "requested more time to determine whether or not she plans to give consent for the Student to receive initial special education services." (*Id*.) Specifically, the Mother wanted to seek a third-party opinion. (Tr., pp.380-381 (Mother).)

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

13. The Parent signed a "Written Parental Consent for Initial Special Education Services" on February 7, 2019. (D5, p1; Tr., pp.171-172; 191 (Elliott).) The District issued a PWN on February 7, 2019, proposing the IEP, and noting that the Parent had refused consent to initiate services at the December 17, 2018, IEP Team meeting. (*Id.)*

14. Beginning February 7, 2019, through December 18, 2019, Ms. Elliott delivered written language SDI services that focused on teaching the Student to slow down, take pride in her work, and understand editing, revising, and legibility. (Tr., p.172 (Elliott).) The SDI included using visuals, graphic organizers, guided spelling and editing, and other techniques. (*Id*.) Ms. Elliott observed the Student make steady progress and her confidence increased. (Tr., p.175 (Elliott).) Ms. Elliott also delivered math SDI during the same period, using math games to focus on fluency and supporting her movement and counting. (Tr., p.175 (Elliott).) Ms. Elliott observed the Student make significant progress towards one of her math goals. (Tr., pp.176-177 (Elliott).)

15. Ms. Kloberdanz expended 40 OT related services minutes on December 14, 2018, writing the 2018 IEP and 60 minutes attending the 2018 IEP meeting on December 17, 2018. (PN, p.1; Tr., pp.346-350 (Kloberdanz).) The District did not provide any OT minutes to the Student between December 14, 2018, and April 16, 2019, because of 1) lack of consent from the Parent, 2) the school's annual winter break, 3) unexpected snow days, and 4) Ms. Kloberdanz's personal bereavement time away from school. (PN, p.1; Tr., pp.353-355 (Kloberdanz).) The Parent was aware of the complications the District encountered providing the OT services to the Student during this period and was "willing to wait" because "Ms. Kloberdanz was very good." (Tr., pp.381-383.)

16. On April 2, 2019 Ms. Kloberdanz expended 15 minutes of OT time meeting with Ms. Elliott to discuss "POC and scheduling." (*Id*.) Thereafter, Ms. Kloberdanz provided a total of 195 minutes of OT services to the Student on five days between April 16, 2019, and June 18, 2019. (*Id*.) On June 21, 2019, Ms. Kloberdanz expended 85 minutes of OT time "meeting with the new OT [Jessica Alire] . . . to discuss student needs, activities and to orient to new space." (*Id*.; Tr., pp.260-261 (Alire); p.251 (Kloberdanz).) In total, Ms. Kloberdanz expended 395 minutes of OT between December 14, 2019, and June 18, 2019, for an average of 65 minutes per month. (Tr.,pp.354-356 (Kloberdanz).)

2019 IEP During the 2019-2020 (Fourth Grade) Academic Year

17. The Student attended Bryant Elementary School in the District as a fifth grade student during the 2019-2020 Academic Year. (D6, p.1.)

18. Jessica Alire[9], the District's fifth grade OT, attempted to provide the Student with OT services on September 18, 2019, but the Student was not in attendance due to a field trip. (PN, p.1; Tr., pp.252-256 (Alire).) Ms. Alire thereafter provided the Student 145 minutes (an average of 20 minutes per week or 80 minutes per month) of OT services in the general education environment between September 25, 2019, and December 11, 2019. (PN, pp.1-2; Tr., pp.248, 263, 269-275 (Alire).) Ms. Alire expended 40 minutes of OT meeting with the Parent and

[9] Ms. Alire earned a Bachelor's Degree in exercise science, with an emphasis in pre-physical therapy from Western Washington University. (Tr., pp.265-266.) Ms. Alire also earned a Master's Degree in occupational therapy and is a licensed occupational therapist in the State of Washington. (*Id.*)

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

collaborating with Ms. Elliott on December 18, 2019. (*Id.*) Ms. Alire chose to provide the OT related service minutes to the Student in the general education environment because the Student and general education teacher Michelle Boske[10] preferred the Student to remain in the classroom where she was learning. (Tr., pp.249-250, 269-270.) Ms. Alire developed and implemented an OT "intervention plan" to assist the Student in the areas of written language by addressing the Student's motor skill deficiencies when handwriting and typing. (Tr., pp. 258-259, 269, 282 (Alire).) The OT services Ms. Alire provided did not differ in the general education environment from the special education environment. (*Id*.)

19. In September and October 2019, Ms. Elliott provided SDI to the Student in the area of math and reported via email to the Parent that the Student was progressing and receiving interventions and support because math continues to be an area of concern. (PO, p.1.; Tr., pp.173-175 (Elliott).) The Parent knew the OT services were being provided in the general education classroom, but expected the services to be provided in the special education environment as per the 2019 IEP and believed she should have been consulted about the change. (Tr., pp.385-387 (Mother).)

20. On December 13, 2019, the District convened an IEP team consisting of the following members: Charmaine Marshall (District administrator); Ms. Boske; Ms. Alire; the Parent; and Ms. Elliott. ("2019 IEP Team"). (D6, p.1; Tr., pp.214-215 (Boske); pp.271-273 (Alire); pp.176-177 (Elliott); pp.391-392 (Mother).) The purpose of the December 13, 2019, meeting was to propose and discuss a draft of the Student's annual IEP. (D6, p.13; PC, p.13.) The 2019 IEP Team considered input from the Student's teachers, the Parent, Ms. Alire, and Ms. Elliott, as well as systematic teacher observation and data. (D6, p.13; PC, p.13; Tr., pp.273-275 (Alire); pp.176-178 (Elliott); pp.383-385 (Mother).) The 2019 IEP Team also considered that the Student would transition into sixth grade at a middle school on September 1, 2020, (during the pendency of the 2019 IEP) and adjusted the services and goals to account for this anticipated change in placement. (D6, p.10; PC, p.10; Tr., pp.181-182 (Elliott); pp.270-275(Alire).)

