

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

IN THE MATTER OF

OSPI CAUSE NO. 2020-SE-0008

OAH DOCKET NO. 01-2020-OSPI-00981

HOCKINSON SCHOOL DISTRICT

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

A due process hearing in this matter was held before Administrative Law Judge (ALJ) Pamela Meotti by video conference on June 8 through 12, 22 and 23, 2020. The Parents of the Student whose education is at issue¹ appeared and were represented by Shannon McMinimee and Whitney Hill, attorneys at law. The Hockinson School District (District), was represented by William Coates and Erin Sullivan-Byorick, attorneys at law. Also present was Keila Dean, District Director of Special Programs. The following is hereby entered:

STATEMENT OF THE CASE

Procedural History

The Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on January 9, 2020. OSPI assigned Cause No. 2020-SE-0008 and forwarded the Complaint to the Office of Administrative Hearings (OAH). In a scheduling notice entered January 13, 2020, OAH assigned the matter to ALJ Jacqueline Becker. The District filed a response to the Complaint on January 21, 2020.

ALJ Becker issued a prehearing order on February 13, 2020. On March 10, 2020, OAH reassigned the matter to ALJ Pamela Meotti, who issued prehearing orders on March 23, 2020; April 28, 2020; May 7, 2020; May 22, 2020; and June 2, 2020.

Decision Due Date

As set forth in the prehearing order dated February 13, 2020, the due date for a written decision in this case was extended at the Parents' request to thirty (30) days after the record of the hearing closes. The record closed on August 26, 2020, when the parties timely submitted post hearing briefs. Accordingly, the due date for a written decision in this case is **September 25, 2020**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

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

Joint Exhibits: J1 through J33; Joint Exhibits J33A through J38 were withdrawn.²

Parent Exhibits: P1 and P2 were admitted over the District's objection.

District Exhibits: D2 through D13; D20 through D22; D24 through D26; D29; D30; D36 through D38; D54 through D67; and D69 through 74; were admitted without objection.

D39; D40; D45; D47; D48; D53; D82; D88 through D93; and D95 through D97 were admitted over the Parents' objection.

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

Keila Dean, District Director of Special Programs;
Marilea Brock, Speech and Language Pathologist; Owner, Communication Connection NW;
Jey Buno, Executive Director of Special Services - Evergreen School District;
Amber Lindly, Principal - Evergreen School District;
Maryann Keyser, Special Education Teacher - Evergreen School District;
Carla-Marie Myers, Owner, Discovery Behavior Services;
Heather Schwartz, Board Certified Behavior Analyst (BCBA) for Discovery Behavior Services;
Lionel Enns, Ph.D., BCBA-D;
Vanessa Tucker, Ph.D, BCBA-D;
The Mother;
Robyn Spencer; Speech and Language Pathologist – Evergreen School District;
The Father;
Shairn Villa, District School Psychologist;
Leslie Ruby, District Special Education Teacher.

ISSUES

On May 2, 2020, the parties submitted a joint statement of the issues and relief requested (joint statement). The issues for the due process hearing as stated in the joint statement³ are as follows:

1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) from January 8, 2018 by:
 - a. failing to timely complete an Independent Educational Evaluation (IEE) at public expense after the Parents requested the same in May of 2019 and the District failed to file a due process hearing request to defend its November 15, 2018 reevaluation?

² The Parents' attorney disagreed with how some of the joint exhibits had been labeled and argued some of the District's exhibits should have been marked as joint exhibits. She agreed that it was too late to relabel or mark the exhibits. McMinimee T20.

³ Neither party objected to the minor changes made to the joint statement as set forth in the third prehearing order dated May 7, 2020.

- b. failing to offer Individualized Education Programs (IEPs) for the Student for the second half of the 2017-2018 school year as well as the 2018-2019 and 2019-2020 school years that were reasonably calculated to allow for the Student to make meaningful educational progress given his unique needs?
- c. failing to offer IEPs for the Student from January 9, 2018⁴ forward that accurately included the Parents' input; provided enough specially designed instruction and related services for the Student; provided enough specially designed instruction and related services for the Student from certificated staff; provided the supplementary aid and service of a dedicated Registered Behavior Technician (RBT) working under the supervision of a Board Certified Behavior Analyst (BCBA) delivering Applied Behavior Analysis (ABA) in order to support the Student's ability to remain in his least restrictive environment; properly identified that the Parents needed the related service of parent counseling and training; properly identified that the Student needed the related service of recreational therapy; and included accurate representations of the Student's present levels of performance?
- d. failing to offer IEPs for the Student for the second half of the 2017-2018 school year as well as the 2018-2019 and 2019-2020 school years that included measurable goals in all areas of need?
- e. failing to offer IEPs for the second half of the 2017-2018 school year as well as the 2018-2019 and 2019-2020 school years that included the Extended School Year (ESY) services that the Student specifically needed?
- f. failing to have appropriately qualified individuals deliver to the Student all the specifically designed instruction and related services called for in his IEPs for the end of the second half of the 2017-2018 school year until he was placed at 49th Street Academy?
- g. failing to implement the use of appropriate Functional Behavior Assessments (FBAs) and Behavior Intervention Plans (BIP) to address concerns related to the Student's behavior?
- h. reducing the amount of services that the Student was receiving in the areas of adaptive, behavior, and social/emotional and then in turn claiming that the Student needed a more restrictive environment because of struggles in these areas?
- i. predetermining that the Parents' request for a dedicated Registered Behavior Technician (RBT) working under the supervision of a Board Certified Behavior Analyst (BCBA) delivering Applied Behavior Analysis (ABA) in order to support his ability to remain in his least restrictive environment would not be considered?
- j. predetermining the Student's educational placement without consideration of options other than existing District programs and the 49^h Street Academy?

⁴ The parties' joint issue statement and the third prehearing conference order mistakenly referred to January 9, 2020. The Parents' attorney clarified during the third prehearing conference that the correct date was January 9, 2018. Audio File, May 6, 2020, minute 4:55.

- k. predetermining that the Student would only receive Extended School Year (ESY) services consistent with a standard District two-week ESY program?
- l. Committing procedural violations of the IDEA that resulted in the denial of FAPE to the Student by:
 - i. failing to provide the Parents with written invitations to IEP meetings,
 - ii. holding meetings without the Parents where decisions that should have been made in IEP team meetings were made,
 - iii. failing to provide the Parents with prior written notice of District decisions,
 - iv. failing to provide the Parents with prior written notice of District decisions in enough time to allow for them to challenge the same, including issuing prior written notices only after decisions had been made and implemented by the District,
 - v. failing to provide the Parents with Notification of Parent Rights and Protections/Procedural Safeguards after making decisions and at IEP team meetings,
 - vi. failing to provide accurate and timely reports of the Student's progress to the Parents,
 - vii. failing to offer IEP team meetings for mutually agreeable dates and times, prioritizing the Parents' ability to attend,
 - viii. failing to have all necessary members of the Student's IEP team present for IEP team meetings,
 - ix. misrepresenting who was providing specially designed instruction and related services to the Student, and
 - x. failing to timely respond to a request for the Student's educational records by the Parents and counsel on their behalf?
- 2. Whether the District violated the IDEA and denied the Student FAPE by moving him to the 49^h Street Academy, a placement that is not the Student's LRE?
- 3. Whether the District violated the IDEA and denied the Student FAPE since the Student was moved to the 49th Street Academy in February of 2019 by:
 - a. failing to serve the Student in his LRE by having him in an unnecessarily restrictive placement at the 49^h Street Academy?
 - b. failing to offer an IEP team meeting from May 1, 2019 through October of 2019, despite repeated requests from the Parents for the same?

- c. failing to send a District representative to meetings offered by 49^h Street Academy staff during June, July, and August of 2019 that would have allowed for the meetings at issue to be considered IEP team meetings?
 - d. predetermining that the Student would only receive ESY services consistent with a standard 49th Street Academy ESY program?
 4. Whether the District violated the IDEA and denied the Student FAPE since September 13, 2019 by:
 - a. refusing to hold an IEP team meeting to discuss transitioning the Student back to his neighborhood middle school after staff from the 49th Street Academy advised the District that the Student should be transitioned back; and
 - b. refusing to timely implement a transition plan to facilitate the Student's transition back to his neighborhood middle school after staff from the 49th Street Academy advised the District that the Student should be transitioned back.
 5. Whether the District violated the IDEA and denied the Student FAPE since October of 2019 by proposing to conduct an Assessment Revision rather than a Special Education Eligibility Reevaluation?
 6. Whether the District violated the IDEA and denied the Student FAPE since December 20, 2019 by:
 - a. holding an annual IEP meeting for the Student on December 20, 2019 without the Parents despite knowing that the Parents wished to participate in the meeting and were unable to do so because of illness and work obligations; and
 - b. refusing to reschedule an annual IEP meeting for the Student knowing that the Parents wished to participate in the meeting and were unable to do so because of illness and work obligations.
 7. And, whether the Parents are entitled to their requested remedies:
 - a. declaratory relief finding that the District violated the IDEA and that the Student was denied FAPE by the District's actions;
 - b. compensatory education and supplemental services for the Student to allow him to obtain the educational benefit that he would have received, but for the District's violations of the IDEA and denial of FAPE;
 - c. an order voiding the IEP team implemented in Parent's absence and directing that a new annual IEP meeting be held on a mutually agreeable date and time to allow for meaningful participation of the Parents;

- d. An order directing the District to immediately provide to the Parents all the educational records that they have requested pursuant to 34 CFR §300.613(b)(3) and WAC 392-172A-05190;
- e. Or other equitable remedies, as appropriate.

See Prehearing Order dated May 7, 2020.

FINDINGS OF FACT

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

Background

1. The Student is fourteen years old and has attended District schools since preschool. Mother T1084-85.⁵ He displays characteristics of Down's Syndrome and Autism and qualifies for special education under the category of multiple disabilities. J12 p4.⁶ As a fifth grader, the Student's IEP called for him to spend 41.84% of his time in the general education setting. D3 p26; Dean T74.

2017-2018 School Year – Sixth Grade

2. The Student attended 6th grade at Hockinson Middle School (HMS) for the 2017-2018 school year.⁷ He was assigned to a resource room with four or five other students. Dean T697. The transition from elementary school to middle school was difficult for the Student and led to an increase in behaviors such as eloping from staff, clearing desks, avoiding tasks, spitting, and using "potty talk." D6 p4. Due to his behaviors and lack of progress, the Student did not meet his annual functional performance goals. D12 p13. Functional performance is an umbrella term that includes behavior and social/emotional skills. Dean T77,120. Goals in that area include social/emotional and behavior. Dean T99; D2p9. In November, 2017, the Student's IEP team decreased his time in the general education setting to 0%.⁸ D12 pp 27, 30.

⁵ Citations to the hearing transcript are to the name of the witness, except in the case of the Mother and Father, followed by the page number(s) on which the testimony appears. For example, a citation to Mother T661 is a citation to the Mother's testimony at page 661 of the transcript.

⁶ Citation to the exhibits of record are by the party ("P" for the Parents; "D" for the District; "J" for joint exhibits) and page number. For example, a citation to P20 p1 is to the Parents' Exhibit 20 at page 1.

⁷ As discussed in the conclusions of law, events that occurred before January 9, 2018 are not at issue in this case. The parties were permitted to elicit testimony about events that precede that date *solely* for the purpose of providing background and context. T78-79; 97.

⁸ The Student's IEP indicated that he would spend 0.22% of his time in the general education setting. This figure resulted from the IEP program the District uses; the Student's actual time in the general education setting was 0%. Dean T104.

3. On January 10, 2018, the Father met with Keila Dean, District special education director;⁹ Shairn Villa,¹⁰ District school psychologist; and Heather Stivers, the Student's special education teacher, to discuss amending the Student's IEP to increase his general education time because his behaviors were starting to improve.¹¹ A general education teacher did not attend. J3 p3; Dean T109. The District issued a prior written notice (PWN) on January 10, 2018, providing that the Student would spend time outside the resource room by having 25 minutes in the cafeteria four days per week, delivering the newspaper one day per week, and spending time in the library. These changes took effect the day after the meeting. J3 p3; Dean T110.

January 2018 IEP

4. On January 24, 2018, the Student's IEP team met to review and amend his IEP. J4 p1. The District sent a letter notifying the Parents of the meeting on January 10, 2018. Dean T111; J4 p2. In attendance were the Father, Ms. Villa, Ms. Stivers, Ms. Dean, and Kayla Briggs, an Occupational Therapist (OT). J4 p32. A general education teacher did not attend. Dean T111. The Student continued to have support from a dedicated 1:1 paraeducator. J4 p29. The team decreased the Student's functional performance minutes by five minutes per week, to 805 minutes weekly, and maintained the Student's time in the general education setting at 0%. Compare D12 p27 with J4 p29; Dean T112. The Student's adaptive minutes were unchanged. The Father asked about the expected timeline for reintroducing the Student to the general education setting, but the team was unable to set a timeline. J4 p32; Dean T112-13. The team also updated the Student's behavior intervention plan (BIP) from November 28, 2017.¹² D10 p1; J4 p33.

5. The service matrix in the January 2018 IEP amendment (January 2018 IEP) provided that a special education paraeducator would deliver the specially designed instruction (SDI) set forth in the IEP, monitored by a special education teacher. J4 p29. In practice, however, a special education teacher also provided direct services to the Student. Dean T93. The District wrote IEPs in this manner because a special education teacher, when listed as monitor, can also provide direct service. IEPs are written to allow flexibility because student needs vary from day-to-day, meaning that on any given day a special education teacher may need to focus exclusively on assisting one student. Dean T93-94; 704.

6. The January 2018 IEP included goals in Adaptive, Functional Academics-Math; Functional Academics-Reading; Functional Academics-Writing; Communication; Fine Motor Skills; and Functional Performance. The Student's 2016 evaluation recommended SDI in these areas. D2

⁹ Ms. Dean holds a master's degree in school psychology and worked as a school psychologist between 2006 and 2015. J40.

¹⁰ Ms. Villa holds a master's degree in psychology and is a nationally certified school psychologist. She has worked as a school psychologist for twenty-three years and was named Washington State School Psychologist the Year in 2007. J56; Villa T1481-82.

¹¹ Ms. Dean asked the Father if he wanted a full IEP team meeting, noting that if he just wanted to make amendments, that could be achieved without the full team. The Father responded that he wanted to make adjustments to the IEP and wanted to incorporate these into the IEP but was not concerned about how that happened. Ms. Dean did not schedule a full IEP team meeting. D2.

¹² The BIP in D10 is the updated version of the BIP originally created on November 28, 2017. Dean T89.

p9. The evaluation also recommended SDI in “functional performance,” which is described as “specially designed instruction in social/emotional and behavioral skills.” D2 p9.

7. The January 2018 IEP included two functional performance goals but did not include separate goals in the specific area of social/emotional. The first goal expected the Student to “demonstrate expected levels of classroom behavior improving self-control of his body (refraining from work refusal, spitting, grunting, clearing tables, throwing objects) from 0/7 opportunities (class periods) to 4/7 opportunities (class periods) as measured by teacher/paraeducator observation.” J4 p23. The second goal expected the Student to “demonstrate appropriate peer interactions (maintaining space proximity, safe and respectful behavior) improving his self-control with peers from 3 out of 7 class periods a school day to 7 out of 7 class periods a school day as measured by teacher data collection.” J4 p23; Dean T215-16. The District sent a prior written notice (PWN) on January 24, 2018, proposing to initiate the new IEP that day. J4 p33.

8. Ms. Dean’s general practice was to prepare PWNs during IEP team meetings by projecting the PWN onto a TV screen and making adjustments as the team reviewed information. She would then confirm the accuracy of the information with the family. When the PWN was complete, she would email it to the family and ask if they had questions or concerns. Ms. Dean often followed this practice with the Student’s family. Dean T118, 713.

9. The Student’s case manager was responsible for providing the Parents with a copy of the Notice of Special Education Procedural Safeguards for Students and their Families. If the case manager was not present, Ms. Dean was responsible for doing so. Dean T282. Additionally, whenever the District sent PWNs, it included a page with a link to the procedural safeguards. The page also stated that printed copies were always available at IEP meetings and at the District office. Dean T280-81. The Mother recalled receiving the procedural safeguards at one meeting, and recalled clicking on the link provided by the District and “scanning” the document. Mother T1119, 1152.

10. For evaluation meetings, Ms. Villa was the case manager. Dean T282. Ms. Dean could not recall whether the Parents were provided with procedural safeguards at evaluation meetings and the Parents did not ask Ms. Villa this question at the hearing. T283.

11. On January 24, 2018, the IEP team also developed an extended school year services (ESY) plan for the summer of 2018. D12 p28; J5 p5; Dean T113-14. The team determined ESY was appropriate because the Student experiences regression following extended breaks. Dean T115. The ESY plan provided the Student with three hours of ESY per day for two weeks, which is the standard District ESY program. J5 p4; Dean T114-15. It was typical for the Student’s IEP team to establish the Student’s ESY eligibility midway through the year and develop the details of his program closer to summer. Dean T 336-37. The team determined that this amount of ESY was sufficient and neither the Parents nor anyone else requested additional ESY for the summer of 2018. Dean T695-96.

12. During the hearing, Ms. Dean explained that Exhibit J5 (the Student’s ESY plan) contained documents from the summer of 2018 that were subsequently added online to demonstrate skills the Student was learning during ESY. The District sent a PWN on January 24, 2018, but it did not contain these additional documents. J5 p5; Dean T115.

13. On February 28, 2018, the Parents met with Ms. Stivers and Ms. Dean to discuss the Student's progress. The team was "closely monitoring [the Student's] behavior to ensure that he is receiving services in the least restrictive environment." J6 p3. The Student was having difficulty going to the band room but was doing well going to the library. J6 p3. The District did not send a formal meeting notice to the Parents, but they attended the meeting. A general education teacher, OT and Physical Therapist (PT) did not attend the meeting. Dean T117; J6, pp1,3.

April 2018 IEP

14. On April 11, 2018, the IEP team met to amend the Student's IEP. J7 p1; Dean T119. In attendance were the Parents, Ms. Dean, Ms. Stivers, and Ms. Villa. J7 p31. A general education teacher did not attend the meeting, nor did an OT or Speech Language Pathologist (SLP). J7 p31; Dean T119. The team amended the Student's IEP to reflect that he was spending 14.87% of his time in a general education setting because his behavior had improved. J7 pp28, 31. The team decreased the Student's functional performance service minutes to 555 minutes per week. J7 p28; Dean T120. His adaptive minutes were unchanged. The change took effect the next day.¹³ Dean T121.

15. On May 1, 2018, the Parents met with Ms. Stivers and Ms. Dean to discuss the Student's behaviors, which had been inconsistent. J8 p3. The District did not send a formal meeting notice to the Parents. J8 p1; Dean T122. Behaviors occurred when the Student was changing clothes for P.E. class. J8 p3. The team decided the Student would change clothes before and after P.E. class. A general education teacher did not attend the meeting, nor did an OT or SLP. J8 p3; Dean T122. The PWN did not provide a proposed action date. J8 p4.

16. The IEP team met again on May 18, 2018. The District did not send a formal meeting notice to the Parents. J9 p3; Dean T132. In attendance were the Parents, Ms. Dean, Ms. Stivers, Ms. Villa and Brian Lehner, HMS Principal. J9 p3. A general education teacher did not attend the meeting, nor did an OT or SLP. J9 p3; Dean T132. The IEP team temporarily changed the Student's schedule so that he would spend all of his time in the resource room except for lunch and recess. The change was due to school-wide testing, which led to an escalation in the Student's behaviors. Dean T686-87; 686-87; J9 p3. In making this temporary change, which ended on June 8, 2018, the District did not formally amend the IEP. Dean T135; J9, p3. The Parents raised concerns that inconsistent paraeducators may have contributed to increasing behaviors. Dean T129; J9 p3. The PWN does not list a date for the proposed action, but it took effect the day after the meeting. Dean T136. The PWN states that the Student's "schedule will be changed. He will spend the duration of his day in the resource room with the exception of lunch (including recess)."

17. All District paraeducators must pass a competency test and complete training called Right Response.¹⁴ Ruby T1627-28; Dean T714. Much of the District's paraeducator training occurred in the classroom, with the special education teacher providing the paraeducator with instruction when an incident occurs. Dean T714-17. Staff also had weekly "collaboration time" to discuss behaviors and responses. Dean T212. If necessary, staff received additional training from a

¹³The date reflected in the PWN is a typographical error. Dean T121.

¹⁴The first day of the two-day initial right response training focuses on principles of proactive behavior supports; the second day includes discussion about physical holds. Ruby T1656.

District school psychologist. Dean T212; 714. During the Student's sixth grade year, Leslie Ruby and Ms. Villa provided behavioral support to Ms. Stivers. Dean T718.

18. The Parents expressed concerns at IEP meetings and in emails that they had seen the Student's paraeducators addressing the Student's behaviors in ways that were incompatible with his BIP, such as yelling, grabbing his shoulders, and using threats, such as "please don't do that or else." Father T1286-87; 1290. The record does not contain evidence of how often the Parents observed these actions.

2018-2019 School Year – Seventh Grade

19. The Student's seventh grade year started on September 4, 2018. J1 p2. Although the Mother testified that the Student experienced regression "sometimes," the year started smoothly. Ruby T137. There is no evidence in the record that the Student regressed during the summer of 2018. The April 2018 IEP was in place and the temporary reduction of his general education time no longer applied. Ruby T1632; Dean T687; J7. The Student was placed in a developmental resource classroom¹⁵ with Ms. Ruby¹⁶ as his special education teacher. The classroom had four other students and two classroom paraeducators in addition to the Student's dedicated aid. Ruby T1626, 1631, 1634.

20. Because Ms. Ruby was the teacher for the developmental resource programs at both HMS and Hockinson High School (HHS), she did not spend a full six-period day at HMS. Ruby T1625; 1717. Ms. Ruby arrived at HMS for fourth period, meaning she was present for half of the school day. Ruby T1718. During first period, Ms. Runyon and the Student worked on "school jobs," such as collecting mail in the office and greeting people. Ruby T1631, 1717. Kelly Rough, the resource room teacher at HMS, taught a functional performance class during second or third period. Ruby T1633, 1718. Ms. Ruby worked directly with the Student on a daily basis, but could not estimate for how long. Ruby T1710.

