

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

IN THE MATTER OF:

OSPI CAUSE NO. 2020-SE-0106

OAH DOCKET NO. 08-2020-OSPI-01103

SHORELINE SCHOOL DISTRICT

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

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Dana Diederich by video conference on October 1 and 2, 2020. The Father of the Student whose education is at issue¹ appeared and represented the Parents. The Shoreline School District (District) was represented by Lynette Baisch and Elizabeth Robertson, attorneys at law. Amy Vujovich, Director of Student Services, also appeared for the District. 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 August 4, 2020. The Complaint was assigned Cause No. 2020-SE-0106 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered on August 6, 2020, which assigned the matter to ALJ Jacqueline Becker. A Notice of Reassignment of ALJ was issued on September 2, 2020, reassigning the case to ALJ Dana Diederich. The District filed its Response to the Complaint on September 9, 2020.

ALJ Diederich held a prehearing conference on September 11, 2020, and issued a prehearing order dated September 15, 2020, setting hearing dates for October 1 and 2, 2020. The District filed a Motion to Continue the hearing dates on September 21, 2020. On September 24, 2020, the District filed an objection to the September 15, 2020 prehearing order requesting one of the Parents' issues be stricken. The District's Motion to Continue and request to strike an issue were both denied in a prehearing order dated September 24, 2020.

Due Date for Written Decision

As set forth in the September 15, 2020 prehearing order, the due date for a written decision in this matter was continued to thirty (30) calendar days after the close of record, at the request

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

of the District. The record closed with the receipt of the post-hearing briefs on October 30, 2020, and the due date for the written decision is November 29, 2020.

EVIDENCE RELIED UPON

Exhibits Admitted:

District's Exhibits: D1 through D30.

Parents' Exhibits: P2, P5 through P31.

Witnesses Heard (in order of appearance):

The Student's Mother

The Student's Father

Hayley Waltz, MS, BCBA, LBA, CCC

Julie Kiyonaga, District physical therapist

Andrew Ybarra, District occupational therapist

Celeste Dang, District speech language pathologist

Kerri Schloredt, District behavior support teacher on special assignment

Alison Novak, District special education teacher

Amy Vujovich, District Director of Student Services

Post-Hearing Briefs

The parties' post-hearing briefs were timely filed on October 30, 2020.

ISSUES

As set forth in the September 15, 2020 Prehearing Order, the issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
 - i. Failing to provide an appropriate Individualized Education Program (IEP) for the 2020-2021 school year by not providing appropriate supplementary aids and services, namely 1:1 behavior support provided by a Certified Behavior Technician (CBT) under the supervision of a Board Certified Behavior Analyst (BCBA), to effectuate the Student's inclusion in the general education setting;
 - ii. Failing to provide an appropriate IEP for the 2020-2021 school year by increasing minutes outside of the general education setting and reducing goals without completing the agreed Functional Behavioral Assessment and without attempting revisions to supplementary aids and services or the Behavioral Intervention Plan;

- iii. Failing to implement the Student's IEP during the 2019-2020 school year by using his AAC accommodation for reward videos and games;
 - iv. Failing to provide an appropriate IEP and failing to educate the Student in his least restrictive environment during the 2019-2020 school year by:
 - a. Failing to meaningfully revise his educational program responsive to ongoing behavior issues, and improperly rewarding the behavior;
 - b. Failing to make meaningful progress on the Student's IEP goals with only 3 of 17 being reported as sufficient progress and none being met;
 - c. Failing to provide any services required by his IEP during the Covid-19 school closure and failing to provide accessible alternatives during that time period;
 - d. Failing to provide meaningful or accessible extended school year (ESY) services in the summer of 2020 as required by the Student's IEP;
 - e. Denying Parents' request for ESY services in areas other than behavior, despite emerging skills being reported and behavioral regression resulting in regression of other areas
 - v. Failing to provide meaningful participation of Parents in addressing behavioral issues through misrepresentations regarding steps being taken to address the issues;
- b. And, whether the Parents are entitled to their requested remedies:
- i. Declaratory relief finding that the District violated the IDEA;
 - ii. Declaratory relief finding that the Student was denied FAPE by the District's actions;
 - iii. Compensatory education and supplemental services in the form of ABA and SLP service hours;
 - iv. A one year extension of Student's eligibility for services;
 - v. Reimbursement to the Parents for services in the amount incurred because of the failures of the District;
 - vi. Continued placement in the Student's neighborhood school in which Student spends at least 80% of his time in the general education setting with 1:1 behavior support provided by a CBT under the supervision of a BCBA with said support provided in-person during remote learning consistent with current health guidelines and the designation of CBTs and BCBA as essential workers;