21. The 2019 IEP Team identified that the Student had made "significant progress" on the first math goal regarding multiplication fluency sheets because the Student solves the problems with 75% accuracy. (D6, p.3; PC, p.3; Tr., pp. 201-204, 211 (Boske); pp.181-182 (Elliott).) The Student also demonstrated the ability to utilize various multiplication strategies, but needs more focus on increasing speed while solving. (*Id.*) The District's personnel also reported that the Student had made "some progress" towards the second math goal because when she is given fourth grade level word problems involving addition, subtraction, multiplication and division, the Student writes the number sentence and solves word problems with 65% accuracy. (*Id*.)

22. The 2019 IEP Team proposed two new math goals:

> *By 12/13/2020, when given 5th grade level division problems with up to four digit dividends and two-digit divisors, [the Student] will solve the division problems with and without remainders improving division fluency from 30% accuracy to 80% accuracy as measured by systemic teacher observation and data.*

[10] Ms. Boske received a Bachelor's Degree in English and history and a Master's of Education at the University of Washington. Ms. Boske has been a certificated teacher in Washington for over 20 years. (Tr., p.210 (Boske).)

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

> *By 12/13/2020, when given 5th grade level work problems involving addition, subtraction, multiplication, and division [the Student] will write the number sentence and solve improving ability to solve word problems from 65% accuracy to 90% accuracy as measured by systemic teacher observation and data.*

(D6, p.4; PC, p.4.) A new written language goal was also proposed:

> *By 12/13/2020 when given a 5th grade level writing prompt [the Student] will use appropriate capitalization, punctuation, sizing, and spelling improving ability to use writing conventions from 60% accuracy to 90% accuracy as measured by student writing samples.*

(D6, p.6; PC, p.6.) The 2019 IEP Team constructed the goals to focus on areas in which the Student needed additional support. (Tr., pp.177-178 (Elliott).)

23. Regarding OT services, Ms. Alire reported that the Student had received OT services at a rate of 20 minutes weekly in the general education classroom starting on September 4, 2020, and that the services were "supporting her while editing her written work or working on typing lessons." (D6, p.4.; PC, p.4; Tr., pp.257-259, 271-272 (Alire).) Ms. Alire reported that the Student works on strategies to improve legibility and that she "is also working on developing her typing skills, working on using both hands together and locating keys efficiently." (*Id*.) Ms. Alire identified the need to "continue to support [the Student's] written language goal, continuing with the same goal from current baseline (60%)." (*Id*.)

24. Notably, at the meeting, the Parent provided information that the Student's undiagnosed vestibular deficit affected her balance to such a degree that the Student had continued to suffer occasional falls at home and that she believed the Student needed additional support to address her balance deficits. (*Id*; pp. (Mother).) Ms. Alire had not observed the Student fall or suffer balance problems, and believed that any vestibular challenges needed to be diagnosed and addressed by a clinical professional who treats vestibular deficits. (Tr. pp.245-247, 275 (Alire).) Ms. Alire, Ms. Boske, and Ms. Elliott all agreed to support the Student's challenges with balance as they related to her ability to achieve her educational goals. (Tr., pp. 152-153 (Elliott).)

25. The 2019 IEP Team recommended that the Student receive 60 minutes of OT per month, served as 15 minutes weekly in her general education classes, but the services should change to 300 minutes yearly when she transitions to sixth grade the Fall of 2020. (D6, p.5; PC, p.5; Tr., pp.271-274 (Alire).) Ms. Alire recommended the related service minutes because the amount is "sufficient to support the Student" in her "natural environment, and "gives . . . flexibility if . . . there's no school or [the Student] is out, or if sometimes [Ms. Alire] will spend extra time" collaborating with other teachers on strategies. (*Id.*) Notably, the 2019 IEP Team agreed that when the Student transitioned to sixth grade, more minutes should be available to assist with the transition. (*Id*.) The Parent was offered an opportunity to express concerns regarding the OT minutes at the 2019 IEP Team meeting. (Tr., pp.273-274 (Alire); pp.383-385 (Mother).)

26. The 2019 IEP provided that for the period of December 14, 2019 to August 31, 2019, the Student would receive 30 minutes weekly of written language SDI in the special education setting, and 60 minutes per week of math SDI in the special education setting. (D6, p.10; PC, p.10.) The

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

2019 IEP also provided 60 minutes per month of OT in the general education setting, and all accommodations from the 2018 IEP remained in place. (D6, p.8; PC, p.8.)

27. The Parent was provided an opportunity to review and provide input. (Tr., pp.391-392 (Mother).) The Parent, along with the rest of the IEP Team, signed the 2019 IEP on December 14, 2019. (D6, p.1, PC, p.1.) The District issued a PWN on December 14, 2019, and implemented the IEP on the same date. (D6, pp.13-14; PC, pp.13-14.)

28. Ms. Elliott emailed the Parent a copy of the 2019 IEP on December 16, 2019. (PA, p.1.) The Parent responded by expressing concerns that she believed she would have a chance to review the OT section a second time prior to agreeing to the 2019 IEP, and that she believed that the motor portion of the IEP was missing information about OT balance support services. (PA, p.2; Tr., pp.391-394.) Ms. Elliott responded that the information from the meeting about OT and balance support was considered, and that Ms. Alire intended to incorporate balance support into the OT services as per the 2019 IEP. (*Id.*) The Parent informed Ms. Elliott via email that she objected to provision of OT as a "push-in" service and that she believed that the 60 minute per month of service was not enough. (PA, p.4.; Tr., pp.391-392 (Mother).)