21. In addition to working with Ms. Runyon, the Student worked with Julie Nally as his dedicated aid. Ruby T1631. After Ms. Nally was injured at some point, the Student worked with a long-term substitute and another substitute. Dean T158-59; Ruby T1631; 1662-63; Mother T1087. Ms. Ruby trained each of these individuals before they worked with the Student and on an ongoing basis. Ruby T1663.

22. At the beginning of the year, Ms. Ruby met with paraeducators in her classroom to discuss the Student's IEP, accommodations and modifications, BIP, schedule, and needs. Ruby T1626-27. Ms. Ruby spent a lot of time modeling how instructions should be implemented. With respect to behavior, training was "ongoing," and discussed during collaboration time. Ruby T1628. Ms. Villa met with several of the Student's paraeducators at different times for approximately one half hour each to review his BIP and to discuss appropriate interventions. Villa T1556. The District did

¹⁵ Ms. Villa sometimes referred to the developmental resource room as the structured learning center. The terms refer to the same place. Villa T1501, 1538.

¹⁶ Ms. Ruby holds a master's degree in special education and a certificate of autism studies from the University of Washington. She has been a District special education teacher for thirteen years. J52; Ruby T1622-23.

not provide behavioral support from anyone outside the District to assist Ms. Ruby or her staff. Ruby T1674-75.

23. Although the 2018-2019 school year started well, the Student started to struggle with behavior as the year progressed. The most significant behaviors were elopement from staff, charging up to peers and spitting in their faces, and sometimes grabbing their private areas or rubbing himself against a peer. Ruby T1637; J12 p11.

24. In working with the Student, Ms. Ruby and her staff used the FBA and updated BIP contained in Exhibits D9 and D10 and the behavior strategies listed in Joint Exhibit 15, pages 17-19. Ruby T1635-36; 1639. When she writes FBAs and BIPs, Ms. Villa creates a document, as in D9 and D10, that summarizes all of the key points in the larger more comprehensive FBA because it is very functional and “useful for people to understand what the FBA and BIP were actually about.” Villa T1490-91; Ruby T1635-40.

25. Ms. Ruby reviewed the Student’s BIP with the paraeducators who worked with the Student and found it helpful, easy to understand, and appropriate in the classroom. Ruby T1636-37. In training her staff, Ms. Ruby discussed how to use these tools and strategies, modeled their use, observed staff implementing these tools and strategies, and provided feedback and corrections during collaboration meetings. Ruby T1640. Ms. Ruby and her staff also implemented strategies to address the Student’s sensory processing difficulties. Ruby T1642; J12p19. The Father considered Ms. Ruby to be a very good, even “excellent,” teacher. Father T1453.

26. Despite these tools, Ms. Ruby was struggling to support the Student with behaviors involving inappropriate peer interactions. He was not making meaningful progress on resolving those behaviors. Ruby T1643. The Student could go several days without engaging in the behaviors, but then they would reoccur and ultimately happened many times. Ruby T1638, 1704. She was particularly concerned because these behaviors raised safety concerns for the Student and others, and posed significant barriers for him to learn the skills required to enjoy a meaningful life after high school. Ruby T1637-38, 1643.

Reevaluation

27. On October 8, 2018, the District proposed to initiate a special education reevaluation that included an assessment for autism spectrum disorder (ASD). J10 p3. The Parents provided consent for the reevaluation on October 17, 2018. J12 p2.

28. On October 18, 2018, before the evaluation began, Ms. Dean contacted the Evergreen School District (Evergreen) to determine if they had space for the Student in a therapeutic day treatment program at 49th Street Academy (49th Street). Dean T149-50.

29. Jey Buno, Executive Director of Special Services and Federal Programs for Evergreen, oversees 49th Street, which is a special education program with two components – a treatment program for students with typical cognitive capacity and behavioral and mental health needs, and a developmental disabilities program for students who have both disabilities and significant behavioral issues. Students in this program tend to be aggressive, violent or disruptive. There are no general education students at 49th Street. Buno T378-81. 49th Street is the only developmentally delayed program in Clark County and serves students from other districts when it has capacity to do so. Districts typically contact 49th Street to determine if it has space available.

Buno T389-90, 396. If a District decides to move forward with a placement, 49th Street conducts an intake process to determine whether the student's level of need is such that it can only be served at 49th Street. Buno T390; 400. Placement at 49th Street is intended to be temporary; the purpose of the program is to identify and address a student's needs and transition them out of the program. Buno T411.

30. On November 2, 2018, the District held a meeting to discuss the Student's ongoing reevaluation. The District did not send a formal meeting invitation to the Parents. Dean T153-54; J11 pp1-3. In attendance were the Parents, Ms. Dean, Mr. Lehner, Ms. Villa and Ms. Ruby. No general education teacher, OT or SLP attended. Dean T155; J11 p3. The team raised 49th Street as a possible placement option. J11 p3. Ms. Ruby had visited 49th Street in a previous school year. Ruby T1647. Ms. Villa had never been to 49th Street, but Ms. Dean was familiar with it and discussed what it could provide. Villa T1616. The Parents felt unprepared to discuss the Student's placement because they had not received notice that placement would be discussed. Father T1300.

31. The Parents raised concerns that the Student often had substitute paraeducators, and emphasized that he required consistent support from paraeducators who were known to him and received consistent training. Dean T158; J11 p3. The team discussed that although the Student had had substitute paraeducators for a brief time period, a paraeducator had been assigned. Dean T160; J11 p3.

32. On November 15, 2018, the Student was determined to be eligible for ESY services for the summer of 2018. J13 p5. These services included the District's standard ESY program of three hours per day for two weeks. Dean T190-191; J13 p3.

33. On November 15, 2018, the District completed the Student's reevaluation.¹⁷ J12p1. Ms. Villa prepared the evaluation summary and recommendations for the IEP team. J12. The summary recommended changing the Student's eligibility category from intellectual disability to multiple disabilities and noted the following. First, the Student could not be integrated into the general education environment at that time because of unpredictable and inappropriate behaviors including spitting, grabbing, and inappropriate language. He required 1:1 support to keep other students safe from these behaviors.¹⁸ Second, the Student would benefit from "a highly structured instructional program that is carefully sequenced such as ABA or discrete trial training approach in order to learn basic routines, concepts and language." Third, the Student would benefit from an environment that allowed him to take initiative independently without constant adult supervision and prompts. J12 p4; Villa T1512-13.¹⁹ The evaluation team recommended, among other things, supplementary aids and services to include consultation by a school psychologist and behavior consultant. J12 p6.

¹⁷ The Parents have not claimed the reevaluation was inappropriate as an issue for hearing. T916-919.

¹⁸ The record contains no evidence that the Student's behaviors ever caused a person to experience substantial bodily injury or required disciplinary action. Dean T178.

¹⁹ In assessing the Student's behaviors, Ms. Villa administered the Behavior Assessment System for Children, Third Edition (BASC-3) with parent and teacher rating scales. J12 p9, 11-12. She also observed the Student and interviewed his Parents. J12 p19-20.

34. Ms. Villa made the following significant findings concerning the Student's behaviors. Villa T1509; J12 p11. His behaviors appeared to function as a means of escape or communication rather than malicious impulse. When the Student did not understand or want to engage in a task, he would disengage or resist doing the task, or use potty talk, fall on the floor, spit, throw objects, run away, or destroy property. These behaviors sometimes seemed fun for the Student "and he engaged in them almost manically." As a result, the function of the behavior was not only to escape, but also to obtain excitement, stimulation or activity. J12 p11; Villa T1510-11; 1614. Less frequently, but more significantly, the Student sometimes ran up to peers or staff and engaged in physical aggression such as spitting in their faces, or grabbing at their private parts or rubbing himself against them. These behaviors occurred in the self-contained classroom as well as in the general education setting. The Student tended to focus these behaviors on girls he fixated on. District staff responded by positioning themselves between the Student and peers. J12 p11.

35. The Parents believed the Student was acting out in order to interact with his peers and that his behavior resulted from his removal from general education. Father T1296. Ms. Villa considered the Parents' theory but disagreed with it because District staff consistently found that the Student's behaviors increased when he was in general education settings such as the hallway, lunch, P.E. or band. Villa T1552. Ms. Villa did not believe his behaviors were related to a lack of access to the general education setting, but thought they were set off by access to the general education setting. Villa T1598; 1616-17. The Student's behaviors worsened when he was in the general education setting, and were most likely to occur when he was overstimulated with noise, movements, crowds and where there was less structure. Villa T1494. Because the Student had more difficulty in a general education setting, he required a higher level of support there. Villa T1617.

36. The District considered Ms. Villa a behavioral specialist who could support the Student. Dean T185. Ms. Villa, who had extensive responsibilities as the school psychologist for the District's high school, middle school, preschool, and 18 to 21 year old program, did not have the time to provide behavioral support to the Student. Villa T1484; 1529. She "felt like he needed more resources than I had to give in terms of time." Villa T1529.

37. When at home, the Student does not engage in the behaviors seen in the school setting. Father T1391.

38. The evaluation team met to discuss the evaluation on November 27, 2018. Dean T201. Although Ms. Ruby had been present for the initial evaluation meeting on November 15, 2018, she was ill on November 27, 2018 and did not attend.²⁰ J12 p7; J14 p2. Kim Abegglen, a District instructional coach, attended as a general education teacher.²¹ J12 p7. Ms. Abegglen had prior experience as a general education teacher, knew the Student, and was very knowledgeable about

²⁰ Ms. Ruby did not attend one of the evaluation meetings because she had the flu, but she could not recall which meeting. Ruby T1641,1645. Because there are two attendance sheets dated November 27, 2018 and Ms. Ruby did not sign either one, it is concluded that she was not present on November 27, 2018. J12, p7; J14, p2; Dean T201. The record does not contain an attendance sheet for November 15, 2018.

²¹ Ms. Abegglen holds a master's degree in teaching. Between 2006 and 2016, she was a general education teacher at HMS. Between 2016 and 2019 she was employed by the District as an instructional coach. This position included mentoring new teachers and "identifying and implementing interventions for struggling students both academically and behaviorally." J39.

middle school standards and how to accommodate and modify instruction for students with disabilities. Dean T710. Because the Student was not in a general education classroom, Ms. Abegglen was in the best position to determine what options might be available for him in the general education program, even though she was not and could not be his general education teacher. Dean T130-32; 173-74. Jerri Clark attended the evaluation meeting with the Parents as a PAVE²² advocate, acting as a guide through the process rather than as an advocate. J12 p7; Father T1373.

39. During the evaluation meeting, the Parents distributed a written response to the District's proposal of 49th Street as a placement option for the Student. However, the team did not discuss the Student's placement during this meeting. Father T1301-02. The Parents also requested a consultation with a behavioral specialist. J12 p25; Dean T184. The team planned to discuss this request during the IEP meeting when they discussed services. Dean T184-85.

40. During the fall of 2018, the District considered contracting with an outside provider for ABA services for the Student and discussed this with the Parents. Dean T169-70. Since the 2017-2018 school year, the District has contracted with two service providers—Footprints and Discovery Behavior Solutions (DBS)—to provide ABA services for students. Dean T279; Myers T594. During November 2018, DBS was available to contract with the District to provide services to the Student. Dean T329; Myers T595. Ultimately, the District did not contract with Footprints, DBS or any other ABA providers or behavioral specialists to provide behavioral consultation or services to the Student. Dean T169-70, 185-89.

41. During the November 27, 2018 meeting, the team also created an FBA and a BIP for the Student. Exhibits J14 and D20. In a PWN dated November 28, 2018, the District proposed to change the Student's eligibility category and draft a new IEP based on the evaluation results on December 4, 2018, four business day after the PWN.²³ The PWN does not discuss the FBA or BIP. J12 p25.

December 2018 IEP

42. After the reevaluation, the team met to develop a new IEP on December 3, 2018. (December 2018 IEP). J15 p1. The District sent a formal meeting notice to the Parents on November 28, 2018, but it did not indicate that the IEP team would be discussing the Student's placement. J15 p1; Dean T200-201. In attendance were the Parents, Mr. Lehner, Ms. Abegglen, Ms. Briggs, Ms. Villa, Ms. Dean, Ms. Ruby, Ms. Clark, and Sophia LaGriede, a District SLP. A special education facilitator also was present. J15 p4.

43. An adverse impact summary in the IEP documented that the Student's multiple disabilities "have global impacts on his ability to make adequate progress in the general education curriculum" and that the Student required SDI in adaptive, behavior management and communication; related services from an SLP and OT; and supplementary consultative services from an SLP, OT and a Board Certified Behavioral Analyst (BCBA). J15, p11; Dean T301. During

²² When asked if PAVE stands for Partnership for Action, Voices for Empowerment," the Mother stated "sounds familiar," but she was not sure. Mother T1130.

²³ It is appropriate to take judicial notice that November 28, 2018 was a Wednesday; December 4, 2018 was a Tuesday; and Thanksgiving occurred on November 22, 2018.

the meeting, Ms. Ruby stated that a BCBA and ABA supports would be tremendously beneficial to the Student. Ruby T1697.

44. The December 2018 IEP included behavior consultation for 30 minutes per month but did not specify that a BCBA would provide the consultation. J15 pp11, 35-36; Ruby T1688. The IEP also documented existing behavior support practices used with the Student. J15 pp17-18. The IEP did not specifically include ABA as a related service. J12 p4; J15 pp17-18; Ruby T1669; 1679-82.

45. The IEP team also updated the Student's annual goals and changed the term "Functional Performance Skills" to "Behavior Management Skills." J15 p17; Dean T207. In the area of Behavior Management, the team set two goals. The first was for the Student to use his augmented alternative communication (AAC) system to communicate the need for a break. The second pertained to transitioning within classroom activities and routines within the special education classroom. J15 pp21-22.

46. The Student's December 2018 IEP provided he would spend no time in the general education setting. Dean T217; J15 p35.²⁴ It reduced his minutes of behavioral management skills instruction to 262 weekly and increased his adaptive minutes to 30 minutes, five times daily, or 750 minutes per week. There was no testimony to explain if the IEP mistakenly said "daily," rather than "weekly." The service matrix provided that SDI in functional academics, adaptive, and behavior management skills would be provided by a special education paraeducator with a special education teacher as monitor. J15 p35. With respect to communication, the IEP listed a Speech Language Pathologist Assistant (SLPA) as the service provider and an SLP as monitor. J15 p35. During the IEP meeting, the Parents asked to know who was working with the Student and requested the highest level of professional possible. J15 p40. Because the Parents were concerned the Student's behaviors could be tied to puberty, the team agreed a BCBA or behavior specialist would provide instruction on understanding the body. J15 p39.

47. On December 3, 2018, the IEP team also developed a BIP. D21. The BIP does not contain any information, but instead refers to an attached FBA and an attached BIP. However, no documents are attached. D21. During the hearing, Ms. Dean explained that the reference to the attached FBA was to Exhibit J14 and the reference to the attached BIP was to Exhibit D20, which had been created during the November 27, 2018 reevaluation. Dean T284-85. Ms. Dean acknowledged that exhibit D21 and the attached documents were not provided to the Parents. Dean T284. The PWN associated with the December 2018 IEP does not provide notice that the Student's BIP was being updated. J15 39-40; D21.

Change in the Student's Educational Placement

48. The IEP team also discussed the Student's placement during the December 3, 2018 meeting.²⁵ J15 p39; Villa T1562. The Parents strongly disagreed with placement at 49th Street

²⁴ In December 2018 and January 2019, the Student still had lunch and recess with his general education peers. Dean T327. The record does not establish how much time he spent in lunch and recess.

²⁵ The Parents were surprised by discussion concerning the Student's placement because the team had been discussing specific information about what the Student's program at HMS would look like. Father

and believed the Student could be successful at HMS with proper supports. J15 p40. They reiterated concerns that the Student had not been receiving the support he required because paraeducators were not consistent or trained consistently, and Ms. Ruby was not in the classroom consistently because she was assigned to multiple schools. Father T1314. They also raised concerns that the Student did not have support from an RBT or BCBA. Father T1315. Ms. Dean responded that the District was small and did not have the services to meet the Student's needs. Father T1316.

49. Ms. Dean recalled the team specifically considering whether a BCBA would meet the Student's needs at Hockinson. Dean T970. She did not recall discussing support from an RBT. Ruby T1697; Dean T217. When the Parents asked the District to provide a BCBA at HMS, Ms. Dean replied that 49th Street had a BCBA. Father T1316; Dean T202; Ruby T1710. The team did not consider providing more direct instruction from Ms. Ruby rather than from paraeducators prior to moving the Student to 49th Street. Villa T1566. When they mentioned their belief that the District was serving another Student by providing a BCBA and RBTs, the Parents were told that other students could not be discussed. Father T1319.

50. On December 3, 2018, the District issued a PWN proposing to change the Student's IEP and educational placement effective that date. J15 pp39-40. The PWN states that the Father "noted that [the Student] requires specialized services and inquired about receiving them within the neighborhood school setting. Mrs. Dean shared that because of [the Student's] specialized needs, the District recommends a change of instructional placement in a therapeutic, day treatment setting, such as 49th Street Academy. [The Parents] do not want [the Student] to attend 49th Street Academy and shared that they believe this placement is not appropriate for [the Student's] needs. Mrs. Dean reviewed the Life Skills Program [at 49th Street] and offered to set up a tour for the family." J15 p40. The Parents also asked Ms. Dean to check into other options in neighboring school districts and a private school called Firm Foundations. Dean T218. The PWN further reflects that "the team discussed the reasoning behind the change of placement recommendation and [the Parents] shared that they do not agree with this placement decision." J15 p40.

51. On December 4, 2018, the Parents requested an Independent Educational Evaluation (IEE) at public expense, to which the District consented on December 17, 2018.²⁶ D22; Dean T286. The District provided IEE criteria stating "the District will convene an IEP meeting within 30 days to consider the results of the evaluation." D22 p5; Dean T291. The criteria does not specify whether the 30 day requirement means 30 business days or school days. Dean T291.

52. On January 10, 2019, the District sent a PWN proposing to change the Student's placement on January 24, 2019, and proposing dates for intake meetings at 49^h Street.²⁷ The PWN further

T1312. In addition, after the District had raised 49th Street as a placement option on November 2, 2018, it had not revisited the issue during the reevaluation meetings. Father T1311-1313.

²⁶ The Parents' attorney confirmed during the hearing that the appropriateness of the District's November 15, 2018 evaluation is not at issue in this due process hearing. T917-19. This order focuses on the evaluation solely for the purpose of establishing what information was available to the IEP team when it developed the Student's December 2018 IEP.

²⁷ Although J16 contains a meeting notice for a meeting on January 10, 2019, a meeting did not take place on that date. Dean T292.

indicated that if the Parents were unable to participate in an intake meeting at 49th Street prior to January 24, 2019, the District would unilaterally place the Student at 49th Street “and assume the family does not want to participate in the placement process.” J16 p3.

Requests for Further Consideration of the Student’s Educational Placement

53. On January 10, 2018, the Father emailed Ms. Dean to express the Parents’ willingness to meet and participate in the placement process. D24 p2. Ms. Dean responded that the IEP team had already determined the Student’s placement. D24 p2. The Father requested clarification of what attempts had been made to correct the Student’s behavior and justification for the decision to send the Student to 49th Street. D24 pp 1-2. Ms. Dean responded that information about the Student’s behaviors were included in the FBA and BIP and that the justification for the decision to send the Student to 49th Street was “embedded throughout the documents discussing his needs. Specifically, the page in the IEP with the heading ‘Special education and Related Services’ discusses services and placement.” D24 p1. The District did not provide a copy of the BIP in Exhibit D21 to the Parents. Dean T284. The page in the IEP to which Ms. Dean referred—the service matrix—did not contain information about the Student’s behaviors or justification for the placement decision. Dean T299-300.

54. On January 16, 2019, the Father again emailed Ms. Dean asking for a meeting to brainstorm ways to keep the Student at HMS. D25. The Parents felt they were not true members of the team and their input was being ignored. Father T1299. They requested another IEP meeting to discuss the Student’s placement. D26.D26 p1. On or about mid-January 2019, Ms. Dean contacted Ridgefield School District and Firm Foundations, but neither had a placement available. J17 p3.

55. On or about mid-January 2019, the Parents and the Student visited 49th Street and met with the Principal, Amber Lindly. D25. 49th Street followed its typical intake procedures in considering whether to accept the Student. Lindly T450. Although 49th Street has declined to serve students whose needs can be met by their own districts; Buno T400; Lindly T450; the intake team determined that placement at 49th Street was appropriate for the Student at that time. Buno T429.

56. On January 29, 2019, the Student was making sufficient progress on most of his IEP goals at HMS. D82; Dean T370-71. He had emerging skills with respect to communicating his need for a break. D82 pp2, 12; Dean T370-74. Although he was struggling with behavior, Ms. Ruby determined that he was making sufficient progress because during the limited time that the December 2018 IEP was in place, he had not regressed, even with time away from school for winter holiday break. Ruby T1689. When a student has a new IEP and is away from school for a significant time period without showing regression, Ms. Ruby would say that student is making sufficient progress. Ruby T1713.

57. On January 30, 2019, the Student’s IEP team met again to discuss the Student’s educational placement. The District did not send a formal meeting notice to the Parents, but they attended the meeting. Dean T309; J18 p4. Ms. Abegglen attended in the role of general education teacher. Dean T311. The Father agreed that the Student required more supports but he wanted them to be provided at HMS. J18 p3. The team discussed concerns that the Student was very isolated. Ms. Dean “stated that she understood the family wants [the Student] in the neighborhood school but that services are not available. 49th Street Academy is an extension of our program [and] the team is recommending this placement to best meet [the Student’s] current needs. J18 pp3-4. Ms. Villa stated that the change of placement would give him increased access to other students,

opportunities to be independent, and BCBA's to meet his behavioral needs. Ms. Dean said "our motive is to get him to the level of independence and we want to use the resources we have available to us to get him to that point." J18 p5.

58. The IEP team, aside from the Parents, decided to place the Student at 49th Street over the Parents' objections. The District issued a PWN on January 30, 2019, with an action initiation date of February 12, 2019. J18 pp3,5. Ultimately, Ms. Ruby and Ms. Villa believed that 49th Street was the least restrictive environment for the Student compared to the isolation required for him to stay at HMS. Ruby T1647-48; 1652; Villa T1532, 1602. At HMS, the Student was being isolated more and more due to his behaviors. Ruby T1647-48. When he had been placed in a separate section of the classroom so that he could still be in the room with his peers, he would run across the room and do something such as grabbing or spitting on someone. Villa T1512. The Student required a calmer environment in order to address his behaviors, which would have been very isolating. Villa T1598. Both Ms. Villa and Ms. Ruby felt that assigning a BCBA to work with the Student at HMS would not have been effective because it would not have changed his environment, specifically the stimulus and proximity to peers that were triggering his behaviors. Villa T1530; 1602; Ruby T1648, 1708. Ms. Ruby also felt that even with a BCBA at HMS, the Student would have been isolated. Ruby T1648, 1708.