- vii. Increase service minutes, as necessary, to levels reasonably designed to facilitate both inclusion and an educational benefit;
- viii. Or other equitable remedies, as appropriate.

FINDINGS OF FACT

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

Background Information

1. The Student was diagnosed with [REDACTED] at birth. D3p5; P19p1.² He participated in a birth to three program and transitioned to special education services in the District in May 2017 at the age of 3. D3p5. At that time, services in the areas of cognitive, adaptive, fine motor, gross motor, and communication skills were recommended. *Id.*
2. During the 2017-2018 school year, the Student received services through the District's self-contained preschool class. D3p5. During the 2018-2019 school year, the Student participated in an integrated preschool class. *Id.* The majority of his specially designed instruction (SDI) was provided through push-in³ services with some pull-out services in the area of physical therapy, fine motor, and speech therapy. D3p5. The Parents observed improvement in the Student's abilities after being in an integrated educational setting. T85.
3. In July 2018, the Student was evaluated at the University of Washington's [REDACTED]. P19. In addition to [REDACTED], the Student was diagnosed with behavioral difficulties including aggression, eloping, and defiance. *Id.* at 1. The team who evaluated the Student provided educational, medical, and behavioral recommendations. *Id.*
4. A reevaluation of the Student was completed by the District and an evaluation team meeting was held on June 5, 2019. The reevaluation was initiated at the request of the Student's Parents and IEP team to assist with the Student's transition from preschool to kindergarten. D3p5. The evaluation team determined that the Student continued to be eligible for special education under the category of other health impairment. D3p6. It was determined the Student required SDI in the areas of cognitive, daily living/adaptive, behavior, fine motor, gross motor, social emotional skills, and communication. D3p7. It was recommended in the evaluation that the student have a dedicated augmentative and alternative communication (AAC) device for use at school. *Id.* at 16.

² Citation to the exhibits of record is by exhibit number and page number, e.g. D3p5 is a citation to District exhibit 3 at page 5.

³ "Push-in" services are provided in the general education setting. "Pull-out" services are provided in a setting outside of the general education setting.

5. A Functional Behavior Assessment (FBA) was done as part of the comprehensive evaluation of the Student. D3p10. The targeted behaviors identified by the team were “[u]nwanted physical contact with peers” and “off task behaviors during structured learning activities.” *Id.* at 11. The FBA found that the physical contact behaviors were a way for the Student to seek attention from adults and peers. *Id.* at 12. The off task behaviors were found to serve as a way for the Student to avoid doing non-preferred tasks. *Id.* It was determined the Student would perform best in an environment with defined boundaries and clear expectations. *Id.* The evaluation noted that “A Behavior Intervention Plan (BIP), which is based upon the findings of the FBA is recommended. For more information, please refer to the accompanying Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP).” D3p12.