29. The Parent filed a due process hearing request on January 7, 2020.

CONCLUSIONS OF LAW

Jurisdiction

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

Burden of Proof

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

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

The IDEA and FAPE

3. School districts "shall provide every student who is eligible for special education between the age of three and twenty-one years, a free appropriate public education program (FAPE) . . . A FAPE is also available to any student determined eligible for special education even though the student has not failed or been retained in a course or grade and is advancing from grade to grade." WAC 3927-172A-2000; RCW 28A.155.090 and 34 C.F. R. Part 300.

4. The IDEA and its implementing regulations provide federal money to assist state and local agencies in educating children with disabilities, and condition such funding upon a state's compliance with extensive goals and procedures. In *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982) (*Rowley*), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

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

Rowley, 458 U.S. at 206-07 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Id.* at 200-01.

5. First, it must be determined whether the District complied with the procedures established by the IDEA. *Id. at* 206-07. Procedural flaws do not automatically require a finding of a denial of a FAPE. However, "procedural inadequacies that result in the loss of educational opportunity, *Burke County Bd. of Educ. v. Denton,* 895 F.2d 973, 982 (4th Cir. 1990), or seriously infringe the parents' opportunity to participate in the IEP formulation process, *Roland M.,* 910 F.2d at 994; *Hall,* 774 F.2d at 635, clearly result in the denial of a FAPE." *W.G. v. Bd. of Trustees of Target Range School Dist*., 960 F.2d 1479, 8 IDELR 1019 (9thCir. 1992.)

6. Next, it must be determined whether the District engaged in a substantive violation of the IDEA. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

> To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . [H]is educational program must be appropriately ambitious in light of his circumstances . . .

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

> In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

omitted), taking into account the progress of his non-disabled peers, and the child's potential.

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 583 U.S. , 138 S. Ct. 556 (2017). The determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is "a snapshot, not a retrospective." *Id.*

The Parent Has Not Shown that the District Violated the Child Find Requirement of WAC 392-172A-02040

7. All school districts in Washington "shall conduct child find activities calculated to reach all students with a suspected disability for the purpose of locating, evaluating, and identifying students who are in need of special education and related services, regardless of the severity of their disability." WAC 392-172A-02040. Methods of locating students with a suspected disability include: " . . . (f) using internal district child find methods such as screening, reviewing district wide test results, providing in-service education to staff, and other methods . . . including a systemic, intervention based, process within general education for determining the need for a special education referral." (*Id*.)

8. In her due process hearing request, the Parent asserted that the District failed to identify and evaluate the Student's suspected disability in the areas of written language and math in 2015-2016, the Student's first grade year. However, at the hearing the Parent did not present evidence supporting her claim that the District should have identified the Student's suspected disability during the 2015-2016 academic year. The Parent clarified this issue on the record at the hearing, stating that she is not seeking compensatory education for the Student's first grade school year of 2015-2016. (Tr., p.13 (Mother).) Instead, the Parent wanted to make a record of "some of the things that happened" during the Student's first grade year (2015-2016) and second grade year (2016-2017). (Tr., p.13 (Mother).) Therefore, the Parent does not assert that the District violated WAC 392-172A-02040 for the Student's first grade year (2015-2016).

9. Regarding the Student's second and third grade years (2016-2017 and 2017-2018) and the first month of the Student's fourth grade year (September 2018), the Parent asserts that the District should have identified the Student's suspected disabilities in written language and math. The Parent claims that the District was on notice of the Student's suspected disability based on: 1) the Parent's conversations with the Student's general education teachers, 2) the Student's second grade report card (Spring 2017), and 3) the Student's test scores on district wide assessments. The District argues that the Parent's claims that the District violated WAC 392-172A-02040 by failing to initiate an evaluation are barred by the statute of limitations in WAC 392-172A-05080(2), and unproven by the record presented.

The Parent's Claims for the Period of September 2016 through January 6, 2018 are Barred by the Statute of Limitations.

10. The Washington regulation concerning the IDEA statute of limitations provides:

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

The due process hearing request must be made within two years of, and allege a violation that occurred not more than two years before, the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint except the timeline does not apply to a parent if the parent was prevented from filing a due process hearing request due to:

(a) Specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process hearing request; or

(b) The school district withheld information from the parent that was required under this chapter to be provided to the parent.

WAC 392-172A-05080(2). The Washington regulation is substantially similar to the statute of limitations in the IDEA. *See* 20 United States Code (USC) §1415(b)(6)(B) and §1415(f)(3)(C); 34 Code of Federal Regulations (CFR) §300.507.

11. In *Avila v. Spokane School District 81*, 852 F.3d 936 (9th Cir. 2017), the Ninth Circuit Court of Appeals interpreted the statute of limitations set forth in the IDEA. In a question of first impression for the Ninth Circuit, the court held that "the IDEA's statute of limitations requires courts to bar only claims brought more than two years after the parents…`knew or should have known' about the actions forming the basis of the complaint." *Id.* at 937. Under this standard, known as the "discovery rule," a claim is timely "so long as the complaint is filed within two years of the known or should have known (KOSHK) date." *Collette v. D.C.*, 2019 U.S. Dist. LEXIS 128520 (D.D.C., August 1, 2019).