59. During the hearing, the Mother testified that if the Parents had received notice that the District was planning to discuss the Student's placement at the December 3, 2018 IEP meeting, the Parents would have hired an attorney. Mother T1093. I do not give any weight to this assertion because even after the Parents became aware that the Student's placement was at issue, they did not hire an attorney for the January 30, 2019 meeting to reconsider the placement.

49th Street

60. On February 12, 2019, the Student began attending 49th Street in the life skills program with Marianne Keyser²⁸ as his special education teacher. Keyser T530. Ms. Keyser consistently has six or seven students in her classroom, with a classroom assistant to help her. Each student in the class has support from one or two adults. In total, there are nine or more adults in the classroom. Keyser T504. Additionally, there are RBTs and a BCBA in the building who are sometimes present in the classroom. Keyser T505. There were no female students in Ms. Keyser's class. Keyser T547.

61. Ms. Keyser received the Student's IEP from HMS and found it appropriate. Keyser T531. The Student's goals were clear to her. Keyser T532-33; 588. When the Student first arrived at 49th Street, he did not have many behaviors during the initial "honeymoon" period. As staff increased expectations, he started to show behaviors such as clearing tables, refusing to follow instructions, destroying things in his area, and engaging in extra "silliness" that interfered with his ability to follow his schedule. Keyser T542; 569. These behaviors were "getting in the way of his school day." Keyser T569. The behaviors lasted longer than two months, but with decreasing frequency. Keyser T569.

62. Additionally, the Student sometimes backed his body into another person, which Ms. Keyser interpreted to be a sensory-seeking activity. He sometimes spit in people's faces and used

²⁸ Ms. Keyser holds a bachelor of arts degree in special education and has been a special education teacher for Evergreen since she completed her degree in 2016. J46.

language such as “son of a bitch,” “toots,” “farted,” and “butthole.” Additionally, he would sometimes step on someone’s foot or “kind of trip them.” Keyser T477-481; Spencer T1185-86. At 49th Street, the Student also learned the additional behavior of banging his head against the wall. Father T1386.

63. Ms. Keyser did not write a new BIP for the Student. She used the BIP that had been prepared at HMS (Exhibit D20) and made adjustments to reflect interventions and strategies that were effective. Keyser T586-87. She believed the BIP from HMS was appropriate, but because it was in a different format than she was accustomed to using at 49th Street, she consulted with the 49th Street BCBA in interpreting it. Keyser T586.

64. The Student was a good fit for Ms. Keyser’s class, although he had the fewest behavioral problems compared to other students in the classroom. Keyser T542, 564; Spencer T1245. The Student’s behaviors improved significantly from the time he started at 49^h Street until January and February, 2020. Keyser T563-65; Spencer T1212. Ms. Keyser believed 49th Street was an appropriate program for the Student from the time he arrived until the fall of 2019. Keyser T564

65. Robyn Spencer²⁹ provided SLP services to the Student at 49th Street. Approximately one time per month, Ms. Spencer arranged for the Student to have conversations with students in different classrooms and settings, such as during lunch and playing basketball. Spencer T1202; 1227; 1255-57. Although 49th Street does not have any general education students, Ms. Spencer explained during the hearing that students in the day treatment program, rather than the life skills program, are more typical to general education peers because they may be at 49th Street due to a social/emotional disability. Ms. Spencer also provided the Student with strategies to help him focus. Spencer T1187-88. By December 2019, the Student had progressed to being able to sit at a table and work with Ms. Spencer for 30 minutes. Spencer T1192-93. He also started filtering out background noise and advocating for a break when he needed one. Spencer T1192. He was “learning to be a student.” Spencer T1212. Additionally, he met his communication goal to take two turns in a conversation and, by the end of the winter of 2020, was learning to connect eyes with other students and adults when he said hello. Spencer T1201. His stamina for unwanted tasks improved a lot. Spencer T1192. The Father agreed that the Student did well behaviorally at 49th Street during the 2018-2019 school year. Father T1386. Although he had general concerns about academics, he did not have specific concerns. Father T 1347;1457.

66. During the hearing, there was conflicting evidence as to whether the Student’s speech and language services at HMS were provided by an SLP or SLPA. Ms. Dean testified that an SLP provided service to the Student because the District did not employ an SLPA at that time. Ms. Dean did not provide the name of the SLP who worked with the Student. Dean T209; 328. The Mother believed that Ms. LaGriede, who attended the December 2018 IEP meeting, was an SLPA at that time, but she did not provide the basis for this belief at the hearing. Mother T 1092. The attendance sheet for the December 2018 IEP meeting lists Ms. LaGriede as an SLP. J15 p4. Ms. Spencer reviewed Ms. LaGriede’s resume and considered her to be an SLP, not an SLPA, but acknowledged during the hearing that she does not know Ms. LaGriede and did not know with certainty whether the Student had been served by SLPs or SLPAs at HMS. Spencer T1223; 1233. Ms. LaGriede’s resume provides that she was an SLP employed by the District for 2018 and 2019,

²⁹ Ms. Spencer holds a master’s of science degree in speech and language pathology. She has worked for Evergreen as an SLP since 2016. Between 2010 and 2016, Ms. Spencer worked as an SLP in various rehabilitation settings, and she continues to work as an on-call therapist. J54.

but her resume also says that she has been a certified member of the American Speech-Language-Hearing Association since July 2019. J47 p2. The Parents did not call Ms. LaGriede to question her as to her qualifications and credentials. Considering this evidence as a whole, I find that it is not sufficient to establish whether Ms. LaGriede was an SLP or SLPA in December 2018 or at other times relevant to this matter.

67. On March 13, 2019, the IEP team increased the Student's ESY program from two weeks to four weeks because "his behaviors have contributed to a regression that requires more intensive ESY." J19 p5. The District contacted the Parents, who were unable to meet and gave permission for the team to proceed without a meeting. J19 p2.; Dean T336. The standard ESY program at 49th Street is four weeks, but students may attend for more than four weeks under special circumstances. Dean T337; Lindly T444, 455-56. The Parents did not voice any disagreement with the Student's 2019 ESY program. Dean T697.

68. On May 1, 2019, the Parents asked Ms. Dean whether the District had completed paperwork related to an evaluation of the Student by the Child Development and Rehabilitation Center. Ms. Ruby had completed and submitted the paperwork several weeks before. D29 p7.

Request for an IEP Meeting

69. On May 1, 2019, the Father requested an IEP meeting to ensure that the District was focusing on transferring the Student back to HMS as soon as he was ready. Father T1333; D29. The Father offered three meeting dates. D29, pp 6,7. Because Ms. Dean and Ms. Ruby were only available to participate for 20 minutes by telephone, the parties attempted to reschedule. Dean T341-42.

70. On May 22, 2019, Ms. Dean offered an IEP meeting on June 3, 11, and 17, 2019. The Father stated he was available on June 3 and 17, 2019, but Ms. Dean was no longer available and asked for dates in September. D29, p2-6. The Father offered to miss an event on June 11, 2019 to be available. Ms. Dean stated she was no longer available and again proposed September. The Father voiced his fear that if the team waited until September to devise a plan it would delay the Student's progress and goal to bring him back to HMS. D29 p1. Aside from being available for a 20 minute phone call on May 22, 2019, Ms. Dean did not offer any dates when she was actually available for an IEP meeting between May and August 2019. Dean T343-44.

ESY Program – Summer 2019

71. On June 11, 2019, the Father met with 49th Street staff. The meeting did not constitute an IEP team meeting because a District representative did not attend. D30; Dean T340. Staff at 49th Street talked about the Student's ESY program. Additionally, because the Student had shown a lot of progress, staff were anticipating that he would transition back to HMS in the fall. They wanted to see how he did during ESY, with a different group that included female students. They also wanted to see how he handled the start of the next school year. Keyser T499-500; Lindly T443-45. Ms. Keyser believed the ESY program was appropriate for the Student, that there was agreement as to the ESY plan, and that he did not require more ESY services. Keyser T545-47; 588.

72. During July and August 2019, the Student participated in a four-week ESY program at 49th Street. The Student “did great” in the ESY program. Keyser T548. There is no evidence in the record that the Student regressed during the summer of 2019.

2019-2020 School Year – Eighth Grade

73. In September 2019, the Student began his eighth grade year at 49th Street. Because he had had a successful ESY program and a good start to the school year, he was ready to start transitioning back to HMS. Keyser T544, 548; 550; Buno T415; Lindly T445.

74. Typically, 49th Street staff develop an individualized plan for transitioning a student back to their neighborhood school based on tracking behaviors and gradually adding more time at the new location as they show positive behaviors. Lindly T466. This helps to avoid increases in behaviors that can result from sudden transitions. Lindly T453. The shortest transition period is about 1.5 to 2 months. Lindly 462-63. Ms. Lindly is not aware of a student in the life skills program taking a full year to transition back to their neighborhood school. Lindly T463.

75. The IEP team did not meet in September 2019. The parties participated in mediation the final week of September 2019. Dean T344.

76. In late September 2019, the District contracted with Discovery Behavior Solutions (DBS). Heather Schwartz,³⁰ a BCBA employed by DBS, observed the Student at 49th Street on three occasions between October and December of 2019 to conduct an FBA and prepare a BIP. Schwartz T625-28; J17. The documents she prepared were significantly lengthier than the District’s FBA and BIP in Exhibits J14 and D20, which she described as more of a quick guide. Schwartz T630. Although her documents were more detailed, Ms. Schwarz did not opine that J14 and D20 were inappropriate. Ms. Schwarz’ BIP included many of the existing support strategies listed in the Student’s December 3, 2019 IEP in Exhibit J15 pp17-18. Schwartz T671.

77. On October 1, 2019, the District held an IEP team meeting. The District sent notice by email. Dean T337. The record does not establish the precise contents of the notice. In attendance were the Parents; Christy Bisconer, a District SLP; Ms. Keyser; Ms. Lindly; Ms. Villa; Ms. Ruby; Ms. Briggs, a District OT; and Ms. Dean. J22 p1. A general education teacher did not attend. J22 p1; Dean T337. The team wanted to transition the Student back to HMS and started discussing that process. Dean T961; Keyser T550-51. The team did not present the Parents with a transition plan at that point. Father T1334-35; Keyser T574.

Request for Records

78. On October 11, 2019, the Parents filed a due process hearing request that resulted in a stay-put placement for the Student. The Parents sought the Student’s immediate placement at HMS with proper ABA supports. T1415. The Parents requested all educational records related to the Student, including all special education records; general education records; data, journals, and progress reports and documents used and relied upon in generating progress reports; contractual agreements related to the Student; communications, including email communications related to the Student and the Parents. D88 p1.

³⁰ Ms. Schwartz has a master’s degree in early childhood education and is BCBA. Schwartz T614-29; J53.

79. Ms. Dean oversaw the production of documents. She worked with the District's public records officer and provided search criteria to a member of the District's technical team. Dean T746; 757-58. In response to the request, the District sent CDs in installments on October 15, 2019, October 30, 2019, December 4, 2019 (two installments), December 11, 2019, December 19, 2019, December 20, 2019, January 6, 2020, January 7, 2020, January 9, 2020, and February 5, 2020. D88 pp1-13. Ms. Dean also uploaded all of the documents from the CDs into Google Drive and sent them to the Parents' counsel. Dean T754.

80. Ms. Dean provided Evergreen staff with the records request and relied on them to provide documents. Dean T941; 948. Ms. Dean made a good faith effort to comply with the records request. Dean T. 964. The response included turning over "a very large number of emails that were pulled from the email search." Dean T755. During cross-examination at the hearing, however, Ms. Dean acknowledged that she had missed at least one e-mail and that the search criteria did not include the Student's ID number or common misspellings of the Parents' last name. Dean T944-45. The District had an electronic student record database called Skyward from which Ms. Dean printed and provided records. Dean T947.

81. Ms. Keyser produced the documents associated with the Student, except for response and prevention plans she prepared in Google documents. These were a quick reference printed out and kept on a clipboard for staff working with the Student. Ms. Keyser wrote over them in Google documents as things changed. Keyser T571-73; 580, 583.

Request for Different IEE Providers

82. On October 10, 2019, the Parents' counsel notified the District by email that "the previously identified [IEE] provider (OHSU) has an exceptionally long waiting list. As such, we are identifying alternative providers to the [District]" The email identified Dr. Lionel Enns, Marilea Brock, Advanced Pediatric Therapies, Inc., and Pediatric Therapy Associates (Jennifer Rainey-Yates) as alternative providers to conduct the Student's IEE. D37 p1.

83. On October 21, 2019, the District issued a PWN proposing to slowly transition the Student back to HMS because his behaviors had decreased. J22. In a second PWN issued on October 21, 2019, the District approved the IEE providers proposed by the Parents in lieu of OHSU. J21. The Mother was not certain when she made appointments with these providers. Mother T1138-39.

Scheduling an IEP Meeting

84. On November 4, 2019, Ms. Keyser notified the Parents that she was working on the Student's IEP, which was set to expire on December 2, 2019. Her email stated: "We have a date set for the [IEP] meeting on November 26, 2019 at 2:20. Hope that works for you as well." J39 pp2-3. Ms. Keyser sent a follow up email on November 6, 2019. On November 7, 2019, the Parents responded that they had been advised not to reply by their attorney, who would reply on their behalf. D39 p2.

85. On November 21, 2019, the Parents' counsel notified Ms. Keyser that an IEP team meeting was not scheduled for November 26, 2019, because no mutually agreeable IEP team meeting date had been set. The email stated the Parents would never miss an IEP meeting and wanted

to attend every IEP meeting. D40 p2. It did not state whether the Parents were unavailable to meet on November 26, 2019, and did not offer alternative dates.

86. On November 22, 2019, counsel for both parties exchanged emails concerning scheduling. The District's counsel inquired about availability on December 5, 6, 9 and 10. D42 p4. The Parents' counsel noted: "one of the Parents was scheduled for a medical procedure and obviously we will not agree to a time that conflicts with that or recovery from the medical procedure." The email did not indicate when the medical procedure had occurred or was set to occur and did not propose a meeting date or time. D42 p3.

87. That day, the District replied: "You did not specify that 12/5 was completely unavailable. If 12/9 and 12/10 are unavailable, is there any other date that week that is available?" D42 p2. The Parents' counsel did not offer a date, but responded: "That is because [the District's counsel and the District] have committed to attending an all-day ALJ settlement conference that day. I trust you are not proposing a 6 am or 6 pm IEP meeting." D42 p2. The District responded: "Are there any other dates the week of December 9" D42 p1. The Parents counsel replied: "[O]ne of the parents is having a medical procedure so I cannot commit to any dates until I talk to them." D42 p1.

88. On December 3, 2019, the District's counsel sent an email asking for the Parents' availability for an IEP meeting. D44 p3. The Parents' counsel responded but did not provide availability. D44 p1-2. On December 7, 2019, Ms. Dean sent an email stating "The [IEP] meeting will take place at 49th Street Academy at 7:00 a. m. on December 11th." D45 pp3-4. The Parents' counsel responded that date would not work because counsel for both sides were scheduled to attend an ALJ settlement conference in another matter. The Parents' counsel reiterated the Parents' desire to attend the IEP meeting but did not offer dates. D45 pp1-2.

89. On December 9, 2019, Ms. Dean notified the Parents that she had scheduled the IEP team meeting for December 12, 2019 at 7 a.m., which was three days away. D47 p1. In several emails on December 9, 2019, the Parents' counsel responded that she was not available on that date with such short notice and emphasized that the meeting should be held at a mutually agreeable date and time. D47 p1; D48 p2. The Parents' counsel stated "Stop trying to violate Ninth Circuit law by forcing a meeting on days when they're not available." D48 p1. In these emails on December 9, 2019, the Parents did not offer any dates when they were available.

90. On December 10, 2019, attorneys for both sides had a telephone conversation. In an email after the meeting, the Parents' counsel thanked the District "for confirming that there will not be an IEP meeting on 11/12 [sic] at a time that is not mutually agreeable," and provided her own availability. D50 p2. The District's counsel responded: "There was no discussion about cancelling the meeting on the 12th. If we are unable to find a mutually agreeable date based on the dates you provided, then the meeting on the 12th will be going forward." D50 p1. Later that day, Ms. Dean notified the Parents that the IEP meeting would be held on December 16, 2019, because their attorney was available on that date. The Parents' counsel responded that although she was available, the Parents were not. The Parents' counsel proposed December 20, 2019 at 10 a.m., and the meeting was scheduled for that date. J23 and J24.

91. On December 19, 2019 after 9:00 p.m., the Parents' counsel emailed the District's counsel to alert them that the Mother had a fever and intestinal distress, the Student might also be sick, and the Father had to work because of coworkers calling in sick. D56; D57. The Father learned

of the work obligation the evening before the meeting. Father T1336. The Parents' attorney stated that if the District went ahead with the meeting, the Mother would attend even if she was ill. She emphasized that the Parents "absolutely want to attend this meeting," and were seeking to reschedule on December 26 or 27, 2019. D57.

December 2019 IEP Meeting

92. On the morning of December 20, 2019, Ms. Dean learned that the Parents would be unable to attend the meeting. Dean T350. The District notified the Parents' counsel that the meeting would proceed as scheduled because the current IEP had expired and they anticipated difficulty scheduling another meeting with all participants, especially because District schools were on break until January 6, 2020. The District had also arranged for substitutes to fill in for participating team members. D59 p8. The District's email did not mention that it was important to hold the meeting as scheduled to ensure timely discussion of transitioning the Student back to HMS.

93. The Parents' attorney again requested that the District reschedule because the Parents could not participate by phone. D59 p5. The email stated that the parents "desperately want to attend" and that rescheduling the meeting would have no impact on the Student because of winter break. D59 p4. The Parents were willing to meet the week of January 6, 2020, if District employees could not participate during winter break. The District responded that the meeting would proceed as scheduled. At this point, the District also noted that a key element for consideration at the meeting was the Student's transition back to HMS. D59 p 5.

94. The Student's IEP team met to review and adopt a new IEP on December 20, 2019. Dean T351. In attendance were Ms. Schwartz, Ms. Dean, Ms. Abegglen, Ms. Keyser, Ms. Spencer, Mr. Buno, and Troy Haverkamp, an OT. J25 p2. The team considered the Parents' feedback on a draft IEP. J25 p33. The team also considered the Student's progress toward his goals and set new goals. J25 pp6-25. Additionally, the IEP provided 460 minutes per week of instruction in behavior skills and continued to provide a behavior consultant. J25 p29. The IEP reduced the consultant time from 30 to 20 minutes per month, and changed the service provider from a behavior consultant to a special education teacher supervised by a BCBA. J25 p29; J15 p25; Dean T352. The IEP provided 445 minutes of adaptive instruction each week. J25 p29. The team recommended transitioning the Student back to HMS. A significant part of the meeting was devoted to Ms. Keyser, Ms. Schwartz and Ms. Spencer working on the details of the transition plan. Keyser T559; J25 pp37-38. The Parents did not have any input as to this plan. Keyser T578.

95. In a PWN issued December 20, 2019, the District indicated that it would initiate the proposed change to the Student's IEP and placement on January 6, 2020. J25 p33-34. The team also developed a new BIP for the Student. The team noted that the Student's behaviors changed based on staffing and staff familiarity with his BIP. J25 p39; D60 p1.

96. On December 31, 2019, the Parents filed another due process hearing request, which again resulted in a stay-put placement for the Student. The previous due process hearing request was dismissed without prejudice on January 13, 2020 by ALJ Jacqueline Becker. D63; File in Cause No. 2020-SE-0148.³¹ The Parents' records requests were updated after the District received this request. Dean T964.

³¹ The Parties did not provide the dismissal order in Cause No. 2020-SE-0148 as an exhibit in this case, but agreed that it would be appropriate to take judicial notice of the file in that case. See RCW 34.05.452(5)

97. On January 3, 2020, the Parents' counsel notified the District that the Parents were not interested in an after-the-fact IEP meeting, which they did not consider sufficient to remedy the District's actions in holding the December 2019 IEP meeting without the Parents present. D64 p1. The Parents disagreed with the District's transition plan in Exhibit J25 p37 because it did not provide any ABA support. Father T1447; D69 p2.

98. Between January 6, 2020 and January 28, 2020, the parties were unable to schedule a resolution meeting because they could not agree on who would attend. D65; D66; D67; D69; D70; D72.

99. On January 6, 2020, the District's counsel asked if the Parents were available for a resolution session on January 10 or 24, 2020. D65 p2; D66 p5. The Parents' counsel wanted certain IEP team members to be present and asked when the District could hold a meeting with these individuals present. D65 p1. The District then offered January 17, 2020, to which the Parents' counsel responded: "Same response as to your prior emails. Please confirm: 1) a timeline for production of documents prior to the resolution session . . . and 2) availability of the requested IEP team members." D66 p4-6. The District responded that it would not require the IEP team to attend a resolution session, that it had sent the documents on December 19, 2019, and again asked if the Parents were available on January 10, 17 or 24, 2020. D66 p3-4. In response, the Parents' counsel discussed the requirements of WAC 392-172A-05090 concerning resolution sessions, but did not provide the Parents' availability. D66 p2. The District's counsel responded: "The District accepts the Parents' refusal to hold a resolution session. The District is not waiving the meeting." In return, the Parents stated: "The only refusal is that of [the District], who per your email is refusing to convene a meeting" with the relevant members of the IEP team present. The Parents' counsel requested that the District provide dates for a meeting when Ms. Keyser, Ms. Schwarz, a general education teacher from HMS, and a special education teacher from HMS could attend. D66 p1. Throughout this exchange, the Parents did not provide their availability on any of the offered dates.