6. A prior written notice (PWN) was issued on June 6, 2019, stating that the Student continued to be eligible for special education services. D3p26. It noted the Student would require SDI in pre-academic, adaptive behavior, social emotional, behavior management, communication, fine motor, and gross motor skills. *Id.* It also noted the Student would require “a high degree of scaffolding, cuing and instructional supports to access instruction and participate in classroom learning activities.” *Id.*

7. A PWN was issued on July 9, 2019, proposing to change the Student’s educational placement. D4p1. It indicated the Student’s placement at the start of the 2019-2020 school year would be in the general education setting with a 1:1 paraeducator for at least 80% of the school day. *Id.* It also added 80 minutes per week of SDI in the area of communication to be delivered by a paraeducator in the general education setting. *Id.* The proposed actions were set to be initiated on September 4, 2019. *Id.*

2019-2020 School Year

8. The first day of school for kindergarten students in the 2019-2020 school year in the District was September 9, 2019. D1p1. The Student attended Meridian Park Elementary School in the District as a kindergarten student. T266; D5p1.

9. During the 2019-2020 school year, the Student’s resource room special education teacher was Alison Novak⁴. The Student worked with Ms. Novak for fifteen to twenty minutes each morning. T346. She also saw him throughout the day both in the general education setting and in the resource room and she would assist the Student during transitions throughout the day. T346-47. Ms. Novak observed the Student in the general education setting for less than one hour total per week. T333.

10. On September 17, 2019, Ms. Novak emailed the Parents with some questions regarding the Student and certain behaviors that were being observed in the school setting. P11p2. Ms. Novak noted the Student had fallen asleep in class and that he was not eating much at school. *Id.* She further noted the Student was grinding his teeth and had not had a bowel movement at school. She asked the Parents if they would like her to send home the data collection sheets she was working on for the Student. *Id.* On September 25, 2019, Ms. Novak emailed the Parents again and explained that the Student was having some challenges in the classroom with throwing

⁴ Ms. Novak has a bachelor’s degree in special education and is certificated to teach special education in Washington State. T266. She has been a special education teacher with the District for four years. T265.

objects, including his shoes, and asked the Parents if they had any techniques they used to deal with these behaviors. *Id.*

11. The Parents responded to both emails on September 25, 2019, and explained that the Student had sleep apnea, which may cause his fatigue, and explained the types of food the Student will eat. *Id.* The Parents also explained tricks they had for stopping the Student from grinding his teeth and stated that they did want Ms. Novak to send home the data collection sheets. *Id.* The Parents explained the different techniques they use to stop the Student from throwing objects and agreed to send the Student to school with a different pair of shoes. *Id.* The Parents also suggested the District coordinate with the Student's private BCBA, Hayley Waltz, in regards to behavioral concerns regarding the Student. *Id.* at 2.

12. Ms. Novak responded on September 26, 2019, stating she was excited to talk to Ms. Waltz and that she "would love her insights and ideas to work with [Student]." *Id.* at 1.

13. On October 7, 2019, a PWN was issued proposing to amend the Student's IEP to reflect changes agreed upon by the District as part of a settlement⁵ reached in June 2019. D6; T282-83. The changes included amending the service minutes so the Student received no more than 300 minutes as pull-out services. Further, the IEP would be changed to include a 1:1 paraeducator for 80% of the school day and the paraeducator would attend the Student's pull-out speech services and provide 80 minutes of push-in communication SDI to the Student. *Id.* Finally, the language of the goals in the Student's IEP would be amended to "better align with the Kindergarten program and their data collection systems." *Id.* The goal amendments were proposed at this point because the District staff had gotten to know the Student better and they wanted to adjust the goals so that he could make progress by the end of the school year. T283.

14. On October 10, 2019, an IEP team meeting was held to discuss amending the Student's IEP in accordance with the agreements made between the District and Parents in June 2019, described above. D7p1. The Student's Father attended the meeting. *Id.*

15. On October 14, 2019, the Student's IEP was amended. D5. The amended IEP included SDI and goals in the areas of behavior, cognitive, communication, daily living/adaptive, fine motor, gross motor, and social/emotional. D5p5-20, 29. It placed the Student in general education for 79 percent of the school day and provided him a 1:1 adult support/paraeducator for 1340 minutes per week. *Id.* at 29, 31. The IEP indicated the Student would spend 370 minutes per week in a special education setting and indicated the Student was qualified for Extended School Year (ESY) services. *Id.* at 29, 31. The IEP also stated that "A Behavior Intervention Plan (BIP) which is based upon the findings of the FBA is recommended. For more information, please refer to the accompanying Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP)."⁶ *Id.* at 6. A BIP was listed as one of the Student's accommodations in his IEP and the present levels of performance include a note that the Student "has a 1:1 support para-professional implementing his BIP and offering Russell support throughout the school environment." *Id.* at 5, 26.