12. Determining the KOSHK date, or the date when the two-year statute of limitations begins to run, is a fact-specific inquiry and courts must make findings regarding when parents knew or should have known about the actions forming the basis of the complaint. *Avila*, 852 F.3d at 945. In determining the KOSHK date, the inquiry focuses on when a parent comes to believe, or reasonably should have come to believe, that their child has been hurt *and that the school is responsible for the injury*, regardless of whether the parent yet knows that the injury is legally actionable. *Vandell v. Lake Wash. Sch. Dist.*, 2019 U.S. Dist. LEXIS 39747, at *11-12 (W.D. Wash., March 12, 2019) (by late August 2014, Parents knew or should have known that Students were not receiving FAPEs for the 2013-14 school year and that the District could be faulted for that failure); *see also Draper v. Atlanta Independent Sch. System*, 518 F.3d 1275, 1288 (11th Cir. 2008) ("[U]ntil 2003, Draper's family did not know enough to realize that Draper had been injured by his misdiagnosis and misplacement by the School System. We decline the invitation of the School System to conclude, as a matter of law, that Draper's family should be blamed for not being experts about learning disabilities"); *M.D. v. Southington Bd. of Educ.*, 334 F.3d 217, 221 (2nd Cir. 2003) (IDEA claim accrued when Parent knew of the "injury" to her child, i.e., the "inadequate education;" Parents' claims were time-barred where they knew or had reason to know of student's injury when they withdrew her from the school system because they believed it was not providing her with an appropriate education).

13. Inherent in any legal standard that incorporates a known-or-reasonably-should-have-known element is the legal construct of the "reasonable person," or in this case, the "reasonable parent." A parent cannot prevail simply by asserting they were unaware that a school district was

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

responsible for harming her child – it is not a completely subjective standard, personal to a particular set of parents. The reasonable-parent construct requires an examination of all the objective facts to determine whether a belief is reasonable to the average parent. As the district court articulated in *Avila v. Spokane School District 81*, 2018 U.S. Dist. LEXIS 14152 (E.D. Wash., January 29, 2018), on remand from the Ninth Circuit, it is often difficult for a court, from its retrospective position, to determine the date on which a parent knew or should have known about the alleged action that forms the basis of the complaint.

> On the one hand, parents should not be "blamed for not being experts about learning disabilities." . . . On the other hand, statutes of limitations "serve the policies of repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." (citations omitted).

Avila at *21-22.

14. The Parent filed her due process hearing request on January 7, 2020, and therefore as per WAC 392-172A-05080 the Parent's claims that arose between September 2016 and January 6, 2018, are barred by the two-year statute of limitations. The Parent has not alleged that the District made specific representations that it had resolved the Student's problems, or that the District withheld information from the Parent. Therefore, the Parent has not met her burden of proving an exception to the two-year statute of limitations base on subsections (1) and 2) of WAC 392-172A-05080. However, the tribunal must also consider whether the Parent "knew or should have known" about the alleged action that forms the basis of her complaint prior to January 7, 2018.

15. The basis of the Parent's complaint is that the District was on notice of the Student's suspected disability as early as the Fall of 2016 when it received the Student's MAP test results and/or when the District issued the Student's Spring 2017 second grade report card. However, the Parent also received this same information. Additionally, the Parent acquired occupational therapy services for the Student from a private provider during the 2016-2017 academic year and therefore knew that the Student may have motor skill deficiencies at that time. The evidence proffered by the Parent, then, shows that the Parent knew or should have known of the basis of her claims during the period of September 2016 through January 6, 2018, and therefore the Parent had an obligation to request an evaluation, inform the District that the Student should be evaluates or file a due process hearing request. The Parent did not take any of these actions.

16. The Parent's claims against the District for violating WAC 392-172A-02040 during the period of September 2016 through January 6, 2018 then, are barred by the two-year year statute of limitations set forth in WAC 392-172A-05080.

Period of January 7, 2018 through October 1, 2018.

17. The Parent asserts that prior to, or at least by January 7, 2018, the District violated the "child find" requirement of WAC 392-172A-02040 because the District was on notice of the Student's suspected disability and was required to initiate an evaluation of the Student. The District argues that it was not on notice of the Student's suspected disabilities until it received a

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

request for an evaluation from the Guidance Team on October 1, 2018, and thereafter the District appropriately and timely evaluated the Student as required by WAC 392-172A-03005.

18. The "child find" requirement does not require school districts to conduct a formal evaluation of every student who is struggling, but instead the duty to make a decision to evaluate a student is "triggered when the [state or local educational agency] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability." *Dept't of Educ., State of Hawaii v. Cari Rae S*., 158 F.Supp2d 1190 (D. Hawaii 2001). Once a district is on notice that a student may have a disability that requires special education services, a fistrict must decide whether to evaluate a student within a reasonable time. See *W.B. v. Matula*, 67 F.3d 484, 501 (3rd Cir. 1995). A parent or istrict personnel may make a written request for an initial evaluation to determine if a student is eligible for special education services. WAC 392-172A-03005(1). Once a request is received, the fistrict must "make a determination whether or not to evaluate the student" "within twenty-five days after receipt of the request." WAC 392-172A-03005(2)(c).

19. The Parent and the District agreed that the Parent did not submit a written request to evaluate the Student at any time between January 7, 2018 and October 1, 2018. Of course, the burden is not solely on the Parent to request an evaluation in writing. The District is obligated to identify students with suspected disabilities and decide whether to conduct an evaluation once the District is on notice that the Student has a suspected disability.

20. A disability is "suspected," "when the district has notice that the child has displayed symptoms of that disability." *Timothy O v. Paso Robles Unified Sch. Dist*., 822 F.3d 1105, 1119 (9th Cir. 2016). 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 Edu*c., 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).