100. On January 9, 2020, counsel for the parties continued to exchange emails. The District asked the Parents to identify every date they were available for a resolution session within the next 15 days, again offered January 17 and January 24, 2020, and stated that Ms. Dean and a District representative would attend. D67. The Parents counsel responded: "I have no desire to get into another tedious circle with you. The [District] does not get to unilaterally determine who from the IEP team is present." The Parents reiterated who they wanted to attend and noted that if the District "is refusing to follow the IDEA . . . we will seek intervention from an ALJ." D67 p3. In response, the District's counsel opined that the Parent's request was not reasonable and offered to have Ms. Schwarz attend as a compromise, noting "however, we will not commit to having that person available without an identified date from the Parents." D67 p2. The Parents' counsel responded by again quoting WAC 392-172A-05090, reiterating who the Parents wanted present, and stating that they would seek intervention from the ALJ if the District refused to comply with the IDEA. The Parents continued to provide no response to the dates offered. The Parents' counsel sent another email: "Side note, it is not unreasonable to have the core minimum members of an IEP team present, particularly when the Parents were excluded from the last IEP meeting. What was unreasonable was failing to include the Parents and the HMS staff at the IEP meeting. No transition is going to work without the buy in of HMS staff. Please back off and be reasonable yourself here." D67 p1. The Parents did not provide their availability to meet throughout this exchange.

101. On January 14, 2020, the Parent's counsel sent a letter to the District's counsel proposing a formal transition plan for the Student. The letter reiterated the request for Ms. Keyser, Ms. Schwartz, and a general education and special education teacher from HMS to attend. D69 p2-3. On January 15, 2020, the District responded that it agreed to the meeting and offered more dates. On January 18, 2020, the Parents provided the District with a proposed transition plan, contained in Exhibit D73, that had been "vetted" by Dr. Enns and shared with DBS. D69 p1. Ms. Keyser, Ms. Spencer and Ms. Schwartz also worked on the plan. Keyser T509. The Parents still did not provide their availability for a resolution meeting on any of the dates offered. D69.

Transition Plan

102. On January 19, 2020, the Parents asked the District to adopt the transition plan in D73 in place of the plan adopted during the December 20, 2019 IEP meeting. D70 p2. On January 21, 2020, the District's counsel responded "In an earlier email I provided dates for a possible resolution meeting where the transition plan can be discussed. We have also agreed to have the people attend you requested. Do any of the dates work for you and your client? D70 p1. The Parents' counsel responded that it was asking the District to implement the transition plan in D73 but did not provide the Parents' availability for the resolution session. D70 p1.

103. A resolution meeting took place on February 6, 2020, with individuals requested by the Parents in attendance. D72. During the resolution session, the parties agreed to a plan to transition the Student back to HMS. Accordingly, the team proposed to amend the December 2019 IEP, noting that "the amendment comes in the form of the attached transition plan." J30 p1. The reference to the attached plan is to the transition plan contained in Exhibit D73. Dean T362. On February 18, 2020, the District issued a PWN proposing to change the Student's IEP with an effective date of February 19, 2020.

104. The transition plan in Exhibit D73 provided in relevant part:

Provision of Supplemental Aides and Services

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

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

It is anticipated that the District will contract with Discovery Behavior Solutions (DBS) to provide Applied Behavior Analysis (ABA) services,³² including the RBTs and/or

³² "The dedicated RBT and/or CBT would be supervised by the BCBA and/or LABA consistent with the Behavior Analyst Certification Board Ethics Code. [The Student] would be provided ABA services throughout his educational day as a supplementary service and as a method for providing specially

CBTs and BCBA and/or LABA, as the District has already contracted with DBS to have BCBA Heather Schwartz observe [the Student]. It is anticipated that Ms. Schwartz³³ will be the BCBA assigned to work with [the Student] and supervise the dedicated RBTs and/or CBTs who are assigned to serve him and to serve as substitutes for him.

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

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

D73 p1 (Footnotes in original).

105. Ms. Schwartz kept track of the Student's behavior during the transition. D74. The Student did not display any inappropriate behavior during the first week of the transition, other than to say the words "toot," "butt cheeks," and "butthead." Dean T364. On March 9, 2020, the District issued a PWN proposing to update the Student's transition plan to reflect his progress and increasing his time at HMS to 2 hours per day. J32 p2. The Student's progress in the transition plan was "fantastic." Keyser T510; Schwartz T640; Father T1340. The Father believes Ms. Schwartz was doing a good job with the Student. Father T1437.

106. On March 17, 2020, District schools closed in accordance with an order by Washington Governor Jay Inslee closing schools statewide to prevent the spread of COVID-19. D76. At that point, the Student was one day away from spending three hours at HMS. Keyser T510. The Student likely would have completed the transition process by the end of the 2019-2020 school year if he had continued to attend school. Keyser T510; Schwarz T642.

Observation by Dr. Enns

107. Dr. Lionel Enns, PhD,³⁴ conducted an assessment of the Student as part of the IEE. He reviewed the Student's medical and developmental history, and educational records provided by the Parents, which did not include the Student's IEPs. Enns T859; 823-24. He administered the Autism Diagnostic Interview, Revised (ADI-R); the Behavior Assessment System for Children, Third Edition (BASC-3) with parent and teacher rating scales; and the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3). J28 p1. On January 9, 2020, Dr. Enns observed the Student

designed instruction in the areas of adaptive, behavior, and social emotional skills." (footnote is from transition plan)

³³ "This is not intended to bind Ms. Schwartz in any way, but instead to identify who has already observed [the Student] and is familiar with him. The District currently has a contract with DBS. This plan does not supersede or dictate the terms or duration of the contractual relationship between the District and DBS." (footnote is from transition plan)

³⁴Dr. Enns has a PhD in School Psychology. He is also a BCBA-D, or board-certified behavior analyst, doctoral, and is a Nationally Certified School Psychologist. Enns T774-77; J45.

at 49th Street for approximately two hours. Enns T846. At that time, the Student's behavior was significantly improved compared to his behavior when he arrived at 49th Street. Keyser T563.

108. Dr. Enns observed the Student working with his paraeducator, Katy Lowry. Dr. Enns was impressed by her effective manner of working with the Student and noted "it takes a lot of energy, a lot of expertise to do what Ms. Lowry was doing, and it was exceptional." Enns T787. Dr. Enns was also impressed by Ms. Keyser's work with the Student and noted that she was a "talented behaviorist." Enns T788. In his view, the issue in addressing the Student's behaviors was not his physical placement or environment, but the expertise of the individuals who worked with him. Enns T814; 853; 874. He believed that the Student's behaviors changed based on the application of sensitive, thoughtful interventions that provided him with the level of support he required, and contended these supports could have been provided at HMS. Enns T824; 854.

109. During January 2020, Dr. Enns also visited HMS for approximately 30 minutes, where he interviewed Ms. Dean and Ms. Ruby. J28; Enns T783-84, 823. The Student was not present in the classroom at that time. Enns T823. When he met with Ms. Dean and Ms. Ruby, Dr. Enns did not review all of the behavior interventions they had tried with the Student, and he does not know what behavioral interventions the Student's teachers and paraeducators actually tried. Enns T838; 824. He was concerned because there was an OT room with a swing at the back of the classroom and "if I recall correctly, I think that was also used as a place where . . . Student might be isolated when behaviors ramped up." Enns T825. In his opinion, there should be some separation between the classroom space and a space where the child can go when "things get out of hand." Enns T825.

110. Dr. Enns noted that at 49th Street, the Student's behaviors rapidly deescalated, indicating staff were doing exactly what they should be. At HMS, in contrast, the Student's escalating behaviors indicated to him that the Student was ahead of staff and they were being reactive. Staying ahead of the Student is key to reducing problem behaviors. Enns T830-31; J28 p13.

111. At the hearing, when asked about the District's FBA in Exhibit J14, Dr. Enns did not have a strong recollection of the document. He opined "it's not completely off the beam," but he felt it needed to be more thorough and detailed. Enns T809-10. In order for a behavior plan to work, people have to be very well trained so that they have an understanding of why behaviors occur. Enns T810; Schwartz T680.

112. Dr. Enns believed that the District should have consulted with a BCBA or someone with similar expertise in drafting the FBA. Enns T813. A BCBA has very specific knowledge about autism. In his view, school psychologists generally do not have the same training and experience as a BCBA, but he noted there are exceptions. Enns T818. Dr. Enns did not express any opinion on Ms. Villa's training and experience as compared to a BCBA. He knows Vanessa Tucker, PhD, and considers her work as a highly trained BCBA to be excellent. He believed that it would have been helpful to involve Dr. Tucker in the Student's case in the fall of 2018. Enns T819.

113. Dr. Enns concluded that 49th Street was not the Student's LRE at any time the Student attended, noting that other students in his classroom were more profoundly impacted by behavioral, emotional, psychological, and cognitive challenges. J28 p13; Enns T790; 863-64. According to Dr. Enns, the methods Ms. Lowry and Ms. Keyser applied at 49th Street could have been applied in a more typical environment. Enns T790-91; 842. He acknowledged in his report, however, that 49th Street did not have female students, and was therefore "less problematic from

an antecedent perspective.” J28 p20. Dr. Enns noted that the Student “has a very high level of need, and he needs intensive supports provided by experts who understand what they’re doing, and that would shape his behaviors.” Enns T838. Dr. Enns acknowledged that Ms. Keyser and Ms. Lowry do not have ABA training, and that a person who is not an RBT or BCBA could be successful in working with the Student. However, it is difficult to find someone with that level of expertise and working with a BCBA ensures a high level of training. Enns T844; 866.

114. Additionally, he did not believe that the Student had benefited from his time at 49th Street. Enns T843. In his view, the placement at 49th Street slowed things down because if the interventions used at 49th Street had been used at HMS, the Student would not have had to transition between the schools. Enns T877.

115. In his report, Dr. Enns noted that Ms. Keyser said “I don’t know why [the Student’s] here.” J28 p11; Enns T788. During the hearing, Ms. Keyser acknowledged that she had made that statement, but as part of a longer conversation about the transition plan and the Student’s need to get started in that process. Keyser T. Keyser T508.564. I give more weight to Ms. Keyser’s testimony as to the meaning of her own statement.

116. In his report, Dr. Enns noted that ABA therapy could be beneficial at home and at school. He recommended that the Student receive ABA support at school by a team led by Ms. Schwartz. Enns T779; J28 p22. The individuals who worked with the Student under Ms. Schwartz’s direction would need to have expert training. Enns T779. His recommendations included, among other things, that the District work with the staff at 49th Street to learn the behavioral methods effective in working with the Student, and training for support staff in focusing on the functions of the Student’s behaviors and using fewer verbal commands. J28 p22-23. Ms. Schwartz agreed with the recommendations in Dr. Enns’ report. Schwartz T636.

117. To compensate for time he was unable to interact with general education peers while at 49th Street, Dr. Enns believes that the Student would benefit from ABA support in a community setting with peers where he could learn appropriate social skills. The ABA support could be assistance from an RBT. Enns T869.

Records Review by Dr. Tucker

118. Vanessa Tucker, PhD,³⁵ started contracting with the District as a consultant in 2017. J55; Tucker T1051. At the District’s request, Dr. Tucker reviewed the Student’s educational records in this case. Tucker T995. Dr. Tucker has never met or observed the Student, and has never met the Parents. Tucker T995; 1050. She has not been to 49th Street or spoken with 49th Street staff. Tucker T1051.

119. Based on her review of the Student’s educational records, Dr. Tucker believed the Student’s desire to interact with peers was being expressed in an unsafe way. He also had difficulty working on nonpreferred tasks, a significant level of prompt dependence, and was demonstrating sensory overload in his environments with noise and other activities in the school setting. Tucker T998.

³⁵ Dr. Tucker has a PhD in Applied Behavior Analysis. Her focus included autism spectrum disorders. Dr. Tucker is also a BCBA-D. J55; Tucker T984-85. Between 2004 and 2010, Dr. Tucker was a special education coordinator for the Tacoma Public Schools. Tucker T987. Prior to that position, she taught special education for many years. Tucker T988.

Dr. Tucker found Ms. Villa's simple format for BIPs to be more practical in working with people than a lengthy document. Tucker T1003; 1007-08. Dr. Tucker also found the District's FBAs and BIPs to be "excellent," as long as "all members have the training and supervision in understanding the back story of the larger document it is based on and provided that the staff learned from each episode of behavior." Tucker T997, 1008. From her review of Ms. Villa's observations of the Student during his reevaluation, Dr. Tucker believed that District staff were using interventions that were in alignment with the FBA. Tucker T1020-21; Exhibit J12 p19. Dr. Tucker opined: "The teachers [at HMS] were excellent, from my review of records. What they put into place, I would want for any of my teachers that I train. And so if we take that element out, the only element remaining is the change in environment as the catalyst for opening that door so that he could develop new behavior patterns that he could bring back." Tucker T1069. Although Dr. Tucker found evidence the staff was implementing appropriate interventions, she does not know in fact whether the strategies were implemented. Tucker T1030; T1055-56.

120. In Dr. Tucker's opinion, a paraeducator can be trained to implement ABA strategies. Tucker T1027. A high-level degree is not necessary to implement behavioral strategies such as those listed in Exhibit J15 pp17-18, but training is critical. In supervising, "you model, you train, you supervise and you learn from these things." Tucker T1067-68.

121. Dr. Tucker believed that even if the District had brought in a trained BCBA to assist in the development and operation of the Student's program, they "would have ended up having to put him in an entirely separate environment, away from the things that triggered him. And that, to me – is more exclusionary than other options that were explored and implemented. A BCBA is going to recommend the same things that were already present" in the existing strategies listed in Exhibit J15 pp17-18. Tucker T1033. She did not believe the District could have changed the environment for the Student at HMS by bringing in an RBT or BCBA unless they had also segregated him entirely. Tucker T1037.

122. Based on her review of the Student's 49th Street records, Dr. Tucker was impressed by Ms. Keyser's knowledge, the reduction in the Student's high-level behaviors, and the development of new strategies the team could use when he returned to HMS. She believed the reason the Student's behaviors suddenly improved after he moved to 49th Street was because the contingencies had changed for him. She defined contingencies to mean "what exists around the person, whether it is reinforcement based on social attention from peers, or another contingency could be noise that is present in the environment or a larger number of students. So things that are present in the environment." Tucker T1035. She believed 49th Street was an appropriate placement that increased his behavioral growth. Tucker T1036; 1038. For instance, he learned to ask for a break, meaning that he developed skills in self-regulation. Tucker T1040.

123. Dr. Tucker did not believe it was appropriate or necessary to provide the Student with an RBT to go to community activities as a way of making up for time away from his general education peers while at 49th Street because the Parents identified community settings as areas of strength for him. Tucker T1043-44; 1079. During the hearing, the Father testified that they have not taken the Student into the community because they have not had supports. Father T1391-92. I give more weight to the Father's testimony on this point because Dr. Tucker has never met or spoken with the Student or his family.

Communication Assessment

124. Marilea Brock³⁶ conducted a communication assessment of the Student as part of the IEE. On February 12, 2020, Ms. Brock observed the Student at 49th Street for approximately 1.5 hours. J31 p7; Brock T227. Ms. Brock confirmed with Ms. Keyser that the Student's behaviors on the day of her visit were consistent with his typical behaviors. Brock T235. The Student engaged in some "potty talk," but it was "pretty tame" and did not prevent him from engaging in assigned tasks. Brock T236. Ms. Brock observed that the Student did not have any opportunities to communicate directly with his peers. Rather, all communication was facilitated through an adult. Brock T230-31. As a result, she concluded that the Student did not have the opportunity to address social communication goals or functional communication goals. Brock T232; 237. Ms. Brock does not think 49^h Street was an appropriate placement for the Student in the area of communication and recommends a program in his home school. Brock T247

125. Ms. Brock recommended that the Student "must be given the opportunity for meaningful peer communication interactions," noting that 49th Street did not provide such an opportunity. J31 p9. Ms. Brock also recommended that the Student needed 1:1 support from a trained paraeducator, meaning a person who is trained as a CBT or RBT, or a person who has "gone through pretty significant training" and is skilled. Brock T243.

126. Ms. Spencer disagreed with a recommendation in Ms. Brock's report to target articulation goals. Spencer T1213-14; J31 p9. The Student had had years of articulation therapy and was not making any progress. She thought working on articulation therapy such as drilling and sound practice was "a surefire way to get him to want to check out." Spencer T1214. Because the Student made significant progress working with Ms. Spencer at 49th Street, whereas Ms. Brock has only observed and has never worked with the Student, I give more weight to Ms. Spencer's testimony on this point.

Additional Assessments Performed as Part of the Student's IEE

127. Pediatric Therapy Associates performed a physical therapy assessment as part of the IEE and issued a report on December 9, 2019. J26; Dean T357. The record does not contain evidence of when the District received this report.

128. Discovery Behavior Solutions conducted a functional behavior assessment (FBA) and prepared a report on December 25, 2019. Despite the date on the report, the District did not receive it until approximately one week to three days before it held the meeting to discuss the IEEs on April 8, 2020. J27; Dean T358; J33.

129. Dr. Enns completed his report on January 28, 2020, and the District received it around that time. J28; Dean T360.

³⁶ Ms. Brock is a credentialed SLP, licensed to practice in Washington and recognized by the National Association of Speech/Language Pathologists. She has been practicing since 2005. Brock T223-25; J43. During the hearing, Ms. Brock testified near the end of the day and there was insufficient time for the District to cross-examine her. The District determined that it was not necessary to cross-examine Ms. Brock. T882.

130. Advanced Pediatric Therapies, Inc. conducted an OT assessment as part of the IEE and prepared a report dated February 11, 2020. J29. The District received the report on or about that date. Dean T361.

131. The District received Ms. Brock's report on or about February 28, 2020. Dean T364; J31.

132. The District held an IEP meeting to discuss the IEE, comprised of the foregoing assessments, on April 8, 2020. Dean T360.

133. The Parents request that the Student be placed at HHS with a dedicated RBT under the supervision of a BCBA. Mother T1159; Father T1340. They believe that after the summer, the Student should not split his time between HHS and 49th Street because it would be disruptive and he would be spending close to an hour traveling back and forth between schools. T1341-43;

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

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

The IDEA and FAPE

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

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

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures

reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

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

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

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

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

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

7. The Ninth Circuit has explained the *Andrew F.* standard as follows:

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

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

Evidentiary Rulings

8. The Parents offered Exhibit P3 (P3), an email exchange involving Ms. Dean and Evergreen staff, for impeachment purposes. The District objected on the ground that P3 was not included in the Parents' proposed exhibits exchanged five business days before the hearing. Under the five-day rule, any party to a due process hearing has the right to prohibit the introduction of evidence that has not been disclosed at least five business days before the hearing. WAC 392-172A-05100(1)(c). The Parents contend that they did not produce P3 because they could not have anticipated the need to impeach Ms. Dean's testimony. They also contend that they thought

P3 would be included in the joint exhibits, which were agreed to by the parties but assembled and submitted by the District.³⁷ This ALJ took the matter under advisement to be decided in the final order, but permitted the Parents' counsel to use the document to refresh Ms. Dean's recollection and to question her.

9. During her testimony, Ms. Dean acknowledged that she contacted Evergreen before the Student's evaluation to determine if 49th Street had space for the Student. Dean T138-39. Although she recalled discussions about space for the Student, she did not recall discussions about billing. Dean T149-50. Therefore, the Parents sought to admit P3 to impeach her credibility. P3, however, holds little evidentiary value for the following reasons. First, although Ms. Dean authored the first email inquiring about placement, she was not even copied on two subsequent emails between Evergreen staff members. Exhibit P3 pp1-2. The only email Ms. Dean authored is consistent with her testimony that she was inquiring whether 49th Street had space for the Student. P3, on its own, is not sufficient to contradict this testimony. Therefore, the District's objection to Exhibit P3 is sustained and the email is not admitted into evidence.

10. The Parents objected to the admission of Exhibit D68, claiming it involved confidential settlement information. The parties agreed that the information the District was seeking to admit into the record was also contained in Exhibit D69. Accordingly, Exhibit D68 was not admitted.

Statute of Limitations

11. Under WAC 392-172A-05080, a due process hearing request must be made "within two years of, and allege a violation that occurred not more than two years before, the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint" The Parents filed their due process complaint on January 9, 2020. There is no dispute that the complaint is limited to actions that occurred after January 9, 2018.

Independent Educational Evaluation (IEE)

12. The Parents contend that the District violated the IDEA and denied the Student a FAPE by failing to timely complete an IEE at public expense. (Issue 1.a.). Under WAC 392-172A-05005, parents of a student eligible for special education have the right to obtain an independent educational evaluation (IEE) of the student if the parent disagrees with the school district's evaluation. If a parent requests an IEE at public expense, the school district must either initiate a due process hearing within fifteen days to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense without unnecessary delay. WAC 392-172A-05005(2)(c). If a parent obtains an IEE at public or private expense that meets applicable criteria, the District must consider the results of the evaluation. WAC 392-172A-05005(5)(a). Additionally, in this case, the District's IEE criteria provides that the District will convene an IEP meeting within 30 days to consider the results of the evaluation.

³⁷ The District timely submitted the joint exhibits but they were not accessible because of formatting issues. The Parents were given extra time to review the joint exhibits to ensure that all documents to which the parties agreed had been submitted. See *Fifth Prehearing Order, June 2, 2020*. When the exhibits were discussed at the start of the hearing on June 8, 2020, the Parents did not identify any documents as missing from the joint exhibits and did not ask for additional time to review the documents. Consequently, I am not persuaded by the Parents' claim that proposed Exhibit P3 should have been included in the joint exhibits and is therefore admissible.

13. Although the IDEA does not define the term “unnecessary delay,” the Office of Special Education Programs (OSEP) has explained that the term allows for “a reasonably flexible, though normally brief, period of time that could accommodate good faith discussions and negotiations between the parties over the need for, and arrangements for, an IEE.” *Letter to Anonymous*, 56 IDELR 175, 111 LPR 13073 (OSEP 2010). The determination of whether there has been unnecessary delay depends on the facts of each particular case. *J.P. v. Ripon Unified Sch. Dist.*, 52 IDELR 125, 109 LRP 22025 (E.D. Cal. Apr. 15, 2009).

14. Here, the Parents requested an IEE on December 4, 2018, and the District approved that request on December 17, 2018. The parties anticipated that Oregon Health and Science University (OHSU) would conduct the evaluation, but because OHSU had a long waitlist, both parties agreed to different providers. The Parents’ claim focuses on events that occurred *after* the parties agreed to use different providers. T1469.