⁵ The settlement relates to a prior Complaint filed by the Parents.

⁶ A copy of the Student's BIP was not provided for the record.

16. The October 2019 IEP also included as an accommodation that the Student would have access to an iPad during the entire school day and in all school settings. D5p26. ProLoQuo2go, a software program, was downloaded onto the iPad so it could serve as the Student's AAC device. T234. This program speaks when the Student hits various buttons and provides the Student a method of communication. T234.

17. Once the October 2019 IEP was implemented, a daily schedule was created for the Student. D8; T284. This schedule included what the Student's 1:1 paraeducator would be doing with the Student and what level of support the Student would need for specific activities. T284-85. Many of the activities listed for the Student were different or modified from the general classroom tasks because the Student needed additional support and often more direction and repetition than other students in the general education classroom. T285. The schedule was broken up into fifteen-minute increments. D8.

18. The Father observed the Student in the school setting for roughly one to two hours on one occasion in November 2019. T114. On November 18, 2019, after that observation, the Parents emailed the Student's school team and expressed concerns that the Student's behaviors would be better controlled if the IEP and BIP were being implemented properly. P10p4. They also requested that the District coordinate with Ms. Waltz so she could observe and continue to provide recommendations for the Student. P10p4. Ms. Novak responded to the email on November 22, 2019. P10p1. Ms. Novak stated that the Student's IEP and BIP were being implemented properly, and provided details on the many strategies and recommendations from Ms. Waltz that were being implemented for the Student, including visual schedules and a token system. *Id.* at 2. She also explained that, even with use of those strategies, the Student exhibited behaviors, such as throwing, that were unsafe and required him to be moved to the Cheetah room to complete his work. *Id.* at 3. Ms. Novak also stated in her email, "[p]er your suggestion, we will continue to work with Hayley on this implementation. We are so grateful for Hayley's support! However, I also wanted to let you know that Carin Claus – a district BCBA - will also be coming to support our team." *Id.* at 1.

19. The Cheetah room was a separate work space set up for the Student across the hall from his general education classroom. T291, 91. The Student enjoyed going to this room at the beginning of the school year, but as the year went on, he became more resistant to using the room. T281.

20. On November 26, 2019, the Student was observed by Ms. Claus⁷ at the request of the District. D9; T288. He was observed in the general education setting and the special education setting, as well as during recess, lunch, and physical education. D9p1. Ms. Claus provided recommendations in many areas based on her observations. She recommended the Student be taught how to request "all done" and "break," and that some environmental changes be implemented. *Id.* at 2. She suggested the Student have a system for taking his shoes off and that independent work systems be created for the Student. She also suggested the Student be given heavy work or movement tasks, such as pulling a wagon full of books, and that items be

⁷ Ms. Claus is an intensive learning support teacher in the District. She is also a BCBA, although she is not employed in that capacity with the District. T288, 340.

secured to his table to prevent him from throwing objects. *Id.* at 3. The District implemented most of these recommendations, but did not implement the recommendation that items be attached to the Student's desk. T288-89, 342. The District found that many of these strategies were successful with the Student during the first semester. T289-90.

21. The Student's private BCBA, Hayley Waltz, observed the Student at Meridian Park Elementary on at least three occasions, first in October 2019 and again on January 27, 2020, and February 24, 2020. P7p3; T149; T157. In regards to her observation in October, Ms. Waltz testified that the supports in place for the Student were not being implemented consistently by the different teachers and service providers. T149-150. Ms. Waltz also testified that during one of her observations⁸ she found that the Student was not engaging with his work activities and that he was eloping and exhibiting other problematic behaviors. She observed that when this happened, the Student was removed from the classroom space and he was allowed to go outside or use his AAC device to watch Paw Patrol, a preferred activity for the Student. T130. In her opinion, this rewarded the Student for his negative behaviors and would cause him to continue with the behaviors when asked to do non-preferred activities in the future. T130. Ms. Waltz also observed the Student had a drawer system, similar to the independent work system recommended by Ms. Claus, but she did not observe that it was being functionally used. T131.