21. Here, the Parent did not present any testimonial evidence regarding the Student's school performance during Student's third grade year from January 7, 2018, through September 30, 2018. The Parent presented her own testimony about discussions she had with District personnel, but the substance of the conversations appears to be an expression of general concern about the Student's performance in the area of math. The Parent included in the record two exhibits reflecting the Student's SBA scores in ELA/Literacy and Math for the Spring of 2018, but the ELA/Literacy score was at grade level and the Math score was just below the achievement level. Also, while the Parent included as an exhibit an email between the Parent and the Student's third grade teacher regarding the Student's end of year math assessment, there is no further testimony or information regarding what the scores mean in terms of the Student's abilities in relation to standardized testing or other grade level students.

22. While the evidence presented certainly reflects the Student struggling to meet standard achievement levels during the Spring of 2018, without more it cannot be determined that this

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

information placed the District on notice that the Student may suffer from a disability. Therefore, it is concluded that the Parent has not met her burden on this issue and the evidence presented supports a conclusion that the District did not violate WAC 392-172A-02040 by failing to identify and evaluate the Student's suspected disabilities between January 6, 2018 and September 30, 2018.

23. Notably, the Student was referred for an evaluation by the guidance team during September 2018. There is no information in the record regarding why the guidance team initiated the request to evaluate the Student, but the District made its determination to evaluate the Student on October 1, 2018. Given the information available, the record supports a conclusion that, by a preponderance of the evidence, the District complied with WAC 392-172A-02040 because the District identified the Student as having a suspected disability and made a timely determination to evaluate the Student on October 1, 2018, as required by WAC 392-172A-03005.

The 2018 IEP and 2019 IEP were Appropriate Because They were Reasonably Calculated to Enable the Student to Make Progress in the Areas of Written Language and Math in Light of the Student's Circumstances

24. An IEP must include a statement of the program modifications and supports that will be provided to enable the student to advance appropriately toward attaining the annual goals, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students, including nondisabled students. WAC 392-172A-03090(1)(c)-(d); 34 CFR 300.320(a)(4)(ii).

25. In developing a Student's IEP, WAC 392-172A-03110(1) requires the IEP team to consider:

(a) The strengths of the student;
(b) The concerns of the parents for enhancing the education of their student;
(c) The results of the initial or most recent evaluation of the student; and
(d) The academic, developmental, and functional needs of the student.

Subsection (2)(a) of the rule requires the IEP team to consider special factors unique to a student: . . . (v) Consider whether the student needs assistive technology devices and services.

26. An IEP Team must "revise the IEP, as appropriate, to address: (i) Any lack of progress toward the annual goals . . .; (ii) the results of any reevaluations; (iii) information about the student provided to, or by the parents, as described under WAC 392-17A-03025." WAC 392-172A-03110.

27. Specially designed instruction (SDI) means adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction to address the student's unique needs that result from the student's disability and to ensure access of the student to the general education curriculum. WAC 392-172A-01175; 34 CFR §300.39(b)(3).

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

28. Related services are transportation and such developmental, corrective, and other supportive services as are required to assist a student eligible for special education to benefit from special education, including OT services. WAC 392-172A-01155(1).

29. The District correctly points out that tribunals cannot assess the educational benefits flowing from an IEP from a single component. *See, e.g., Karl by Karl v. Bd. of Educ. of Geneseo Cent Sch. Dist.,* 736 F.2d 873, 877 (2nd Cir 1984) (The educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole"); Palo Alto Unified Sch. Dist., 118 LRP 21969 (CA SEA 2018) (citing *J.M v. New York City Dep't of Education,* 171 E. Supp. 3d 236, 247-48 (S.D.N.Y. 2016)("An IEP must be considered as a whole; its individual parts cannot be judged in isolation.") Thus, the tribunal must assess both the 2018 IEP and 2019 IEP to determine whether the level of SDI and OT services are appropriate for the Student.

The 2018 IEP is Appropriate Because it was Reasonably Calculated to Enable the Student to Make Progress in the Areas of Written Language and Math in Light of the Student's Circumstances

30. The Parent's due process hearing request specifically challenges the appropriateness of the goals and service minutes provided in the 2018 IEP. However, at the hearing the Parent stated that she "thought she objected to the 2019 IEP." (Tr., p.397.) The Parent "expressed concerns about the 800 [OT] minutes yearly, how that would look, what that would mean, how that would be applied consistently and how we would see the Student getting consistent therapy over time to make sure that she was best able to utilize that therapy." (*Id*.) The Parent, thereafter, confirmed that she intended to raise the issue of whether the District appropriately implemented the 2018 IEP OT related service minutes. (*Id*.) This issue is addressed below.

31. The District argues that the Parent did not present any evidence to support her initial claim that the 2018 IEP was not appropriate or reasonably calculated, and therefore the Parent cannot prevail on this claim.

32. The record shows that the Parent did not provide any evidence to support her initial claim that the 2018 IEP was inappropriate. On the other hand, Ms. Elliott, Ms. Kloberdanz, and Ms. Kearney all testified that that the IEP was appropriate because it was reasonably calculated to enable the Student to make progress in the areas of written language and math in light of the Student's circumstances. Also, as shown by the progress reports considered in December 2019 during the annual review of the Student's 2018 IEP, it is clear the Student made significant progress in the areas of written language and math during the period of December 17, 2018 to December 17, 2019.

33. Given the evidence presented and the clarification that the Parent intended to challenge the appropriateness of the 2019 IEP, it must be concluded that the Parent did not meet her burden and the District did not violate the IDEA and deny the Student FAPE because the 2018 IEP was appropriate in light of the Student's circumstances.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

The 2019 IEP is Appropriate Because It Provides OT Services that are Reasonably Calculated to Assist the Student to Make Progress in the Areas of Written Language and Math

34. The Parent challenges the 2019 IEP because she believes that the number of OT service minutes and the delivery of those minutes in the general education environment is not appropriate because the Student was performing below grade level and did not meet the 2018 IEP goals in written language and math. The Parent also asserts that she should have received a more thorough explanation for the reduction of OT services because she received the 2019 IEP draft at the December 16, 2019 IEP meeting. The District asserts that the 2019 IEP was appropriate and the Parent has not shown otherwise.