15. There is disagreement as to when this occurred. The Parents suggest that they made a new request for an IEE on May 1, 2019. At that point, they sent an email inquiring whether the District had completed reevaluation paperwork for the child development and rehabilitation center, and the District responded it had. Although the Parents assert this email constituted a renewed request for an IEE, the record does not support this assertion. The May 1 email did not mention OHSU and therefore did not provide notice that the Parents were no longer interested in waiting for an evaluation by OHSU. Additionally, the email did not request any other providers. The Parents first notified the District that they would prefer to work with other providers because of the long waitlist at OHSU on October 10, 2019. It is therefore concluded that October 10, 2019 is the date when the parties agreed to use a different provider. The Parents concede that the District quickly approved those providers on October 21, 2020. With this evidence, the Parents have not met their burden to show that the District acted with unnecessary delay.

16. The Parents also allege that the District violated the IDEA and its own policy by failing to timely consider the results of the evaluation, which was comprised of assessments by Dr. Enns, Marilea Brock, Advanced Pediatrics, Discovery Behavior Solutions, and Pediatric Therapy Associates. PB 22. The District received reports from these providers on or about January 28, 2020, February 28, 2020, February 11, 2020, April 5, 2020, and December 9, 2019, respectively. It is reasonable that the District would wait until it had all of the assessments that were part of the evaluation before it conducted its review of the evaluation. The District policy provides that it will “convene an IEP meeting within 30 days to consider the results of the evaluation.” It does not state that it will review each assessment report individually within 30 days of receipt of that report. Once the District had all of the assessments that comprised the evaluation, it met promptly. Therefore, the evidence does not establish that the District violated the requirements of the IDEA, WAC 392-172A-05005, or its own policy.

Claims Related to the Student’s IEPs

Whether the Student’s IEPs from January 2018 Forward Were Reasonably Calculated to Enable the Student to Make Meaningful Educational Progress Given His Unique Needs?

17. The Parents allege that from January 9, 2018, forward, the District violated the IDEA and denied the Student a FAPE by failing to offer IEPs that were reasonably calculated to allow the Student to make meaningful educational progress or to obtain an educational benefit given his

unique needs. (Issue 1.b.) At issue are the IEPs from January 2018, April 2018, December 2018, and December 2019. PB p27 n.8.³⁸

18. Specifically, the Parents allege that the District, in developing the Student's IEPs, failed to consider his unique needs in light of his behavioral challenges by 1) adjusting his behavior minutes based on school scheduling rather than his individual needs; 2) failing to provide appropriate supplementary aids and services; and 3) failing to include direct instruction from appropriately trained staff members. PB 27-33.

19. The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry that must focus on the unique needs of the student at issue. As the U.S. Supreme Court has made clear, "[a] focus on the particular child is at the core of the IDEA," and an IEP must meet a child's "unique needs." *Endrew F.*, 137 S. Ct. at 999 (emphasis in original). "An IEP is not a form document," and the "essential function of an IEP is to set out a plan for pursuing academic and functional advancement." *Id.* "Above all, an IEP team is charged with developing a 'comprehensive plan' that is 'tailored to the unique needs of a particular child.'" *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834, *67 (W.D. Wash. May 8, 2019) (quoting *Endrew F.*, 137 S. Ct. at 994).

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

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

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

Reductions in the Student's Functional Performance Minutes

23. The Parents' first concern is that although the District was aware of the Student's behavioral challenges as early as sixth grade, his IEPs reduced his functional performance

³⁸ "PB" refers to the Parents' closing brief. "DB" refers to the District's closing brief.

instruction and did so based on scheduling concerns rather than his individual needs. Specifically, the Parents argue that during the course of 2018, the District reduced the Student's functional performance minutes from 805 minutes weekly (January 2018 J4 p29) to 555 minutes weekly (April 2018 J7 p28) to 262 minutes (December 2018 J15 p35). As explained above, functional performance is an umbrella term that encompasses behavior and social/emotional.

24. The Parents claim that these changes were made for District scheduling purposes rather than to meet the Student's unique needs. In support of this claim, however, the Parents point to Ms. Dean's testimony that the Student's SDI minutes were increased in September 2017 to reflect the middle school schedule. As discussed previously, events that occurred prior to January 2018 are outside the scope of this hearing. The Parents have not pointed to any other evidence that the Student's minutes were changed in order to accommodate the District's schedule and the evidence does not support such a conclusion.

The Reduction in Functional Performance and Behavior Skills Instruction in the January 2018, April 2018, and December 2018 IEPs Does Not Reflect the Student's Needs

25. In January 2018, the Student was spending 0% of his time with his general education peers, compared to approximately 40% when he was in fifth grade. The IEP team had reduced the Student's general education time because of his increased behavioral issues. In early January 2018, the IEP team saw some improvement in the Student's behaviors, but his general education time remained at 0%. Moreover, the team was unable to provide the Father with an expected timeline for reintroducing the Student to the general education setting. Despite the fact that the Student was still spending 0% of his time with his general education peers as a result of behavioral issues, the IEP team decreased his functional performance minutes by 5 minutes per week. Although the reduction in the January 2018 IEP was not a significant decrease, a reduction of any amount does not reflect the Student's unique circumstances as required by WAC 392-172A-03110(1), given his behavioral challenges.

26. The evidence further demonstrates that between January 2018 and April 2018 of the Student's sixth grade year, the District was increasing the Student's time in the general education setting as improvements in his behaviors permitted. Accordingly, on April 11, 2018, the IEP team amended the Student's IEP to reflect that he was spending approximately 15% of his time in the general education setting. At that point, the Student's general education time was still significantly lower than when he was in fifth grade. Although the Student's IEP team was closely monitoring the Student's behaviors to ensure that he was in his least restrictive environment, and although his general education time was still significantly below the year before, the IEP team reduced his functional performance minutes. Moreover, the reduction was significant, from 805 to 555 minutes per week. Given that the Student's general education time was directly tied to his behaviors, and his general education time was only at 15%, a reduction in functional performance minutes in the April 2018 did not reflect the Student's unique needs as required by WAC 392-172A-03110(1).

27. With respect to the 2018-2019 school year, after a relatively smooth start, the Student's behaviors started to escalate. Ms. Ruby was struggling to support the Student in terms of his behaviors involving inappropriate peer interactions. The Student was not making meaningful progress on resolving those behaviors and his behaviors posed significant barriers for him to be able to learn. Additionally, the December 2018 IEP meeting followed closely after the November 27, 2018 reevaluation, which highlighted the Student's significant behavioral challenges. Despite the fact that the Student was already struggling with his behaviors, the team decreased the

Student's minutes in functional performance skills (referred to as behavior management skills starting in December 2018) from 555 minutes per week to 262 minutes per week. This reduction is inconsistent with the Student's high-level behavioral needs at the time of the December 2018 IEP meeting. Moreover, Ms. Ruby's testimony establishes that the Student's behaviors were posing a significant barrier to his ability to access his education even *before* the reduction in service minutes. Accordingly, the Student's December 2018 IEP, with reduced instruction in behavior management skills, did not reflect the Student's unique needs as required by WAC 392-172A-03110(1). The District has offered no reasonable explanation for the reductions in his IEPs.

28. The Parents acknowledge that in the December 2019 IEP, the team increased the Student's minutes in behavior skills to 460 minutes per week (J25 p29). Although the Parents contend that this increase was too late, they have not otherwise articulated, and the evidence does not demonstrate, why this amount of instruction does not reflect the Student's needs at that time. The Parents have not shown that the Student's December 2019 IEP did not accurately reflect the Student's unique needs as required by WAC 392-172A-03110(1).

Supplementary Aids and Services

29. The Parents' second concern is that the Student's IEPs were not reasonably calculated to enable him to make meaningful educational progress because they lacked appropriate supplementary aids and services. They contend that although the Student had 1:1 assistance, he could not access his education unless the 1:1 paraeducator was trained to deliver applied behavior analysis (ABA) supports. Therefore, the Parents argue the Student required support from an RBT under the supervision of a BCBA.

30. Supplementary aids and services are aids, services, and other supports that are provided in general education or other education-related settings to enable students eligible for special education to be educated with nondisabled students to the maximum extent appropriate in accordance with the least restrictive environment requirements. WAC 392-172A-01185.

31. A Student's IEP need not address the instructional method to be used unless the methodology is necessary to enable the student to receive an appropriate education. *R.E.B. v. Haw. Dep't of Educ.*, 770 F. Appx 796, 800-801 (9th Cir. 2019); *J.L. v. Mercer Island School Dist.*, 592 F.3d 938, 952 (9th Cir. 2010); see also *Department of Education, Analysis of Comments and Changes to IDEA Regulations*, 71 Fed. Reg. 46665 (2006) (nothing in IDEA requires IEP to include specific methodology; methods may be addressed in IEP if necessary for child to receive FAPE).

32. Prior to November 2018, there is no evidence in the record that the Student required ABA services to enable him to receive an appropriate education. Accordingly, it was not necessary for the Student's IEPs prior to November 2018 to specify that ABA methodology would be used. See *R.E.B.*, 770 F. App'x at 801.

33. Following the Student's reevaluation in November 2018, the record supports a determination that the Student would benefit from ABA therapy, as stated in the reevaluation summary. Moreover, the adverse impact statement in the Student's December 2018 IEP expressly stated that he required supplementary consultative services from a BCBA. Dr. Enns, Dr. Tucker, Ms. Schwartz and Ms. Brock also agreed that the Student could benefit from ABA therapy. Aside from the language in the adverse impact statement, there is no testimony in the

record that the Student *required* ABA to enable him to receive an appropriate education. Both Dr. Enns and Dr. Tucker highly praised Ms. Keyser and Ms. Lowry and admired their skill in working with the Student. However, neither Ms. Keyser nor Ms. Lowry is trained in ABA methodology. Dr. Enns noted that when a person is trained as a BCBA or RBT, there is a greater certainty that they will possess the necessary higher level skills and expertise the Student requires. He acknowledged, however, as did Dr. Tucker, that it was possible for individuals with appropriate training and expertise to serve the Student even if they did not have ABA training.

34. Based on a comprehensive review of the evidence in the record, it is concluded that the Student did not require ABA to make educational progress appropriate in light of his circumstances. Therefore, it was not necessary for the Student's January 2018, April 2018, December 2018 or December 2019 IEPs to expressly state that he required assistance from individuals trained in ABA methodology.

Direct Instruction from Appropriately Trained Staff

35. Next, the Parents claim that the Student's IEPs, as drafted, were not reasonably calculated to enable him to make meaningful educational progress because they failed to include any direct instruction from appropriately trained staff members. As articulated in the Parents' closing brief, this claim asserts that all of the Student's IEPs called for services to be delivered by lesser-credentialed and lesser-trained staff. They contend that if the Student's IEPs had specifically called for the Student to receive special education from a certificated special education teacher and SLP, and had better documented who was providing direct instruction to the Student, the District would have had better data to inform decisions about increasing and decreasing behavior support, which would have allowed the team to make more informed decisions about the provision of FAPE to the Student. PB 33.

36. Special education must be provided by appropriately qualified staff. WAC 392-172A-02090. Other staff, including general education teachers and paraprofessionals, may assist in the provision of special education if the instruction is designed and supervised by special education certificated staff and the Student's progress is monitored and evaluated by special education certificated staff. WAC 392-172A-02090(1)(i).

37. The Parents' claim stems from the District's general practice of drafting IEPs to state that SDI would be delivered by special education paraeducators, when, in fact, special education teachers were also providing direct instruction in the classroom. Similarly, IEPs reflected that SLPAs would provide the Student's instruction, when in fact, SLPs were providing direct instruction. The District drafted IEPs in this manner because a special education teacher, on any given day, might need to devote all attention to one student, and might not be able to serve others. As a result, the special education teacher is listed as a monitor, anticipating that they can provide direct services in their supervisory capacity.

38. The District contends that this practice is in accordance with guidance from the U.S. Department of Education:

Paraprofessionals who provide instructional support must work under the direct supervision of a highly qualified teacher. . . . A paraprofessional works under the direct supervision of a teacher if (1) the teacher prepares the lessons and plans the instructional support activities the paraprofessional carries out, and evaluates

the achievement of the students with whom the paraprofessional is working, and
(2) the paraprofessional works in close and frequent proximity with the teacher.

U.S. Dep't of Education, Title I Paraprofessionals Non-Regulatory Guidance (2004) at D-1, available at: <https://www2.ed.gov/policy/elsec/guid/paraguidance.pdf> (last visited September 10, 2020).

39. Here, the evidence established that Ms. Ruby prepared the Student's lessons and worked closely with the Student's paraeducators. In addition to supervising the Student's paraeducators, she also provided daily instruction to the Student. The Parents have provided no authority indicating that the District's practice of drafting IEPs violates the IDEA and provided no evidence to demonstrate that the IEPs were not reasonably calculated to provide FAPE due to the way they were drafted.

40. To the extent that the Parents are also alleging that the Student required more direct instruction from a special education teacher and SLP, the Parents have not shown that such instruction was required to enable the Student to make progress in light of his circumstances.

41. The Parents rely on Ms. LaGriede's resume and on the testimony of the Mother and Ms. Spencer to establish that Ms. LaGriede was providing the Student's speech and language instruction, that she was not qualified as an SLP, and that she therefore required supervision from an SLP. I found that the record did not contain sufficient evidence to determine whether Ms. LaGriede was an SLP or SLPA. On the basis of this record, the Parents have not met their burden to establish that the Student was not receiving sufficient direct instruction from an SLP in any of his IEPs.

42. Similarly, the record does not establish how much direct instruction the Student's special education teacher was, or was not, providing during the second half of the 2017-2018 school year. Although the record demonstrates that the Parents had concerns about the Student's paraeducators with respect to consistency and training, the record does not establish how much direct instruction they were providing. On the basis of this record, the Parents have not shown that the Student required more direct instruction from his special education teacher in his January 2018 and April 2018 IEPs.

43. In their brief, the Parents acknowledge that Ms. Ruby was providing direct instruction to the Student during the fall of 2018. They contend that the District failed to provide more direct instruction from her, even after the Parents requested it. PB 33. While the record establishes that the Student requires a high level of behavioral support to obtain an educational benefit, the record does not demonstrate that more time with Ms. Ruby would have provided that support. Ms. Ruby worked with the Student on a daily basis but was still struggling to support the Student with respect to his behaviors involving inappropriate peer interactions. A review of the record as a whole does not support the conclusion that if Ms. Ruby had spent additional time with the Student, his behaviors would have improved. Therefore, the Parents have not shown that the Student required more direct instruction from his special education teacher in his December 2018 IEP.

Measurable Goals

44. The Parents also contend that the Student's IEPs failed to include measurable goals in all areas of need. (Issue 1.d.) The Parents argue that "all of the IEPs at issue fail to incorporate

appropriate and measurable goals for [the Student] in all areas of need or fail to consider all areas of need.” PB 35. Their brief, however, focuses largely on the Student’s functional performance goals and the need for social/emotional goals. It provides little to no guidance as to what areas of need the District failed to consider, or what goals were required, but not included, in the Student’s IEPs.

45. An IEP must contain a statement of annual goals, including academic and functional goals designed to meet a student’s needs to enable him to be involved in and make progress in the general education curriculum. WAC 392-172A-03090(1)(b)(i); 34 § CFR 300.320(a)(2). Goals must be stated with enough specificity that they are understandable and must be measurable in order to determine whether a student is making progress toward the goals.

46. The IDEA does not specify the number of goals that must be included in an IEP, but there should typically be at least one goal for each area of need. *See, e.g., Bellflower Unified Sch. Dist.*, 110 LRP 7256 (SEA CA 2010) (IEP deficient because it did not contain goals to address student’s deficits in attending to group instruction); *Flagstaff Arts and Leadership Academy*, 113 LRP 27180 (SEA AZ 2013) (IEP deficient because it failed to provide goals to properly address basic reading, reading fluency, life skills, and other areas of need). An IEP need not contain every goal requested by a parent or recommended by the parent’s experts. *See G.D. v. Torrance Unified Sch. Dist.*, 112 LRP 12078 (C.D. Cal. 2012) (IEP goals not inappropriate where the district included goals addressing the student’s significant needs while excluding those it deemed unnecessary or not age appropriate). The purpose of IEP goals is to enable the IEP team to determine whether the student is making progress in an area of need. *Los Angeles Unified Sch. Dist.*, 110 LRP 34448 (SEA CA 2010). The IDEA does not require “that each identifiable need, deficit, or area of struggle or challenge be addressed in a separate goal. Nor does it require subdividing a student’s needs into smaller components of need and addressing each component in a separate goal.” *Palo Alto Unified School Dist.*, 118 LRP 21969 (CA 2018).

47. The Student’s January 2018 IEP and April 2018 IEP provided goals in each of the areas for which his 2016 evaluation recommends SDI. The Student’s December 2018 IEP and December 2019 IEP provided goals in each of the areas for which his 2018 evaluation recommends SDI.

Social/Emotional Goals

48. The Parents contend that the Student’s January 2018 and April 2018 IEPs should have provided separate social/emotional goals because the evaluation recommended SDI in functional performance, which is described as “specially designed instruction in social/emotional and behavioral skills.” The Parents did not offer any testimony to establish that it was necessary to include social/emotional as a separate area of need. Additionally, they did not provide any evidence to establish what goals should have been provided to meet his social/emotional needs. As a result, they have not established that the Student’s January 2018 and April 2018 IEPs were not reasonably calculated to provide FAPE because they failed to include separate or necessary social/emotional goals.

49. The Parents also assert that the December 2018 and January 2019 IEPs should have included social/emotional goals in addition to behavior skills. Again, the Parents have not met their burden to establish that social/emotional was a separate area of need or to establish what social/emotional goals the Student required. Accordingly, they have not shown that the Student’s

IEPs were not reasonably calculated to provide FAPE because they failed to include separate or necessary social/emotional goals.

50. The Parents also contend that the two functional performance goals in the Student's January 2018 IEP and April 2018 IEP are not measurable because they are framed in the negative. They assert that the goals did not provide the Student or his Parents an opportunity to know what he should be working on. The first goal expected the Student to "demonstrate expected levels of classroom behavior improving self-control of his body (refraining from work refusal, spitting, grunting, clearing tables, throwing objects) from 0/7 opportunities (class periods) to 4/7 opportunities (class periods) as measured by teacher/paraprofessional observation." The second goal expected the Student to "demonstrate appropriate peer interactions (maintaining space proximity, safe and respectful behavior) improving his self-control with peers from 3 out of 7 class periods a school day to 7 out of 7 class periods a school day as measured by teacher data collection."

51. The Parents argue that these goals are "inherently ill-equipped to accurately measure progress." PB 36. It is the Parents' burden, however, to provide an evidentiary basis to support their claim. The Parents did not elicit any testimony to establish that the individual or individuals who were measuring the Student's progress did not understand what the goals meant or how to collect measurement data so that they could determine whether the Student was making progress. Without more, the Parents have failed to establish that these goals were not understandable or measurable. Additionally, the record does not support a finding that the Student's goals in other areas were not understandable or measurable, or that these IEPs did not contain goals in all areas of need. The Parents have not established that the January 2018 and April 2018 IEPs were not reasonably calculated to provide FAPE to the Student because they failed to include measurable goals in all areas of need.

52. With respect to the December 2018 IEP, the Parents point out that there are two behavior management goals – one related to the Student using his AAC to request a break and the other related to transitioning. Ms. Keyser, who implemented this IEP when the Student came to 49th Street, understood the Student's goals. There is no evidence that she or her staff had difficulty measuring the Student's progress; there is no testimony that the Student required goals in any additional areas of need. The Parents have not established that the December 2018 IEP was not reasonably calculated to provide FAPE to the Student because it failed to include measurable goals in all areas of need.

53. The Parents also do not articulate why the goals in the Student's December 2019 IEP are not understandable or measurable. They contend that "there are no goals related to the areas of Speech or Articulation, which [the Student] continued to qualify for." There was conflicting testimony concerning articulation goals. Although Ms. Brock's report recommended targeting articulation goals, Ms. Spencer disagreed with that recommendation and felt it was "a surefire way to get him to want to check out." Ms. Spencer worked with the Student throughout his time at 49th Street, whereas Ms. Brock's recommendation was based on 1.5 hours of observation. Additionally, the record demonstrates that the Student made significant progress in working with Ms. Spencer. Accordingly, I give more weight to her testimony as to the Student's needs than to Ms. Brock's recommendation. The Parents have not established that the December 2019 IEP was not reasonably calculated to provide FAPE to the Student because it failed to include measurable goals in all areas of need.

Did the Student's IEPs Include Extended School Year (ESY) services that the Student specifically needed?

54. The Parents contend that the District did not take into account or meet the Student's individual needs for ESY because it offered the District's standard two-week ESY program during the summer of 2018 and 49^h Street's standard four-week ESY program during the summer of 2019. (Issue 1.e.) The Parents also claim that the District approved the Student's ESY programs early in the year, before his need for ESY could be assessed accurately.

55. WAC 392-172A-02020 provides in relevant part that:

(6) School districts must develop criteria for determining the need for extended school year services that include regression and recoupment time based on documented evidence, or on the determinations of the IEP team, based upon the professional judgment of the team and consideration of factors including the nature and severity of the student's disability, rate of progress, and emerging skills, with evidence to support the need.

(7) For the purposes of subsection (6) of this section:

(a) Regression means significant loss of skills or behaviors if educational services are interrupted in any area specified on the IEP;

(b) Recoupment means the recovery of skills or behaviors to a level demonstrated before interruption of services specified on the IEP.

56. In *Hellgate Elementary*, 541 F.3d 1202, 1211-12 (9th Cir. 2008), the Ninth Circuit Court of Appeals explained that ESY services are integral to a FAPE only when the benefits a child gains during a regular school year will be significantly jeopardized if the Student is not provided ESY services during the summer.

57. Standing alone, the fact that the District offered a standard ESY program does not establish that the program did not meet the Student's needs. Additionally, the fact that the District established the Student's ESY eligibility for ESY well in advance of the summer does not establish that the program did not meet his needs because the District's practice was to finalize the details for the plan closer to the summer. There is no evidence in the record that the plans that were ultimately developed were of concern to the Parents at the time. Additionally, the record does not indicate that the Parents asked for more ESY, that the Student required additional ESY, or that the Student regressed because he did not have sufficient ESY during the summers of 2018 or 2019. To the contrary, the Student had a smooth start at the beginning of the 2018-2019 and 2019-2020 school years after participating in ESY, with no evidence of regression. Accordingly, the Parents have not met their burden to show that the District failed to provide the Student with the ESY services he needed.