22. Ms. Waltz provided recommendations to the District for how to work with the Student. T290-91. She recommended the following:

Using the visual schedule, timers, not allowing screen time as reinforcement, breaking down the tasks into smaller components, preference assessments to identify what was reinforcing and motivating for him, revisiting how the tasks were being presented, understanding that he likely was going to be able to do anywhere from three to five repetitions of math problems or whatever the activity was before he needed to transition to something else or his responding at his ability will decrease. He has got a short attention span.

We talked about different physical outlets to get him the management -- like the regulation that he needed. We talked about environmental arrangements in the classroom.

T176-77. She also recommended peer partnering and different seating options. *Id.*

23. One recommendation from Ms. Waltz that was not implemented by the District was to ignore the Student when he was engaging in certain behaviors. T291. Ms. Waltz explained that the Student was doing certain behaviors for attention, and ignoring the behaviors was the best way to stop the behaviors. *Id.* However, because many of the behaviors in question were disruptive or unsafe in the general education setting, District staff were not able to ignore them. T291.

January 2020 IEP

24. On January 21, 2020, an IEP team meeting was held. D13p1. Parties had agreed during the October 2019 IEP meeting to hold an IEP meeting in January 2020 to review the Student's

⁸ Ms. Waltz did not specify in her testimony which observation she is referencing.

minutes and consider any necessary revisions. D6p1. The Student's Mother and Father attended the January 2020 meeting. D11p1. Ms. Waltz also attended. *Id.* The Parents requested that the Student not be pulled out of general education more than 20 percent of the school day. D12p1; D13p1.

25. An amended IEP was created and dated January 24, 2020. D11. This amended IEP placed the Student in special education for 335 minutes per week, which allowed the Student to be in general education for 80 percent of the school day. *Id.* at 27. The service matrix called for SDI in the following amount: 120 minutes per week in communication, 30 minutes per week in gross motor, 120 minutes per month in fine motor, 280 minutes per week in cognitive, 350 minutes per week in behavior, 150 minutes per week in social/emotional, and 200 minutes per week in daily living/adaptive. D11p27. The IEP also called for 1340 minutes per week of 1:1 paraeducator support. *Id.*

26. A PWN was issued on January 28, 2020, proposing to implement the amended January 2020 IEP. D12. This PWN indicated that the amended IEP reduced the Student's pull-out special education minutes so that he was not out of the general education setting more than 20 percent of the school day. *Id.* It also changed a cognitive pre-literacy goal to "offer a more broad focus on classroom materials" and changed a physical therapy goal to a physical education participation goal. *Id.* The goals were changed to better reflect something that could be measured and worked on in the classroom setting, reflecting the Student's increased time in general education. T305.

27. On February 3, 2020, Ms. Novak sent emails to the Parents and reported that the Student had been having behavioral challenges in class since returning from winter break. P7p3. She also asked the Parents when Ms. Waltz would be able to observe the Student at school again. *Id.* The Parents responded on February 4, 2020, stating that Ms. Waltz would respond with her availability and asking if an FBA could be performed to help with the Student's behavior issues. *Id.* at 2. Ms. Novak responded the same day stating that she would "collaborate with Joette⁹ about" an FBA, but stated it was her observation that the behaviors were happening when the Student was trying to avoid doing a non-desired task. *Id.* at 2.

28. Ms. Waltz emailed Ms. Novak on February 14, 2020, stating that she would be able to observe the Student in the school setting on February 24, 2020. P7p1. Ms. Novak confirmed that February 24, 2020, would work for an observation. *Id.*

29. On February 25, 2020, Ms. Novak emailed the Parents again and reported she was observing in the Student a "huge regression in work production, following classroom routines and safety since the Mid-Winter break." P6p1.