35. In support of her assertions, the Parent relied on the testimony of Sherry Olsen, a vestibular therapist who specializes in vestibular rehabilitation and evaluated the Student at the private clinic in January 2020, and Christine Chang, an occupational therapist who reviewed the Student's educational and medical records. The Parent presented evidence through these witnesses that the Student has a vestibular function deficit that needs to be treated with occupational therapy to assist the Student with balance issues. However, neither of the witnesses observed the Student in the educational environment or consulted with District personnel. Notably, the Student has not received a clinical diagnosis of vestibular dysfunction or deficit, and both witnesses provided speculative testimony about how the Student's potential vestibular deficit effects her ability to learn. As a result, their testimony is given little weight.

36. Even so, the witnesses evaluated the Student and her records after the development of the 2019 IEP. This is important because the determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is "a snapshot, not a retrospective." *Id.* If the District did not have the benefit of Ms. Olsen's evaluation and Ms. Chang's record review prior to December 16, 2019, the District could not consider the information when developing the 2019 IEP.

37. On the other hand, the District has presented evidence that the Student made significant or some progress on all of her goals in the 2018 IEP, and Ms. Alire contributed heavily to the 2019 IEP by providing information about the Student's motor skill development and progress in the general education environment. Ms. Alire's testimony is entitled to greater weight because she provided the Student with direct OT services, and described in detail why the Student could receive OT services that support the Student's achievement of her IEP goals in the general education environment. Importantly, Ms. Alire, Ms. Elliott, and Ms. Boske all agreed to take measures to support the Student's balance issues as they relate to her education and meeting the 2019 IEP Goals.

38. Ultimately, the Parent's claim that the 2019 IEP is not appropriate is based on the Parent's belief that the District should deploy OT services to address the Student's suspected balance issues and perceived vestibular deficit. This is not the purpose of an IEP; the purpose of the IEP is to provide OT as a related service to support the Student in achieving her goals in written language and math such that the Student receives an educational benefit.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

39. Regarding the Parent's claim that she should have received more of an explanation of the OT services in the 2019 IEP, it appears that the Parent may be hinting at an assertion that she did not have a meaningful opportunity to participate in the 2019 IEP Process. RCW 34.05.461(4) provides: "[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." The court is not required to wade through the record to find evidence to support claims. *E.M. v Pajaro Valley Unified Sch. Dist*, 652 F.3d 999, (9th Cir 2011), citing *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994). The record reflects that Ms. Alire and the 2019 IEP Team detailed the OT services in the 2019 IEP draft, met with the Parent on December 16, 2019, received and considered the Parent's input, and answered the Parent's questions. The Parent has not specifically identified how the District may have engaged in a procedural violation of the IDEA such that she was not able to meaningfully participate in the 2019 IEP Team. Therefore, it appears that this issue has not been officially noticed and will not be addressed.

40. Given the evidence presented it must be concluded that the Parent did not meet her burden. The record supports a conclusion that the District did not violate the IDEA and deny the Student FAPE because the 2019 IEP was appropriate in light of the Student's circumstances in the area of OT as a related service provided in the general education environment.

The District Did Not Materially Violate the IDEA by Failing to Deliver 800 minutes of OT Services Between December 17, 2018 and December 16, 2019.

41. It is undisputed that the District provided 600 minutes of OT related services to the Student during the period of December 17, 2018 through December 16, 2019, less than the 800 minutes required by the 2018 IEP. The Parent argues that the District did not act in conformity with the 2018 IEP and materially failed to provide the required 800 minutes of OT related services during the pendency of the 2018 IEP. The District asserts that it substantially provided the OT services to the Student as allowed by the Student's attendance and schedule, and that by withholding consent until February 7, 2019, the Parent prevented the District from administering all 800 minutes of the OT services to the Student. The District also pointed out that throughout the iteration of the issues presented by the Parent over a number of prehearing conference, the Parent asserted that only the period of time from September 4, 2019 to December 16, 2019 is at issue.

42. School districts are required to provide special education and related services in accordance with the Student's IEP when implementing SDI and related services. 34 C.F.R. §300.323(c). However, a district is not required to adhere perfectly to the IEP and minor discrepancies in the implementation of services required by the IEP do not violate the IDEA; only material failures to implement an IEP violate the IDEA. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007).

> "[S]pecial education and related services" need only be provided "*in conformity with*" the IEP. [20 USC §1401(9).] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.
>
> * * *

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

> We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.

Id. at 821-22 (italics in original).

43. Notably, a "school district that is responsible for making FAPE to a student must obtain informed consent from the parent of the student before the initial provision of special education and related services to the student." WAC 392-172A-0300(2)(a). A school district must make "reasonable efforts" to obtain consent, but "if the parent of a student fails to respond to a request for or refuses to consent to the initial provision of special education and related services," then the school district:

> *i) Will not be considered to be in violation of the requirement to make available FAPE to the student for the failure to provide the student with the special education and related services for which the school district requested consent; and*
>
> *ii) Is not required to convene an IEP meeting or develop an IEP.*

WAC 392-172A-03000(2)(d).

44. While it is true that the Parent has primarily asserted that the District failed to provide the requisite OT services between September 4, 2019 and December 16, 2019, after the hearing on the issue, it is clear the following issue is presented: whether the District materially departed from the 2018 IEP and denied the Student a FAPE by delivering only 600 minutes of OT services between December 17, 2018 and December 16, 2019.