Parental Input; Specially Designed Instruction and Related Services; Parent Counseling and Training; Recreational Therapy; Present Levels of Performance

58. The Parents next claim that the District failed to offer IEPs that accurately included the Parents' input; provided enough specially designed instruction and related services for the Student; provided enough specially designed instruction and related services for the Student from certificated staff; properly identified that the Parents needed the related service of parent counseling and training; properly identified that the Student needed the related service of

recreational therapy; and included accurate representations of the Student's present levels of performance. (Issue 1.c.) The Parents' brief lists these allegations but does not provide any discussion.

59. The Parents first claim that the District failed to offer IEPs that accurately included their input. It is unclear how the IEPs were inaccurate with respect to parental input. The Parents' briefing does not explain what statement or statements in the four IEPs at issue are inaccurate. Because the basis for this claim is not apparent from the record and the Parents have not pointed to any specific evidence, they have not proven a violation of the IDEA with respect to this claim.

60. The Parents next claim that the District failed to offer IEPs that provided enough specially designed instruction and related services for the Student. In a related claim (Issue 1.h.), the Parents contend that the District reduced the amount of services that the Student was receiving in the areas of adaptive, behavior, and social/emotional and then claimed that the Student needed a more restrictive environment because of struggles in these areas. Issues concerning the Student's functional performance instruction are discussed above. The Parents did not provide evidence establishing that Student required social/emotional instruction to receive a FAPE. The record indicates that the Student's SDI in area of adaptive increased steadily between January 2018 and December 2019. Additionally, the Parents did not provide evidence that the amount of adaptive instruction was not based on the Student's needs. Based on a review of the record, the Parents have not met their burden to show that the Student's IEPs failed to provide an appropriate amount of SDI in areas besides functional performance.

61. With respect to related services, the Parents' claim appears to be limited to the provision of behavioral supports, parent counseling and training, and recreational therapy. Behavioral supports are addressed above. The Parents have not provided any discussion concerning the related services of parent counseling and training or recreational therapy. Dr. Enns recommended training could be beneficial for the Parents, but his recommendation does not state such training is required to enable the Student to make progress. There is no evidence that parent counseling or recreational therapy are required to enable the Student to make progress. Accordingly, the Parents have not shown that the Student's IEPs were not reasonably calculated to provide FAPE because they failed to include these services.

62. The Parents also assert that the District failed to offer IEPs that provided enough specially designed instruction and related services for the Student from certificated staff. This claim overlaps with the Parents' claims relating to the provision of SDI and related services by appropriately qualified individuals. As discussed, the Parents have not met their burden with respect to this claim.

63. Lastly, the Parents claim that the District failed to offer IEPs that included accurate representations of the Student's present levels of performance. An IEP must contain a statement of a student's present levels of academic and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. WAC 392-172A-03090(1)(a); 34 § CFR 300.320(a)(1). In this case, the Parents presented little evidence concerning the Student's present levels of performance. Additionally, they have failed to articulate how or in what area the District's representations of the Student's present levels of performance are inaccurate. The Parents have not proven this claim.

64. As discussed above, an IEP must be assessed as a whole. See, e.g., *Karl v. Bd. of Educ. of Geneseo Cent Sch. Dist.*, 736 F.2d at 877. Based on a comprehensive view of the record, it is concluded that the Student's January 2018, April 2018 and December 2018 IEPs were not reasonably calculated to enable the Student to make progress appropriate in light his unique circumstances because they did not contain sufficient SDI in functional performance and behavior skills management. Although the Parents have not shown that the IEPs were inappropriate in other respects, the facts of this case establish that the Student's general education time vacillated depending on his behaviors. Additionally, his behaviors were a significant barrier to his ability to make progress. Accordingly, SDI in functional performance and behavior skills was critical to the Student's ability to make progress in light of his circumstances. As a result, the reduction in SDI in this area did not meet the Student's unique needs and denied the Student a FAPE.

Behavior Intervention Plans and Functional Behavior Assessment

65. The next issue is whether the District failed to implement the use of appropriate FBAs and BIPs to address concerns related to the Student's behavior. (Issue 1.g.) The Parents' claim focuses on the documents in Exhibits D9, D13, D20, D21, J14 and J27. PB p45 n17.

66. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team shall consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i). A functional behavior assessment is one type of behavioral intervention or strategy that helps identify causative factors and objectionable behaviors. *J.L. v. Manteca Unified Sch. Dist.*, 2016 U.S. Dist. LEXIS 77441 (E.D. Cal. June 14, 2016); see also *S.J. v. Issaquah Sch. Dist.*, 2007 U.S. Dist. LEXIS 67735 (W.D. Wash. Sept. 12, 2007) (a functional behavior assessment is required only when a student has been removed from her current placement).

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

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

68. A student's IEP must be accessible to special and regular education teachers and service providers. 34 CFR 300.323(d)(2). Those individuals must be informed of their responsibilities

related to implementing the Student's IEP, and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. *Id.* When a Student has a BIP, the BIP must be accessible as well. See *Reynolds School Dist. 7*, 116 LRP 40139 (SEA OR August 19, 2016).

69. The Parents contend that the Student's BIPs and FBAs were not appropriate, as evidenced by the fact that it was unclear to them what behavioral interventions the District had tried. In support of their claim, the Parents rely on the testimony of Dr. Enns. Additionally, the Parents assert that the District's FBAs were not appropriate because they were not amended to reflect the Father's hypothesis that the Student's behaviors were the Student's way of gaining access to his general education peers. PB 45.

70. When asked about the District's FBA in Exhibit J14, Dr. Enns had limited recollection of the document but his impressions were that it needed to be more thorough and contain more detail. However, Dr. Enns did not state that the FBA in Exhibit J14 was inappropriate or that any of the other FBAs or BIPs in the record were inappropriate. Dr. Tucker reviewed the FBAs and BIPs in the record, along with the strategies listed in the Student's December 2018 IEP (Exhibit J15 pp17-18), and deemed them to be "excellent." She found the District's simple FBA and BIP format more useful than a multipage document in working with people. Although Dr. Enns and Dr. Tucker are both highly trained and skilled in their field, I give more weight to Dr. Tucker's testimony on the appropriateness of these documents because she had clearly engaged in a detailed analysis of the Student's FBAs, BIPs, and the behavior interventions in his IEPs. Additionally, her work as a special education teacher is important because she knows what type of document is useful in the classroom.

71. Notably, however, neither Dr. Enns nor Dr. Tucker ever observed the Student during the time period when he was exhibiting the behaviors that led to his placement at 49th Street. I therefore give most weight to the testimony of Ms. Keyser. She is an expert behaviorist, as Dr. Enns and Dr. Tucker both opined, despite a lack of formal training. An ALJ may reasonably rely on testimony of witnesses who have a consistent relationship with the student at issue and/or have observed the student's school performance over those who base their opinion predominately on file reviews. *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d at 1212.

72. Ms. Keyser observed the Student when he arrived at 49th Street. After a brief honeymoon period when he first arrived at 49th Street, the Student began exhibiting some of the behaviors he had shown at HMS. It is telling that when the Student came to 49th Street from HMS, Ms. Keyser did not write a new BIP; she used the BIP that came from HMS. Similarly, when Ms. Schwarz prepared a BIP for the Student in the fall of 2019, she recommended many of the strategies that had been used at HMS, as listed in Exhibit J15 pp17-18.

73. Finally, Ms. Villa explained that she did not agree with the Father's theory that the function of the Student's behavior was to gain access to his general education peers. Based on input from District staff, she believed that the Student's behaviors were not to gain access to the general education setting, but were set off by access to the general education setting. The Parents' testimony is certainly important because they know the Student better than anyone else. In this instance, however, I give more weight to the testimony of Ms. Villa because the Parents are not present at school each day to observe the Student's behaviors, and the Student does not engage in these behaviors at home. Additionally, the Parents' testimony carries less weight because they do not possess the specific education, qualifications, or experience to present an informed opinion

about whether the FBAs or BIPs were appropriate. For all of these reasons, it is concluded that the Parents have not shown that the District's BIPs and FBAs were inappropriate.

74. The Parents claim that "even if the Student's FBAs and BIPs were appropriate, the District failed to properly implement the BIPs in the classroom at HMS." PB 46. The Parents concluded that the Student's paraeducators were not implementing the Student's BIPs because they saw them interacting with the Student inappropriately at times. Although their concerns are valid and important, these isolated instances must be viewed in the context of the entire record. With respect to the Student's sixth grade year, the Parents did not provide any testimony from the Student's special education teacher or paraeducators to establish what documents they were, or were not, using. Neither Dr. Enns nor Dr. Tucker know what behavior interventions District staff were using. Viewed as a whole, this evidence is not sufficient to meet the Parents' burden to show that District staff were not appropriately implementing the Student's BIPs during the second half of the 2017-2018 school year.

75. With respect to the Student's 7^h grade year, both Ms. Ruby and Ms. Villa offered credible testimony that District staff were guided by the Student's FBA and BIP. Ms. Ruby met with paraeducators in her classroom at the beginning of the year to discuss the Student's needs, which included discussing his BIP. She also spent a lot of time modeling how instructions should be implemented. Training in behavior was ongoing, with staff meeting weekly for collaboration time. Ms. Villa also met with several of the Student's paraeducators at different times for approximately one half hour each to review his BIP and to discuss appropriate interventions. After the Student transferred to 49th Street, Ms. Keyser and her staff used the BIP that came with the Student from HMS.

76. To the extent that the Parents' rely on the fact that the Student's behaviors rapidly improved after he arrived at 49th Street, there was conflicting testimony as to why this occurred. Dr. Enns believed that the Student's behaviors rapidly deescalated at 49th Street because staff were "doing exactly what they should be," whereas staff at HMS had been reacting to his behaviors. Dr. Tucker disagreed and opined that the reason the Student's behaviors had improved after he moved to 49th Street was because the contingencies had changed for him. She defined contingencies to mean "what exists around the person, whether it is reinforcement based on social attention from peers, or another contingency could be noise that is present in the environment or a larger number of students. So things that are present in the environment." She believed that even though staff at HMS were using sound interventions appropriately, they could not succeed until the contingencies changed. This is consistent with the testimony of Ms. Ruby and Ms. Villa that they did not feel the Student's behaviors could be addressed at HMS without changing his environment. During the hearing, even Dr. Enns acknowledged that 49th Street did not have female students, who had often been the focus of the Student's behaviors. In other words, the contingencies changed at 49th Street. In considering this conflicting evidence, it is significant that neither Dr. Enns nor Dr. Tucker observed the Student at HMS. This tempers the weight of their opinions. Although Dr. Enns later observed the Student at 49th Street, the Student's behaviors had stabilized by then. I therefore give more weight to the testimony of Ms. Ruby, who worked with the Student daily prior to his placement at 49th Street, and to Ms. Villa, who assessed the Student's behaviors during the fall of 2018 as part of his reevaluation. *N.B. v. Hellgate Elem. Sch. Dist.*, 541 F.3d at 1212 (ALJ may reasonably rely on testimony of witnesses who have a consistent relationship with the student at issue and/or have observed the student's school performance over those who base their opinion predominately on file reviews). Considering this evidence as a whole, it does not establish by a preponderance that the Student's behaviors

improved at 49th Street because staff at HMS had not been appropriately implementing his BIPs or the behavior strategies listed in his IEP during the 2018-2019 school year.

77. Finally, the Parents have not provided sufficient evidence to establish that staff were not implementing the FBA in Exhibit J27 during the 2019-2020 school year. This is the FBA prepared by Ms. Schwartz and there was no testimony to suggest that this FBA was inappropriate or that the BIP Ms. Schwartz developed was not being used by staff.

78. On balance, the evidence in the record does not demonstrate by a preponderance of the evidence that the District's FBAs and BIPs were inappropriate or that they were not being appropriately implemented. The Parents have not proven a violation of the IDEA.

Claims Alleging Procedural Violations of the IDEA

79. The Parents allege numerous procedural violations of the IDEA resulting in the denial of FAPE to the Student. First, the Parents allege that the District failed to provide the Parents with written invitations to IEP meetings. (Issue 1.i.i.)

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

81. The District did not send the Parents a formal meeting notice for IEP meetings held on February 28, 2018, May 1, 2018, May 18, 2018, January 30, 2019, and October 1, 2019, and for an evaluation meeting held on November 2, 2018.³⁹ Although the District sent formal notice of the December 3, 2018 IEP meeting, the notice did not indicate that the Student's placement would be discussed. The District's failure to send appropriate notice on these dates violates the procedural requirements of the IDEA and WACs 392-172A-03100 and -05001.

82. The Ninth Circuit has recognized that "[p]rocedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed." *Amanda J.*, 267 F.3d at 892. 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.

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

³⁹ The Parents' briefing also refers to meetings held prior to January 8, 2018. Those meetings precede the timeframe at issue in this case and were not considered.

83. The Parents were aware of and attended all of the meetings at issue. There is no evidence in the record that the Parents ever missed an IEP or evaluation meeting due to insufficient notice. The Parents also assert that they would have been better prepared for meetings if they had known the purpose and who would be in attendance. Specifically, they contend that they had prepared a document regarding the Student's placement for the November 27, 2018 evaluation meeting, but the topic was not discussed. They were then surprised when placement was discussed on December 3, 2018. Both of these issues pertain to placement at 49th Street, and it is clear from the record that the Parents articulated their strong opposition to the Student's placement at 49th Street during the December 3, 2018 meeting and during subsequent meetings. The Parents have not shown that the District's failure to comply with WAC 392-172A-03100 and -05001 impeded the Student's right to FAPE, significantly impeded their right to participate in the decision-making process, or caused a deprivation of educational benefits.

84. The Parents next claim that the District failed to provide the Parents with PWN of District decisions and failed to provide PWN of such decisions in enough time to allow the Parents to challenge them, including issuing PWNs only after decisions had been made and implemented by the District. (Issues 1.I.iii. and iv.)

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

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

WAC 392-172A-05010.

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

87. The District sent multiple PWNs indicating that it would implement the proposed action the same day as the meeting, within a few days of the meeting, or with no date given. These included PWNs sent on January 24, 2018 (action on same day); April 11, 2018 (action day after); May 1, 2019 (no date for action); May 18, 2018 (no date for action but implemented the day after the meeting); November 28, 2018 (action four business days after meeting); December 3, 2018

(action on same date); and February 18, 2020 (action next day). Notice sent on the same day of the proposed action, or on the day before the proposed action, does not constitute notice sent within a reasonable time prior to the proposed action. Similarly, notices sent with no action date failed to give the Parents any information about when the District would implement the proposed action. Accordingly, the Parents have established that the District violated WAC 392-172A-05010 by failing to provide PWN within a reasonable time prior to the effective date.

88. The Parents have not, however, established how inadequate notice impeded the Student's right to FAPE, significantly impeded their right to participate in the decision-making process, or caused a deprivation of educational benefits. Although the Parents argue that they did not have sufficient time to object to the District's November 2018 reevaluation because the District only provided four business days between the meeting date and the action date, the Parents ultimately challenged the reevaluation and the District agreed to publicly fund an IEE. The Parents also challenged the District's December 3, 2018 decision concerning the Student's placement at 49th Street, leading the District to hold another IEP meeting on December 30, 2019, to discuss the Student's placement. Accordingly, the Parents have not established that the District's procedural violation impeded the Student's right to FAPE, significantly impeded the Parents' right to participate in the decision-making process, or caused a deprivation of educational benefits.

89. The Parents also point to several occasions where they allege the District provided inadequate PWN. First, they contend that the District amended the Student's IEP in a PWN dated May 18, 2018, instead of in an IEP meeting. Therefore, they contend that the PWN was an IEP amendment, and not a PWN, meaning that the District was required to send a *separate* PWN documenting its decision. PB p 78. To this extent that this constitutes a highly technical violation of WAC 392-172A-05010, the Parents have not shown that it impeded the Student's right to FAPE, significantly impeded their right to participate in the decision-making process, or caused a deprivation of educational benefits.

90. The Parents also assert that the District's failure to provide them with a copy of the Student's BIP deprived them of sufficient information to meaningfully participate in IEP team meetings. PB 79. Under WAC 392-172A-03100 (8), a school district must give a parent a copy of the student's IEP at no cost to the Parent. Because a BIP is part of a Student's IEP, this requirement includes provision of a BIP. In this case, Ms. Dean acknowledged that the Parents were not given a copy of the Student's BIP in Exhibit D21. Additionally, neither the PWN associated with the November 2018 reevaluation meeting nor the December 3, 2018 IEP meeting provided notice that the BIP was being updated. Ms. Dean later referred to the BIP in D21 in response to the Father's request for clarification of attempts the District had made to correct the Student's behaviors and justification for the decision to send the Student to 49th Street. The purpose of PWN "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). Given that the Student's behaviors led to his placement at 49th Street, it was important for the Parents to have information about his behaviors and the District's plan for responding to them. A key factor in the IEP team's decision to place the Student at 49th Street was the District's inability to meet the Student's needs at HMS. Without appropriate notice of changes to the BIP, and without a copy of the BIP, the Parents lacked the knowledge to discuss this topic in a meaningful way. It is therefore concluded that the District's failure to provide the Parents with PWN concerning the Student's BIP in D21, and failure to provide a copy of D21 as required by 392-172A-03100 (8), constituted a procedural violation of the IDEA that substantially impeded the Parents' ability to participate in IEP meetings

to discuss the Student's placement at 49th Street and to participate in the decision-making process, resulting in a denial of FAPE.

91. The Parents next allege that the District failed to provide the Parents with Notification of Parent Rights and Protections/Procedural Safeguards after making decisions and at IEP team meetings. (Issue 1.I.v.) WAC 392-172A-05015 provides in relevant part:

(1) School districts must provide a copy of the procedural safeguards that are available to the parents of a student eligible for special education one time a school year, and:

(a) Upon initial referral or parent request for evaluation . . .

(2) A school district may place a current copy of the procedural safeguards notice on its internet web site if a web site exists.

92. The Parents rely on Ms. Dean's testimony that she could not recall if procedural safeguards were provided to the Parents at two evaluation meetings. However, Ms. Villa, as the case manager for evaluations, was responsible for providing the procedural safeguards and the Parents did not ask if she recalled providing them to the Parents. The Mother's testimony that she only recalled getting procedural safeguards at one meeting is not sufficient to meet the Parents' burden of proof. Additionally, the Parents did not contradict Ms. Dean's testimony that printed copies were available at IEP meetings and that the District posted a copy of the current procedural safeguards notice on its website, as permitted by WAC 392-172A-05015. In fact, the Mother acknowledged that she had clicked on the link and scanned the document. The Parents have not shown by a preponderance of the evidence that the District failed to provide the Parents with the Notice of Special Education Procedural Safeguards for Students and their Families after making decisions, at evaluation meetings or at IEP team meetings.

93. The Parents also claim that the District failed to provide accurate and timely reports of the Student's progress to the Parents. (Issue 1.I.vi.) WAC 392-172A-03090(c) requires that a student's IEP must contain a description of how the district will measure the student's progress toward meeting annual goals, and when the district will provide periodic reports on the student's progress toward meeting their annual goals.

94. In their brief, the Parents assert that they learned about incidents during the hearing that had never been reported. However, they did not testify about this at the hearing and assertions in a brief do not constitute evidence. The Parents also contend that when the Student's behaviors escalated in May 2018, the District failed to document this in a PWN or progress report. They point to Exhibit J9, a PWN that belies their claim by specifically indicating that changes were made to the Student's schedule due to escalating behaviors including spitting, leaving the classroom without permission, and property destruction. Additionally, the Parents provided no evidence to establish that the Student's progress reports were inaccurate or untimely. The Parents have not met their burden to show by a preponderance of the evidence the District failed to provide accurate or timely progress reports to the Parents.

95. The Parents next claim that the District failed to have all necessary members of the Student's IEP team present for IEP team meetings. (Issues 1.I.viii.) Under WAC 392-172A-03095(1), a student's IEP team must include:

- (a) The parents of the student;
- (b) Not less than one general education teacher of the student if the student is, or may be, participating in the general education environment;
- (c) Not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;
- (d) A representative of the public agency who:
 - (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students eligible for special education;
 - (ii) Is knowledgeable about the general education curriculum; and
 - (iii) Is knowledgeable about the availability of resources of the school district.
- (e) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in (b) through (e) of this subsection;
- (f) At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and
- (g) Whenever appropriate, the student.

See also 20 U.S.C. §1414 (d)(1)(B).

96. Under the plain language of WAC 392-172A-03095, when a student is or may be participating in the general education environment, at least one of the student's general education teachers must be part of the student's IEP team. The United States Court of Appeals for the Ninth Circuit has held that this requirement is mandatory. *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 643 (9th Cir.), *cert. denied*, 545 U.S. 1128, 125 S.Ct. 2941 (2005). In *M.L.*, the court emphasized that Congress, in defining the necessary members of an IEP team, recognized that "[v]ery often, regular education teachers play a central role in the education of children with disabilities . . . and have important expertise regarding the general curriculum and the general education environment." (Citations omitted.) *Id.* at 643.

97. A general education teacher did not attend IEP meetings on January 10, 2018, January 24, 2018, February 28, 2018, April 11, 2018, May 1, 2018, May 18, 2018, and October 1, 2019. Ms. Abegglen attended IEP meetings on December 3, 2018 and December 20, 2019. She also attended an evaluation meeting on November 27, 2019.

98. The District argues that it was not necessary for a general education teacher to attend meetings to amend the Student's IEP (January 10, 2108, January 24, 2018, April 11, 2018, and May 18, 2018). Under WAC 392-172A-03110(2)(c) and (d), following an annual IEP meeting for the school year, a parent and school district may agree not to convene an IEP team meeting for purposes of making changes to the IEP and may instead develop a written document to amend or modify the IEP. With respect to the January 10, 2018 meeting, the Father agreed to amend the IEP without the full IEP team present. With respect to the other meetings, however, the District held meetings on these dates and there is no evidence in the record of an agreement to amend by written document rather than by convening an IEP team meeting. WAC 392-172A-03110(2)(c). Because the District convened IEP meetings on these dates, and did not agree to instead amend the IEP by developing a written document, the District's claim that it was not required to convene the full IEP team, including a general education teacher, is unavailing.

99. The evidence also establishes that the District held IEP team meetings with no general education teacher present on February 28, 2018, May 1, 2018, and October 1, 2019. Additionally, Ms. Abegglen attended IEP meetings on December 3, 2018 and December 20, 2019. Under WAC 392-172A-03095(1)(b), the District was required to include a general education teacher in IEP meetings if there was a possibility that the Student could be “participating in the general education environment.” WAC 392-172A-03095(1)(b).

100. Based on a review of the facts of this case, it is reasonable to conclude that there was a possibility the Student could be participating in the general education environment when most of these meetings occurred. One of the Parents’ primary concerns at all times was when and how the Student could spend more time in the general education setting. During the second half of the 2017-2018 school year, the Student’s IEP team was increasing his general education time when his behaviors improved. Throughout that time, he was either participating in general education or there was a possibility that he would do so. When the IEP team met on December 3, 2018, the Student’s time in general education had been decreased to 0%, but he was still attending lunch and recess with peers in the general education environment and his general education time could be increased if his behaviors allowed it. On December 20, 2019, the IEP team was considering when and how the Student would transition back to HMS, where it was possible that he would participate in the general education environment. Therefore, the District was required to have “a general education teacher of the student” present for IEP team meetings on January 24, 2018, February 28, 2018, April 11, 2018, May 1, 2018, May 18, 2018, December 3, 2018 and December 20, 2019. The District’s failure to do so constitutes a procedural violation of the IDEA and WAC 392-172A-03095.⁴⁰

101. The District contends that the failure to include a general education teacher at these IEP team meetings was harmless error. *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938 n.4 (9th Cir. 2007). In considering this question, it is important to distinguish between meetings attended by Ms. Abegglen and meetings with no general education representative at all.

102. The District chose Ms. Abegglen to attend the Student’s IEP meetings because her experience as a general education teacher and her knowledge of the Student and how to accommodate and modify instruction for students with disabilities put her in the best position to determine what options could be available for him. Although Ms. Abegglen was not and could not have been a general education teacher “of the student,” as required by WAC 392-172A-03095, the Parents have not offered any evidence to contradict Ms. Dean’s testimony that Ms. Abegglen was the best choice. Accordingly, with respect to IEP meetings on December 3, 2018 and December 20, 2019, the Parents have not established that the presence of Ms. Abegglen, rather than a general education teacher of the Student, impeded the Student’s right to FAPE, significantly impeded the Parents’ right to participate in the decision-making process, or caused a deprivation of educational benefits.⁴¹

⁴⁰ The Parents have not shown that a general education teacher was required to attend the October 1, 2019 meeting. At that time, the Student was attending 49th Street, which does not have any general education students. Although the District was beginning to discuss the Student’s transition back to HMS, there was no possibility that he could participate in the general education setting at that point. The Parents have not proven a violation with respect to the October 1, 2019 meeting.

⁴¹ To the extent that the District was required to have a general education teacher present for the evaluation meeting on November 27, 2018, the Parents have not shown that the presence of Ms. Abegglen, rather

103. In contrast, the Parents have shown that the District's failure to have a general education teacher present for meetings on January 24, 2018, February 28, 2018, April 11, 2018, May 1, 2018, and May 18, 2018, significantly impeded their ability to participate in the decision-making progress by depriving them of an opportunity to discuss and ask questions about the Student's time in the general education setting with a general education teacher. During the second half of the 2017-2018 school year, the team was monitoring the Student's behaviors and adjusting his general education time accordingly. During the meeting on January 24, 2018, the team updated the Student's BIP. On February 28, 2018, the team discussed that the Student was having behavioral issues going to the band room but not to the library. On April 11, 2018, the team increased the Student's time in the general education setting. On May 1, 2018, the team discussed inconsistencies in the Student's behaviors related to getting changed for P.E. class. Because these behaviors were occurring when the Student was in the general education environment, it was important for the Parents to have input from a general education teacher and an opportunity to ask that teacher questions so that they could understand what was happening when these behaviors occurred and to ensure that the Student had the supports he required to succeed. See *S. H. v. Mount Diablo Unified Sch. Dist.*, 263 F. Supp. 3d 746, 767-769 (N.D. Cal. 2017) (District's failure to include general education teacher at IEP meeting addressing recommendations of expert who evaluated student and concluded she was likely to experience difficulties in general education setting significantly impaired Mother's ability to participate in IEP process because Mother was deprived of opportunity to ask questions about general education portion of student's day). Considering that the Student's behaviors in the general education setting ultimately led to his placement at 49th Street, the Parents have shown that the District's failure to include a general education teacher during IEP meetings on January 24, 2018, February 28, 2018, April 11, 2018, May 1, 2018, and May 18, 2018, significantly impeded their ability to participate in the decision-making process and amounted to a denial of FAPE. *Amanda J.*, 267 F.3d at 882.

104. The Parents also argue that the District violated WAC 392-172A-03095 because an OT and SLP failed to attend IEP team meetings on January 10, 2018, February 28, 2018, April 11, 2018, May 1, 2018, and December 3, 2018. WAC 392-172A-03095 does not require that a student's IEP team must include an OT or SLP, but instead gives parents and school districts discretion to determine when it is appropriate to include individuals who have knowledge or special expertise regarding the student, including related services personnel. The Parents presented no evidence that they requested that an OT or SLP attend any of the foregoing meetings. The Parents have not established that the failure to include an OT or SLP at these meetings violated WAC 392-172A-03095.

Claims Relating to the Provision of SDI and Related Services by Appropriately Qualified Individuals

105. The Parents claim that the District failed to provide SDI and related services by appropriately qualified individuals and misrepresented who was providing SDI and related services. (Issues 1.f.; 1.l.ix.)

than a general education teacher, impeded the Student's right to FAPE, significantly impeded their right to participate in the decision-making process, or caused a deprivation of educational benefits.

106. As discussed above, special education must be provided by appropriately qualified staff. WAC 392-172A-02090. Other staff, including general education teachers and paraeducators, may assist in the provision of special education if the instruction is designed and supervised by special education certificated staff and the Student's progress is monitored and evaluated by special education certificated staff. WAC 392-172A-02090(1)(i).

107. The Parents assert that the District did not have an appropriately qualified SLP working with the Student. As discussed previously, I found that the record did not contain sufficient evidence to determine whether Ms. LaGriede was an SLP or SLPA. On the basis of this record, the Parents have not met their burden with respect to this claim.

108. The Parents also contend that the District did not have a credentialed special education teacher providing direct instruction to the Student either in his IEP or consistently in practice. As noted above, WAC 392-271A-02090 specifically provides that a paraeducator may assist in providing special education if the instruction is designed and supervised by special education staff. There is no evidence in the record that the Student's special education teachers were not designing his instruction or supervising paraeducators. Accordingly, the fact that paraeducators provided SDI to the Student under the supervision of the Student's special education teachers does not violate WAC 392-271A-02090 or the requirements of the IDEA.

109. The Parents also claim that the District was misrepresenting who was providing specially designed instruction and related services to the Student, which denied the Parents vital information about who was actually serving the Student. This claim is based on the District's general practice of drafting IEPs to state that SDI would be delivered by special education paraeducators, when, in fact, special education teachers were also providing direct instruction in the classroom. As discussed above, the District drafted IEPs in this manner because a special education teacher, on any given day, might need to devote all attention to one student, and might not be able to serve others. As a result, the special education teacher is listed as a monitor and can provide direct services in that capacity. It is reasonable that a special education teacher, in supervising the provision of services to a Student, would sometimes be providing services directly. There is no evidence that this rises to the level of misrepresentation. Accordingly, there is no merit to this claim.

110. The Parents also claim that the District violated the IDEA and denied the Student FAPE since October of 2019 by proposing to conduct an Assessment Revision rather than a Special Education Eligibility Reevaluation. (Issue 5). A special education reevaluation must be conducted at least every three years unless the parent and the district agree that a reevaluation is unnecessary. WAC 392-172A-03015(2)(b); 34 CFR §300.303(b)(2). A reevaluation must also be conducted if a district determines that the educational or related service needs, including improved academic achievement and functional performance, of the student warrant a reevaluation or if the child's parent or teacher requests a reevaluation. WAC 392-172A-03015(1); 34 CFR §300.303(a)(1)-(2). The Parents did not provide evidence to support this claim and their briefing does not address this issue. Accordingly, they have not proven this claim.

Claims Related to the Student's LRE

111. The Parents argue that the District violated the IDEA and denied the Student a FAPE by moving him to 49th Street Academy, a placement that is not the Student's LRE and was unnecessarily restrictive. (Issues 2.; 3.a.) The Parents also assert that the District failed to

consider supplementary aids and services that would have enabled the Student to succeed at HMS, such as support from an RBT under the supervision of a BCBA or changing the Student's IEP to provide direct instruction from his special education teacher, before moving him to 49th Street.

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

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

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

See 34 CFR 300.116(b)(2).

114. Moreover, WAC 392-172A-02060(3) provides that "Unless the IEP of a student requires some other arrangement, the student shall be educated in the school that he or she would attend if nondisabled. In the event the student needs other arrangements, placement shall be as close as possible to the student's home."

115. In *Sacramento City Unified Sch. Dist. Bd. of Educ. v. Rachel H.*, 14 F.3d 1398 (9th Cir.1994) the Ninth Circuit concluded that school districts must consider four factors when making a decision about a student's least restrictive environment:

- 1) the educational benefits of placement full-time in a regular class; 2) the nonacademic benefit of such placement; 3) the effect [the child has] on the teacher and children in the regular class; and 4) the costs of mainstreaming [the student].

Id. at 1404. "While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals." *City of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1468 (9th Cir. 1996).

116. Whether an IEP placed a Student in the least restrictive environment is subject to the "snap shot" rule of *Adams* that the review of an IEP is "not retrospective" and reasonableness is determined at the time of the development of the IEP. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). Additionally, the *Rowley* rule that a District is not required to provide a

“potential-maximizing” education, but rather a “basic floor of opportunity,” also applies. *Rowley*, 458 U.S. at 206-07.

49th Street was an Appropriate Placement for the Student

117. At the December 3, 2018 IEP meeting, the IEP team placed the Student at 49th Street because team members, aside from the Parents, believed that 49th Street was the best program for the Student. This decision followed a review of the Student’s reevaluation and discussion of the services that the Student required. The Parents agreed that the Student required extensive support but believed that support should be provided at HMS.

118. In reviewing the factors set out in *Rachel H.*, I find that the IEP team’s decision that 49th Street was the Student’s least restrictive environment was appropriate. With respect to the first factor, which focuses on the educational benefits of placing the Student in the regular classroom, Ms. Ruby was struggling to support the Student in terms of his behaviors involving inappropriate peer interactions, to the point that he was not making meaningful progress on resolving those behaviors. Additionally, his behaviors posed significant barriers for him to be able to learn the skills he needed to have in order to enjoy a meaningful life after high school. Although the Student was meeting his IEP goals, Ms. Ruby clarified during the hearing that when a student has a brand new IEP and is away from school for a period of time, she considers the student to be making sufficient progress if he is not regressing. She believed the Student in this case had made sufficient progress, but only because he had a brand new IEP and had not regressed during winter break. Because Ms. Ruby had the most experience with the Student at the time the December 3, 2019 IEP was developed, her input is given great weight. The fact that she holds a certificate of autism studies further bolsters the weight of her testimony.

119. The second and third *Rachel H.* factors focus on whether a student will receive a non-academic benefit from the placement and the impact on the teacher and children in the regular class. Ms. Ruby was concerned that, despite her efforts, she could not address the Student’s behavioral issues. Not only did these behaviors prevent the Student from making academic progress, but they also prevented him from participating in the general education community and obtaining the nonacademic benefits of that participation. Ms. Ruby and Ms. Villa ultimately concluded that the Student would be more isolated, and have less opportunity for peer interaction, if he stayed at HMS. They also felt that 49th Street would be able to meet the Student’s behavioral needs, which was a necessary predicate to his ability to return to HMS and to the general education setting. Additionally, because the Student’s most significant behaviors were focused on his peers, Ms. Ruby and Ms. Villa were uncertain about their ability to keep the Student and other students safe. They were concerned because the Student was being isolated more and more due to his behaviors.

120. Finally, with respect to the fourth factor focusing on the costs of the inclusionary placement, both Ms. Villa and Ms. Dean were concerned that the District did not have the resources or ability to meet the Student’s needs. Although Ms. Villa did not work with the Student as closely as Ms. Ruby, she had just completed the reevaluation of the Student and she has many years of experience working as a school psychologist. Accordingly, I afford her testimony significant weight as well.

121. The Parents firmly believed that the Student could have made meaningful progress at HMS with the proper behavioral supports and contend that the District should have provided ABA

support before changing his placement. In support of their position that 49th Street was overly restrictive and that the Student's needs could have been met at HMS, the Parents rely largely on the testimony of Dr. Enns and Ms. Brock. Dr. Enns believed that the Student could have been successful at HMS with the support he received at 49th Street. Ms. Brock felt that 49th Street did not provide the Student a meaningful opportunity to interact with his peers. Although both Dr. Enns and Ms. Brock have met the Student and observed him at 49th Street, their observations occurred in January and February 2020, after the Student's behaviors had stabilized. Neither Dr. Enns nor Ms. Brock observed the Student at HMS when his behaviors were escalated prior to his placement at 49th Street. As a result, I afford less weight to their testimony on this issue.

122. As Dr. Enns acknowledged, Ms. Keyser is an expert behaviorist, making her input concerning the Student's behaviors significant. She also worked closely with the Student throughout his time at 49th Street. I therefore give significant weight to her testimony. Ms. Keyser believed that although the Student had the fewest behavioral issues in her class, he was a good fit for the program. She considered 49th Street an appropriate program for the Student and felt that he belonged there. Additionally, although 49th Street has decided not to serve other students when their home districts were capable of meeting their needs, the Student was accepted into the 49th Street program following an intake meeting to assess whether the program would be appropriate for him.

123. The Parents also argue that 49th Street was too restrictive because it had no general education Student's. However, both Ms. Ruby and Ms. Villa believed placement at 49th Street was less restrictive than the isolated placement they would have needed to create in order for the Student to remain at HMS. The Parents' belief that the Student could progress at HMS with a high level of support is important. Ultimately, however, the Parents' testimony carries less weight because they do not possess the specific education, qualifications, or experience to present an informed opinion about whether the District placed the Student in his least restrictive environment. Additionally, although 49th Street does not have general education students, Ms. Spencer created opportunities at least once a month for the Student to practice his social skills and interact with students in the day treatment program, who are more typical to general education peers.

124. On balance, the evidence in the record does not support the Parents' claim that 49th Street was an overly restrictive placement at the time that he was placed there.

The IEP team Considered Serving the Student's Needs at HMS Before Placing Him at 49th Street

125. The Parents also contend that the District did not seriously consider providing the Student with support from an RBT working under the supervision of a BCBA and with more direct services from his special education teacher before reducing his general education time to zero and before moving him to 49th Street.

126. The record establishes that the IEP team reduced the Student's general education time to zero before January 9, 2018. As a result, the Parents' claim that the IEP team failed to consider providing the Student with supplementary aids and services before reducing his general education time to zero is outside the statutory timeframe and is not considered.

127. In support of their claim that the District failed to consider providing the Student with supplementary aids and services before moving him to 49th Street, the Parents point to Ms. Dean's

testimony that she did not believe the District considered 1) hiring an RBT to work with the Student instead of a paraeducator; or 2) changing his IEP to have a special education teacher provide more direct instruction; and 3) she stated a BCBA would be available at 49th Street.

128. The record establishes that the Parents had ample opportunity to state their position and to discuss why they disagreed with placement at 49th Street. As discussed above, a review of the *Rachel H.* factors demonstrates that the team gave careful consideration to the complex issues involved in deciding the Student's appropriate placement. Additionally, both Ms. Ruby and Ms. Villa clearly gave significant consideration to their ability to meet the Student's needs at HMS. Ultimately, however, they concluded that assigning a BCBA to work with the Student at HMS would not have been effective because it would not have changed his environment, specifically the stimulus and proximity to peers that were triggering his behaviors.

129. Moreover, the IEP team reconsidered the Student's placement during the IEP meeting on January 30, 2018. The PWN from this meeting shows that the Parents had a second opportunity to present their position, and that the IEP team engaged in extensive discussion of their concerns. Ms. Dean also contacted the Ridgefield School District and Firm Foundations to determine if they had a placement, as requested by the Parents.

130. Additionally, the "snap shot" rule requires assessment of the reasonableness of the placement decision at the time of the decision, in this case December 3, 2018, and January 30, 2019. At that point, neither Dr. Enns nor Ms. Brock had observed the Student and therefore the District did not have the benefit of their opinions at the time the IEP was developed.

131. Considering the record as a whole, it is clear that the Parents had ample opportunity to present their position as to the Student's placement and that critical members of the IEP team listened to and considered their input, even though they ultimately did not agree. Although isolated statements by Ms. Dean make it seem that she was not willing to consider the Parents' concerns, a comprehensive view of the record demonstrates that the Parents had an opportunity to raise and discuss their concerns at the December 3, 2019 IEP meeting and the December 30, 2019 IEP meeting. The testimony of Ms. Ruby and Ms. Villa clearly demonstrates that they gave significant thought to whether the Student's needs could be met at HMS before they ultimately decided that the placement at 49th Street would be less isolating than what they would need to put in place at HMS to meet his needs.

132. On balance, the evidence in the record shows that the Student's disabilities were such that placement in the general education environment could not be satisfactorily achieved with supplementary aids and services. It is concluded that 49th Street was the Student's least restrictive environment when the IEP team decided to place him there, and that the District did not violate the IDEA or WAC 392-172A-02050 or-02060.

The IEP Team's Failure to Timely Meet Led to the Student's Prolonged Placement at 49th Street

133. The Parents next allege that the District failed to offer an IEP team meeting from May 1, 2019, to October 2019, which led to the Student's prolonged placement at 49th Street. (Issue 3.b.)

134. The evidence establishes that the Father requested an IEP meeting on May 1, 2019, and offered three dates. He wanted to ensure that the District was focusing on transferring the Student

back to HMS as soon as he was ready and was concerned that waiting until September might delay the Student's return to HMS. The evidence also establishes that aside from being available for a twenty minute phone call on May 22, 2019, Ms. Dean did not offer any dates when she was available for an IEP meeting between May and August 2019, and the team did not meet that summer. In September, the parties engaged in mediation, and the IEP team ultimately did not meet until October 1, 2019.

135. In *B.B. ex rel. J.B. v. Hawaii Dep't of Educ.*, 483 F. Supp. 2d 1042, 1057 (D. Haw. 2006), the court noted that, while the IDEA does not mandate the creation of a specific transition plan when a student moves from one school to another, knowledgeable experts agree that in some cases a particular student would benefit from such a plan. The parties in this case agree that a transition plan is important to enable the Student to transfer from 49th Street to HMS, although they disagree on the details. It follows that before a transition plan could be implemented, the Student's IEP team needed to meet and approve a transition plan. The Parents wanted to ensure that the Student could transfer back to HMS as soon as he was ready to do so. By June 2019, Ms. Keyser and Ms. Lindly believed the Student could be ready to transition back to HMS in the fall, depending on how well he performed during his ESY program and at the start of his 8th grade year. The Student did very well in ESY and at the start of the school year. The undisputed testimony establishes that he was ready to transition back to HMS by October 1, 2019. Because the IEP team had not met, however, there was no plan in place to start transitioning the Student back to HMS, even though he was ready to do so. Accordingly, the District's unwillingness to hold an IEP meeting to discuss a transition plan prior to October 1, 2019 delayed the Student's ability to transition out of 49th Street.

136. Moreover, the evidence establishes that once the Student was ready to transfer back to HMS, 49th Street was no longer an appropriate placement for him because it was too restrictive. 49th Street is intended to be a temporary placement that prepares a Student to return to his home school. Even though 49th Street was not the Student's LRE at this point, however, he continued to make significant progress there. The testimony of Ms. Keyser and Ms. Spencer, which holds significant weight because of the amount of time they spent working with him and their success in doing so, demonstrates that the Student's behaviors improved. He learned how to focus and how to request a break, was able to take two turns during a conversation, and was learning to make eye contact with other students and adults when he said hello. As Ms. Spencer stated, he was learning to become a student. Moreover, Ms. Spencer's testimony establishes that this progress continued even after the Student was ready to transfer back to HMS.

137. A comprehensive review of the evidence establishes that the District's failure to hold an IEP team meeting before the Student was ready to transfer delayed his ability to transfer when he became ready. By the time the team met on October 1, 2019, to start discussing a transition, the Student was already at the point to start transitioning. Accordingly, since October 1, 2019, the Student has not been in his LRE, which constitutes a denial of FAPE. Because the evidence also establishes, on balance, that the Student has continued to make meaningful progress and to obtain an educational benefit despite the fact that he has not been in his LRE since October 1, 2019, the Parents are not entitled to a remedy for this violation.

138. The Parents also claim that the District failed to send a District representative to meetings offered by 49th Street staff during June, July, and August of 2019, which would have allowed for the meetings at issue to be considered IEP team meetings. (Issue 3.c.) The Parents did not brief this claim and it is unclear what they are alleging. Under WAC 392-172A-03095(1)(d), a student's

IEP team must include a district representative. The Parents appear to be claiming that if the District had sent a representative to a meeting held on June 11, 2019, the meeting could have been considered an IEP team meeting. They have not, however, articulated how this violates the requirements of the IDEA. Accordingly, this claim has not been proven.

Claims Alleging Predetermination

139. The Parents allege that the district predetermined that the Student would only receive ESY services consistent with a standard District ESY program (Issue 1.k.) and with a standard 49th Street Academy ESY program (Issue 3.d.). They also claim that the District predetermined that it would not consider the Parents' request for a dedicated RBT working under the supervision of a BCBA in order to support the Student's ability to remain in his LRE (Issue 1.i.) and that the Student would be placed at 49th Street without consideration of other options. (Issue 1.j.).

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

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

142. The Parents contend that the District predetermined the Student's ESY services. They point to the fact that the Student was offered the standard District two-week ESY program for the summer of 2018, and the standard four-week 49th Street program for the summer of 2019. Evidence that the Student was offered a standard program, without more, does not establish that the District had made up its mind as to what ESY services the Student would receive prior to ESY IEP meetings. There is no evidence in the record that the Parents asked for additional ESY or raised concerns about the Student's ESY program. The Parents have not carried their burden with respect to this claim.