45. Importantly, the 2018 IEP offered the Student 800 minutes of OT services annually and described in detail that the services would be provided to assist the Student in written language and math through direct services in a variety of settings and indirect services through collaboration, program development, and consultation. Both Ms. Kloberdanz and Ms. Alire testified that the annual provision of OT services gave them the flexibility to truly address the Student's needs and deliver OT services on a regular basis. Thus, the 2018 IEP did not require the District to provide a certain number of OT related service minutes to the Student weekly or monthly, and the OT providers were able to increase or decrease the service minutes as needed by the Student's specific situation.

46. The record reflects a complicated series of events that initially inhibited the District from providing the Student with OT services during the first five months (December 17, 2018 and June 18, 2019) of the 2018 IEP period. However, it cannot be said that these events amount to a material failure to implement the 2018 IEP in the area of OT services. For the period of December 17, 2018 to February 7, 2019, as directed by WAC 392-172A-03000(2), the District cannot be held in violation of the IDEA for failing to provide a FAPE during the period of time that the Parent refused to consent to provide the Student services.

47. Regarding the period of February 7, 2019 through approximately April 16, 2019, a series of unfortunate events occurred that prevented both the Student's attendance and Ms.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

Kloberdanz's attendance at school. The Parent was aware of the circumstances and she testified that she chose to wait until Ms. Kloberdanz could be available to provide the Student with OT services. Ultimately, Ms. Kloberdanz was able to provide 300 minutes, or 37%, of the Student's OT Services during the Student's fourth grade year. Ms. Alire also attempted to implement the OT services required by the 2018 IEP during the period of September 4, 2019 to December 16, 2019. Ms. Alire established a routine of providing the Student with 20 minutes of OT services per week when the Student's attendance at school allowed for Ms. Alire to provide the services. Ultimately, Ms. Alire also provided 300 minutes of OT services during a three-month period.

48. Certainly, it is preferable ensure that a Student receives all the service minutes provided in an IEP. However, in this case, it appears that the District could not do so. Given Student's absences from school, the Parent's lack of consent and decision to wait for Ms. Kloberdanz's availability, Ms. Alire's consistent provision of services on a weekly basis, and the fact that the District had only eight months to deliver 800 minutes of OT services instead of 10 months, as well as the flexibility for providing OT services described in the 2018 IEP, it is concluded that the District did not materially fail to implement the 2018 IEP. Therefore, the Student was not denied a FAPE and the Parent is not entitled to the relief requested.

49. The Parent also presented argument and evidence at the hearing that Ms. Alire failed to provide the Student with the full amount of OT service minutes because Ms. Alire expended time assisting the Student with typing and the OT service minutes were to be expended on assisting the Student with handwriting only. However, arguably, the Parent did not raise this issue in her due process hearing request.

50. Notably RCW 34.05.461(4) provides: "[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding." The court is not required to wade through the record to find evidence to support claims. *E.M. v Pajaro Valley Unified Sch. Dist*, 652 F.3d 999, (9th Cir 2011), citing *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994); see *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs hunting for truffles buried in briefs"). Given that the Parent raised this issue for the first time at the hearing and it is distinctly different from the issues described in her due process hearing request, it is concluded that the issue was not properly noticed for hearing.

51. Even so, the Parent has not carried her burden. The 2018 IEP provided for OT services to support the Student in reaching the written language goal in the IEP. These goals included improving her ability to use writing conventions, but also capitalization, punctuation, sizing, and spelling. The Student was working on both handwriting and typing in the general education environment and struggled with her motor function in both areas. Therefore, Ms. Alire developed an intervention plan to assist the Student with developing motor skills to address her difficulty in performing academically in the area of written language while typing and handwriting. The Parent, then, has not shown that Ms. Alire's intervention plan to assist the Student in the area of written language by addressing the Student's needs in the area of handwriting and typing is a material failure to implement the 2018 IEP. Therefore, it is concluded that the District did not deny the Student a FAPE and the Parent is not entitled to any requested relief.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

The District Violated the IDEA By Delivering the Student's OT Services in the General Education Environment Between September 4, 2019 and December 18, 2019. However, the Student was Not Denied FAPE as per WC 392-172A-05105(2).

52. There is no factual dispute that Ms. Alire provided the Student with OT services in the general education environment from September 4, 2019 to December 18, 2019, even though the 2018 IEP provided that the services would be provided in the special education environment. The Parent essentially alleges both a procedural violation and a substantive violation of the IDEA. First, the Parent alleges that she should have received prior written notice as required by WAC 392-172A-05010 or an opportunity to participate in a meeting regarding the decision to change the environment for the OT service delivery. Second, the Parent alleges that the District's provision of OT services to the Student fell short of the OT services required by the IEP.

53. The District argues that it did not have an obligation to provide the Parent with prior written notice or hold an IEP meeting regarding the change, and even so, the District did not materially violate IDEA because the Student received the OT services and was not denied a FAPE.

54. A district must provide a PWN to the parents of a child eligible or referred for special education a reasonable time before it proposes to initiate or change the identification, evaluation, or educational placement of the student, or the provision of FAPE to the student, or refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student. WAC 392-172A-05010; 34 CFR 300.503(a). Moreover, written notice must be provided within "a reasonable time" prior to the effective date. WAC 392-172A-05010(1); 34 CFR §300.503(a); *Letter to Chandler*, 59 IDELR 110 (OSEP 2012). "The purpose of the notice is to provide sufficient information to protect the parents' rights under the Act." *Kroot v. District of Columbia*, 800 F. Supp. 976, 982 (D.D.C. 1992).