143. The Parents also contend that the District predetermined that the Student would be placed at 49th Street without consideration of other options, and that it would not consider the Parents request for an RBT working under the supervision of a BCBA. These claims are considered together because they are intertwined.

144. Placement determinations for students eligible for special education should be made by a group of individuals, including the parents, who are “knowledgeable about the student, the evaluation data, and placement options.” WAC 392-172A-02060. The placement decision should be based on the student's IEP and comply with the least restrictive environment requirements

contained in WAC 392-172A-02050 through 392-172A-02070. *Id.* Districts must ensure that parents of eligible students are members of any group making decisions about the student's placement. WAC 392-172A-05001; 34 CFR § 300.501(c).

145. A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. *K.D. v. Dep't of Educ.*, 665 F.3d 1110, 1123 (9th Cir. 2011). Further, predetermination violates the IDEA because the Act requires that the placement be based on the IEP, and not vice versa. *Id.* The fact that the district may have come to the meeting with pre-formed opinions regarding placement is not dispositive of the issue, so long as they were willing to listen to the parents and the parents had the opportunity to make objections and suggestions regarding the IEP. *L.C. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834, *65-66 (W.D. Wash. May 8, 2019).

146. The evidence indicates that the District came to the December 3, 2018 IEP meeting with pre-formed opinions regarding his placement. Ms. Dean contacted 49th Street to determine if they had capacity to accept the Student the day after the Parents gave consent for the reevaluation. Ms. Dean then raised the issue of changing the Student's placement on November 2, 2018, before the reevaluation was complete. Additionally, when the Parents asked the District to enlist the services of a BCBA to address the Student's behaviors at HMS, Ms. Dean replied that a BCBA would be available at 49th Street.

147. However, as discussed above, the evidence demonstrates that the Parents had ample opportunity to present their position during the December 3, 2018 IEP meeting and again at the January 30, 2019 IEP meeting. The record also demonstrates that critical members of the Student's IEP team gave careful consideration to whether the Student's needs could be met at HMS before they ultimately determined that 49th Street would be the Student's appropriate placement. The fact that they ultimately concluded 49th Street was appropriate does not mean that they did not consider the Parents' point of view. In arriving at this decision, they concluded that even with support from a BCBA, the Student would need to be too isolated if he remained at HMS. Viewed in its entirety, the record does not support the Parents' claim that the District predetermined the Student's placement at 49th Street, that the Parents' request for an RBT working under the supervision of a BCBA would not be considered, or that the Student would be placed at 49th Street without consideration of other options.

Other Claims Related to Parental Participation

148. The Parents allege that the District violated the IDEA and denied the Student FAPE by failing to afford them an opportunity to participate and by failing to take parental input into account. The IDEA requires the IEP team to include a parent and that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement and the provision of FAPE to the student." WAC 392-172A-05001. In order to ensure parental participation, IEP meetings must be scheduled at a mutually agreed on time and place. WAC 392-172A-03100(2). Moreover, 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. at 345.

149. As the court explained in *L.C. v. Issaquah Sch. Dist.*,

An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed. . . . Thus, [a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification. However, a district does not necessarily violate the IDEA if it refuses to implement a parent's requests, and a parent does not have veto power over IEP provisions.

(Citations omitted; internal quotation marks omitted.) *L.C.*, 2019 U.S. Dist. LEXIS 77834 *58.

150. The Parents' first claim related to parental participation is that the District held meetings without the Parents and made decisions that should have been made in IEP team meetings. (Issue 1.i.ii.) Specifically, the Parents point to the formulation of the March 8, 2017 BIP. As discussed previously, under the two-year limitation period set by WAC 392-172A-05080(2), the Parents' due process complaint is limited to actions that occurred after January 9, 2018. Events that occurred in March 2017 precede this date and are not considered. Additionally, the Parents assert that they should have been invited to weekly collaboration meetings when the special education teacher and team met to discuss behaviors and response patterns. The Parents have provided no authority for the proposition that a special education teacher cannot meet and collaborate with other District staff unless parents are included. Lastly, the Parents contend that the District revised the Student's ESY program in March 2019 outside of the IEP process and without consideration of the Student's needs. However, the record establishes that the Parents gave permission for the team to proceed without a meeting and that the team increased the Student's ESY because his behaviors required more intensive ESY. Accordingly, the Parents have not shown that the District held meetings without the Parents or made decisions outside of IEP team meetings.

151. The Parents also assert that the District failed to schedule IEP meetings at mutually agreeable times, as required by WAC 392-172A-03100. (Issue 1.i.vii.) Specifically, they refer to efforts to schedule the IEP meeting that ultimately occurred on December 20, 2019.

152. On November 4, 2019, Ms. Keyser notified the Parents that an IEP meeting had been set for November 26, 2019, and stated "[h]ope that works for you as well." In setting a meeting date, the District did not inquire when the Parents were available to meet but simply set a date. Moreover, the District did not ask whether the time worked for the Parents and did not offer the Parents a chance to request a different date. This does not constitute scheduling an IEP meeting at a mutually agreeable time. Ultimately, however, the District agreed to hold the meeting on a different date and made multiple efforts to ascertain dates that would work for the Parents. The contentious relationship between counsel, as evidenced by their email exchanges, made the process of scheduling the IEP meeting a lengthy affair. When the Parents declined to provide their availability, the District unilaterally scheduled the IEP meeting for December 11, and then for December 12, 2019. The District rescheduled, however, because neither of these dates worked for the Parents. Ultimately, when the Parents proposed scheduling the meeting for December 20, 2019, the District promptly scheduled the meeting for that date. Accordingly, although the process for scheduling the meeting was tortuous and involved several instances in which the District unilaterally set the meeting date, the District ultimately scheduled the IEP meeting for a mutually agreeable time and place based on the Parents' ability to attend. Therefore, the Parents have not established a violation of WAC 392-172A-03100.

153. The Parents next claim that the District held the Student's annual IEP meeting on December 20, 2019, without the Parents, and refused to reschedule the meeting, despite knowing that the Parents wished to participate in the meeting and were unable to do so because of illness and work obligations. (Issues 6.a. and 6.b.)

154. Under the IDEA, an IEP meeting may be conducted without a parent "if the public agency is unable to convince the parents that they should attend." 34 C.F.R. §300.322(d). The U.S. Court of Appeals for the Ninth Circuit has clarified that a district must include the parents in an IEP meeting unless they affirmatively refused to attend. *Shapiro v. Paradise Valley Unified Sch. Dist.* No. 69, 317 F.3d 1072, 1078 (9th Cir. 2003), superseded on other grounds by U.S.C. 1414(d)(1)(B).

155. The facts of this case are analogous to those in *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038 (9th Cir. 2013). There, the student's parent wanted to be physically present at the student's IEP meeting but was sick and unable to attend, even by phone. The district sought to reschedule the meeting in time to meet the annual IEP review deadline, but the parent could not confirm he would be well by then. As a result, the district went ahead with the meeting as originally scheduled. *Id.* at 1042. The parent vigorously objected to the district holding the meeting without him and asked to reschedule for the following week. The IEP team changed the student's placement, after which the parent filed a due process request. *Id.* at 1044. Ultimately, the U.S. Court of Appeals concluded that the parent's right to participate was seriously infringed by the district's procedural violation. *Id.* at 1047. The court also held that when a district proceeds with an IEP meeting without a parent, holding an after-the-fact IEP meeting is not enough to remedy the failure to include the parent in the initial meeting. *Id.*

156. The District cites numerous cases to support the proposition that the IDEA permits districts to conduct IEP meetings without parental participation when parents *refuse* to participate. Those cases are inapposite because the Parents vigorously asserted their desire to attend. In this case, as in *Doug C.*, the evidence is overwhelming that the Parents wanted to be included in the Student's IEP meeting. There is no evidence that they refused to attend. On December 19, 2020, the night before the meeting, the Parents' counsel notified the District's counsel that the Mother had a fever and intestinal distress, the Student might also be sick, and the Father, a firefighter, had to work because of coworkers calling in sick. The Parents' attorney stated that if the District went ahead with the meeting, the Mother would attend even if she was ill. She emphasized that the Parents "absolutely want to attend this meeting," and were seeking to reschedule the following week, on December 26 or 27, 2019.

157. The following morning, when the District notified the Parents' counsel that the meeting would proceed as scheduled, the Parents reiterated that they wanted to attend the meeting and asked the District to reschedule. They explained that neither Parent could participate in person or by phone because of their illness and work obligation. The Parents stated that if the District could not meet on December 26 or 27, the Parents were available the week of January 6, 2020. They emphasized that holding the meeting during this timeframe would have no impact on the Student because of winter break. Accordingly, in this case, as in *Doug C.*, the Parents vigorously asserted their desire to attend the IEP meeting and offered dates to reschedule.

158. The District contends that *Doug C.* is distinguishable because in that case the district refused to reschedule primarily because it did not want to disrupt staff schedules, whereas here the District had a compelling reason to go forward because the Student's transition to HMS "had

been languishing since October 2019, and both districts believed that it was imperative to proceed to advance his transition.” DB52. However, when the District initially informed the Parents that the District had elected to meet as scheduled, it did not mention the transition plan. Rather, it mentioned that the current IEP had expired, that it would be difficult to schedule another meeting with all participants, and that the parties had arranged for substitutes and attorneys. It is therefore concluded that the expiration of the IEP and the difficulties of rescheduling, rather than timely discussion of the transition plan, were the District’s primary purpose for proceeding with the IEP meeting on December 20, 2019.

159. In *Doug C.*, the court emphasized that “the fact that it may have been frustrating to schedule meetings with or difficult to work with [the parent] (as the Department repeatedly suggests) does not excuse the Department’s failure to include him in [the student’s] IEP meeting when he expressed a willingness to participate. We have consistently held that an agency cannot eschew its affirmative duties under the IDEA by blaming the parents.” *Id.* at 1045. The court further noted that “[b]ecause the Department’s obligation is owed to the child, any alleged obstinance of [the parent] does not excuse the Department’s failure to fulfill its affirmative obligation to include [the parent] in the IEP meeting when he expressed a willingness (indeed eagerness) to participate, albeit at a later date.” *Id.* Here, as in *Doug C.*, the District’s frustration with the Parents and their counsel, even if understandable, did not mean that the District could hold the IEP meeting without the Parents when they were willing to participate. *Id.*

160. Lastly, the District points to the fact that in *Doug C.*, the court recognized that in some circumstances, accommodating a parent’s schedule would do more harm to the student’s interest than proceeding without the parent in the IEP meeting. In this case, however, rescheduling would have no impact on the Student because of his winter break.

161. Because the District proceeded with the IEP meeting despite the Parents’ clear assertions that they wanted to be included in the meeting, that they could not participate by phone because of illness and work, that they were available to reschedule the following week or the week after, and that rescheduling the meeting would not adversely impact the Student, the Parents have shown that the District violated the IDEA by holding the December 20, 2019 IEP meeting without them.

162. The remaining question is whether the District’s procedural violation resulted in a denial of FAPE. During the meeting, the IEP team discussed the Student’s transitioning back to HMS and recommended doing so based on a plan being developed by Ms. Keyser and Ms. Schwarz. The transition process, and the details of when and how it would occur, were extremely important to the Parents. This is evidenced from the Parents’ request, as early as May 1, 2019, for a meeting to discuss transitioning. The District contends that the Parents received a draft IEP before the meeting and had a chance to make comments. This is not the same as being able to participate during a meeting. In addition, the IEP team set goals for the upcoming school year as well as addressing SDI and related services. The Parents had no opportunity to participate in discussing these critical components of the Student’s educational program. Accordingly, the Parents have shown that the District’s decision to hold the IEP meeting without them substantially impeded their ability to participate in the decision-making process, which resulted in the denial of FAPE.

163. The Parents next contend that the District violated the IDEA and denied the Student FAPE since September 13, 2019, by 1) refusing to hold an IEP team meeting to discuss transitioning

the Student back to HMS, and 2) refusing to timely implement a transition plan to facilitate the Student's transition back to HMS. (Issues 4.a. and 4.b.)

164. As discussed previously, the District's failure to hold an IEP meeting before October 1, 2019, led to the Student's prolonged placement at 49th Street. However, the IEP team *did* meet on October 1, 2019, to discuss the transition. Accordingly, the Parents have not proven their claim that the IEP team failed to meet to discuss the Student's transition to HMS after September 23, 2020.

165. The overwhelming evidence is that the Student's transition to HMS has been unreasonably delayed. The Student's transition plan was not implemented until February 2020, even though he was ready to start transitioning by October 1, 2019. Ms. Lindley established that a typical transition process takes 1.5 to 2 months. Here, the transition did not start until February 12, 2020, more than 4 months after the Student was ready to start transitioning.

166. However, the delay in the transition process cannot be solely attributed to the actions of the District. To the contrary, the record clearly demonstrates that the contentious relationship between the parties and between the attorneys during the fall of 2019 until the February 6, 2020 resolution meeting was the critical reason for the delay in implementing the transition plan. For example, although the District did not initially schedule the December IEP meeting at a mutual date and time, the Parents refused to offer dates that could work for them, contributing to subsequent delay. Similarly, the parties spent most of January 2020 arguing about who would attend the resolution meeting, with the Parents again refusing to provide their availability to meet. The actions of both parties delayed the implementation of the transition plan, which finally came together when the resolution meeting took place.

167. The District argues that it could not implement the transition plan because the Parents filed a due process hearing request that resulted in a stay-put placement for the Student. Under WAC 392-172A-05125(1):

[D]uring the pendency of any administrative hearing or judicial proceeding regarding the due process hearing proceedings, the student involved in the hearing request must remain in his or her current educational placement, *unless the school district and the parents of the child agree otherwise.*

(Emphasis added.)

168. The District's assertion in its brief that it could not proceed with the transition due to stay-put is inconsistent with its assertion that it had a compelling reason to hold the December 3, 2019 IEP meeting without the Parents because it was imperative to proceed with his transition. DB p52. In addition, although WAC 392-172A-050125(1) prevented the District from unilaterally implementing a transition plan, nothing prevented the parties from agreeing to a transition plan. Ultimately, they did agree to implement a plan, but not until the February 6, 2020 resolution meeting. As discussed above, the overwhelming evidence establishes that the contentious and uncooperative relationship between the parties and their counsel delayed the District's ability to implement a transition plan.

169. Moreover, although *Doug C.* was decided in the context of holding an IEP meeting, the notion that a district's obligation is to the child, and that frustration with parents does not relieve a

district of that critical obligation, seems apt here as well. See *Doug C.*, 720 F.3d at 1045. Therefore, the District violated the IDEA and denied the Student a FAPE by delaying the implementation of his transition plan. Because the Parents shared responsibility for the delayed implementation, however, a remedy is not appropriate for this violation.

Educational Records

170. The Parents' final claim is that the District failed to timely respond to their request for the Student's educational records. (Issue 1.I.x.) Districts must permit the parents of a student eligible for special education to inspect and review, during school business hours, any educational records relating to the student that are collected, maintained or used by the district. WAC 392-172A-05190; 34 CFR § 300.613. "The school district shall comply with a request promptly and before any meeting regarding an individualized education program or resolution session relating to the identification, evaluation, educational placement of the student or provision of FAPE to the student." WAC 392-172A-05190. A school district must respond within forty-five (45) calendar days. *Id.*

Timeliness

171. The Parents' claim expressly challenges the District's failure to *timely* respond to the Parents' request, and does not allege that the District's response was noncompliant. Nevertheless, neither party has addressed the timeliness issue and both parties have briefed whether the District fully complied with the Parents' request for records. To the extent that the Parents have not abandoned their timeliness claim, the record does not support a finding that the District failed to respond to the request in a timely fashion. In response to the Parents' request on October 11, 2019, the District provided its first installment of documents on October 15, 2019, with a second installment on October 30, 2019. The District then sent additional records on five dates in December and three dates in January, with the final installment sent on February 5, 2020. The Parents' have not shown that the District failed to timely respond to their records request.

Compliance with Request for Documents

172. The Parents next claim that because the District failed to produce all of the Student's educational records, the Parents were deprived of an opportunity to meaningfully participate. They contend that the Washington Public Records Act (PRA), Chapter 42.56 RCW, requires state and local agencies to "make available for public inspection and copying all public records, unless the record falls within the specific exemptions of . . . this chapter, or other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1). In a special education due process hearing, parties may bring claims related to the identification, evaluation, educational placement, or provision of FAPE to a student. WAC 392-172A-05080(1). The Parents have provided no authority to establish that an ALJ has jurisdiction to decide a dispute under the PRA. Accordingly, this claim is not considered.

173. To the extent that the Parents claim that the District failed to turn over all emails or educational records under FERPA, the Ninth Circuit Court of Appeals recently considered whether a district committed a procedural violation when it only turned over emails that had been printed and added to the Student's physical file. *Burnett v. San Mateo Foster City Sch. Dist.*, 739 F. App'x 870, 873-74 (9th Cir. 2018). The court held as follows:

An "education record" under IDEA is defined by the regulations implementing the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 300.611(b). Under FERPA, an education record includes records, files, and documents that "(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g(a)(4)(A). The Supreme Court has interpreted the word "maintained" in FERPA as "to keep in existence or continuance; preserve; retain" and reasoned that "[t]he word 'maintain' suggests FERPA records will be kept in a filing cabinet in a records room at the school or on a permanent secure database." *Owasso Indep. Sch. Dist. No I-011 v. Falvo*, 534 U.S. 426, 432-33, 122 S. Ct. 934, 151 L. Ed. 2d 896 (2002). Since the District turned over the emails it "maintained" as part of a student's educational records, we agree with the district court that in responding to the [parent's] request for a copy of S.B.'s education records, it did not commit a procedural violation.

174. Here, the District produced emails retrieved during its electronic search. The Parents have not shown that the District failed to turn over any emails that were "maintained" as part of the Student's educational records. With respect to any other documents the Parents contend were not produced, they have not provided sufficient evidentiary foundation or argument to establish that these documents are educational records. Accordingly, the Parents have not met their burden of proof on this claim.

Issues not Raised in the Due Process Complaint

175. The Parents' closing brief (pp 23-25) argues that the District committed a procedural violation of the IDEA by moving forward with an IEP meeting before the completion of the IEE and without the Parents. Under WAC 392-172A-05100(3), "the party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request unless the other party agrees otherwise." The Parents did not raise this issue in the complaint and there is no evidence that the District agreed to this issue being heard. Moreover, when the ALJ asked the Parents' counsel if timeliness was the only issue related to the IEE, she did not point to other issues. T287-89. Accordingly, this issue is not addressed.

Summary of Violations

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

- i. failing to provide sufficient specially designed instruction in the areas of functional performance and behavior management skills in the Student's January 2018, April 2018 and December 2018 IEPs (Issue 1.b.) (COL 64);
- ii. failing to provide the Parents with notice of the Student's updated BIP and a copy of the updated BIP (Issue 1.i.iii.) (COL 90)
- iii. failing to include a general education teacher at the Student's IEP team meetings on January 24, 2018, February 28, 2018, April 11, 2018, May 1, 2018, and May 18, 2018 (Issue 1.i.viii.) (COL 103);
- iv. failing to offer an IEP team meeting between May 1, 2019, and October 1, 2019, prolonging the Student's time at 49^h Street (Issue 3.b.) (COL 137);
- v. failing to timely implement a transition plan to facilitate the Student's transfer back to Hockinson Middle School (Issue 4.b.) (COL 169); and

- vi. holding an annual IEP meeting on December 20, 2019, without the Parents' despite their desire to attend (Issue 6.a. and 6.b.) (COL 162);

The Parents have not otherwise proven a denial of FAPE.

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

Remedies

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

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

180. The Parents seek a placement for the Student at Hockinson High School (HHS) with a dedicated RBT under the supervision of a BCBA. The overwhelming evidence supports the award of this remedy as a prospective placement and to compensate the Student for the District's failure to provide sufficient SDI in functional performance and behavior management and for failing to schedule an IEP meeting prior to October 1, 2019, prolonging his time at 49th Street. First, the evidence demonstrates that 49th Street has not been the Student's LRE since October 1, 2019. Second, the Student was in the process of transferring back to HMS in February and March of 2020 with the support of a dedicated RBT under the supervision of a BCBA. There is no dispute that the transition was proceeding very well up until schools closed to prevent the spread of COVID-19. Third, while the Parents have not proven that ABA therapy was the only methodology that would serve the Student's needs for purposes of establishing a violation of the IDEA, the testimony in the record establishes that ABA support is appropriate for the Student. Dr. Enns, Dr. Tucker, Ms. Schwarz, Ms. Brock, Ms. Villa and Ms. Ruby all agree on this point. Most importantly, the Student has experienced success during the transition period with expert behavioral assistance throughout his day. His support at HMS during February and March of 2020 consisted of 1:1 support from an RBT under the supervision of a BCBA. Accordingly, it is appropriate to award ABA therapy, in the form of 1:1 support from an RBT under the supervision of a BCBA for the Student throughout his school day for the duration of the 2020-2021 school year, as a prospective placement and compensatory education.

181. Additionally, the evidence in the record establishes that training and supervision of individuals who work with the Student is critical to successful implementation of BIPs. Dr. Tucker, Dr. Enns and Ms. Schwartz agree on this point. The evidence also establishes that the Student's behaviors changed based on staffing and staff familiarity with his BIP. Ms. Schwarz demonstrated success in working with the Student and in supervising his RBTs during the transition process. It

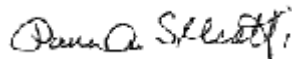
is therefore appropriate for Ms. Schwarz, if available, to serve as the BCBA overseeing the RBTs who work with the Student.

182. The Parents have requested compensatory education in the form of ABA support for the Student to enable him to participate in community activities to compensate for lost time with peers. Additional compensatory education is not appropriate.

ORDER

1. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education as set forth in Conclusions of Law 64, 90, 103, 137, 162, and 169.
2. The Parents have not otherwise established that the District denied the Student a free appropriate education.
3. As a remedy, the District shall place the Student at HHS with one-to-one support by an RBT under the supervision of a BCBA throughout his school day for the duration of the 2020-2021 school year. COL 180. Ms. Schwarz, if available, shall serve as the Student's BCBA and oversee RBTs who work with the Student. COL 181.
4. The Parents' remaining requested remedies are denied.

Served on the date of mailing.



Pamela Meotti
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

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

Parents



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Dated September 18, 2020 at Seattle, Washington.

lan

Representative
Office of Administrative Hearings
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cc: Administrative Resource Services, OSPI