55. Procedural safeguards are essential under the IDEA. See, *Amanda J. v. Clark County Sch. Dist*., 267 F.3d 877, 882 (9th Cir. 2001). The IDEA requires that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." WAC 392-172A-03100; 34 CFR §300.322. To comply with this requirement, parents must not only be invited to attend IEP meetings, but must also have the opportunity for "meaningful participation in the formulation of IEPs." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed Appx. 342, 48 IDELR 31 (9th Cir. 2007).

56. "Each school district must ensure that the parents of each student eligible for special education are members of any group that makes decisions on the educational placement of the student." WAC 392172A-03115.

57. The Parent is correct that the District should have provided the Parent with prior written notice of the decision to change the delivery of OT services to the Student from the special education environment to the general education environment, because a prior written notice is required when changing the educational placement or provision of a FAPE to the Student. Additionally the District should have held an IEP team meeting to provide the Parent with an opportunity to provide input into the decision making process. Therefore, it is concluded that the District procedurally violated the IDEA by failing to provide the Parent with a prior written notice or an opportunity to participate in the decision making process when it changed the delivery of

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

the Student's OT services from the special education environment to the general education environment.

58. However, the record shows that the Parent knew that Ms. Alire was providing OT services to the Student in the general education environment between September 4, 2019 and December 18 2019. Additionally, as discussed below, the Parent has not shown that the Student was denied a FAPE by receiving the OT services in the general education environment.

59. School districts are required to provide special education and related services in accordance with the Student's IEP when implementing SDI and related services. 34 C.F.R. §300.323(c). However, a district is not required to adhere perfectly to the IEP and minor discrepancies in the implementation of services required by the IEP do not violate the IDEA; only material failures to implement an IEP violate the IDEA. *Van Duyn,* 502 F.3d 811 (9th Cir. 2007).

> "[S]pecial education and related services" need only be provided "*in conformity with*" the IEP. [20 USC §1401(9).] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.
>
> * * *
>
> We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.

Id. at 821-22 (italics in original).

60. Here, the District materially departed from the IEP by changing where the Student would receive OT services. Changing the environment from special education to the general education is more than a minor discrepancy; it is a change of educational placement that affects whether the Student was in her least restrictive environment.[11] Thus, it is concluded that the District materially failed to implement the IEP by changing the environment that the Student received OT services.

61. Even though the District engaged in a procedural violation of the IDEA and materially failed to implement the IEP, the Parent is obligated to show that a denial of FAPE occurred in order to receive the relief requested.

---

[11] Subject to the exceptions for students in adult correctional facilities, school districts shall ensure that the provision of services to each student eligible for special education, including preschool students and students in public or private institutions or other care facilities, shall be provided:

> *(1) To the maximum extent appropriate in the general education environment with students who are nondisabled; and*
>
> *(2) Special classes, separate schooling or other removal of students eligible for special education from the general educational environment occurs only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.*

WAC 392-172A-02050.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

62. An ALJ's "determination of whether a student received FAPE must be based on substantive grounds." WAC 392-172A-05105(1). When a procedural violation is alleged, an ALJ "may find that a student did not receive a FAPE only if the procedural inadequacies":

a) Impeded the student's right to a FAPE;
b) Significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE to the parent's child; or
c) Caused a deprivation of educational benefit.

WAC 392-172A-05105(2).

63. The evidence presented does not show that providing OT services in the general education environment impeded the Student's right to FAPE or caused any deprivation of educational benefit. The Student received the OT services as set forth in the IEP, and the Student benefitted from those services. Also, the Parent has not shown that providing the services in the general education environment were any different than the services provided in the special education environment. While the Parent understandably disagreed with the process by which the District made the decision to change the Student's educational placement, the Parent has not shown the impediment was significant regarding the provision of FAPE to the Student. Conversely, the record reflects that the Student continued to make progress in the area of motor skills and that the Student benefitted from being in the general education environment because she not missing class and learning along with her peers.

64. Given the record presented, then, it must be concluded that the District engaged in a procedural violation of the IDEA and materially departed from the IEP by delivering OT services in the general education environment. However, the Parent has not carried her burden and has not shown that the Student was deprived a FAPE from September 4, 2019 to December 18, 2019. Therefore, the Parent is not entitled to any requested relief.

Remedies

65. Because the Parent did not prevail on any of the issues raised in the due process hearing request, the Parent is not entitled to any of the remedies requested.

ORDER

Based on the findings and conclusions above, it is hereby ordered that the District did not violate the IDEA and deny the Student FAPE because:

1. The Parent has not shown that the District violated the child find requirement of WAC 392-172A-02040;

2. The 2018 IEP and 2019 IEP were appropriate because each was reasonably calculated to enable the Student to make progress in the areas of written language and math in light of the Student's circumstances; and

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

3. The District did not materially violate the IDEA by failing to deliver 800 minutes of OT services between December 17, 2018 and December 16, 2019.

4. Further, based on the findings and conclusions above, it is hereby ordered that even though the District procedurally violated the IDEA, the Student was not denied FAPE as per WC 392-172A-05105(2) by receiving OT services in the general education environment between September 4, 2019 and December 18, 2019.

Served on the Date of Mailing.

COURTNEY E. BEEBE
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, Administrative Resource Services.

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135

DECLARATION OF SERVICE

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

Parent
[redacted]

Rachel C. Disario, Senior Assistant General Counsel
Seattle Public Schools
PO Box 34165, MS 32-151
Seattle, WA 98124-1165

Susan B. Winkelman, Attorney at Law
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101

Dated October 23, 2020, at Seattle, Washington.

ta11

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

cc: Administrative Resource Services, OSPI

Office of Administrative Hearings
One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
FAX (206) 587-5135