30. The Student's 1:1 aide for the school year was Kelly Pinkley. T89. Ms. Novak worked closely with Ms. Pinkley and oversaw the instruction given to the Student by Ms. Pinkley. T346. Ms. Pinkley met weekly with Ms. Novak to discuss what was and was not going well for the Student. T298. She also attended trainings within the District for paraeducators and consulted with Ms. Claus and Ms. Waltz on strategies to use with the Student. T299. Ms. Pinkley produced

⁹ No testimony was provided regarding anyone named Joette. However, documents in the record refer to Joette Larson, a psychologist from the District, so it is assumed this is who Ms. Novak is referencing. D18p1.

daily reports broken down into fifteen-minute segments during the school year. T333. These were provided to the Parents and to Ms. Novak. *Id.*

31. During the 2019-2020 school year, the Student received the gross motor services included in his IEP from District physical therapist, Julie Kiyonaga¹⁰. Ms. Kiyonaga was also part of the Student's IEP team for the school year. T85. At the beginning of the school year, Ms. Kiyonaga provided half of the services in the special education setting and half in the general education setting. After the IEP was amended in January 2020, she began providing all services in the general education setting. T191. The Student's gross motor goal was also changed at this time to focus on participation, as that was easier to measure when minutes were provided in general education. T195. In her opinion, the Student was more successful when the minutes were delivered split between general and special education. T191. She felt there was "too much going on" and too many other students in the general education setting to allow the Student to learn new skills. T192. Ms. Kiyonaga found that the Student's behaviors did interfere with his ability to receive gross motor services throughout the school year. T193.

32. During the 2019-2020 school year, the Student received his IEP fine motor services from Andrew Ybarra¹¹, the District's occupational therapist. T202. Mr. Ybarra worked with the Student primarily outside of the general education setting. He found that environment was helpful for the Student's focus. T202. The Student's 1:1 aide was present for most, if not all, of the sessions. *Id.* Mr. Ybarra testified that the Student's behaviors interfered with his progress at times and he was not always able to overcome the Student's behaviors. T207.

33. During the 2019-2020 school year, the Student received his IEP communication services from District speech language pathologist, Celeste Dang¹². T222. These services were delivered in a separate speech room. T233. Ms. Dang found that the Student made progress during the school year up to the point the school closed due to the COVID-19 pandemic, and noted that he was more communicative and was becoming more verbal, interactive, and engaged during his therapy sessions. T224. Ms. Dang noted that the Student's 1:1 paraeducator attended the sessions with the Student and would work on the Student's communication skills and goals during other parts of the school day. *Id.* Ms. Dang noted that the Student used multiple methods to communicate including physical gestures, speech approximations, and an AAC device. T225-226; D17p7. Ms. Dang admitted that the Student's behaviors interfered with his progress in speech. T228.

34. The Parents expressed concerns that the Student was being allowed to use his AAC device to watch reward videos in addition to using the ProLoQuo2go software designed to allow

¹⁰ Ms. Kiyonaga has a bachelor's degree in psychology and a doctorate in physical therapy. She is certificated to work as a physical therapist in public schools in Washington and has worked for the District as a physical therapist for five years. T185.

¹¹ Mr. Ybarra has a master's degree in occupational therapy and has a certificate to work as an occupational therapist in public schools in Washington State. T202. He has been an occupational therapist in the District for three years. T201.

¹² Ms. Dang has a bachelor's degree and a master's degree and is certificated to work as a speech language pathologist in public schools in Washington. She has been a speech language pathologist with the District for forty years. T222.

him to communicate. T90, 93, 100. The information they had received from the Student's private providers was that the Student should have two different devices so that one was used solely for communication. T100-01. Ms. Dang testified that the Student was able to watch reward videos on his AAC device. T230. She also noted that the Student's AAC device had a function called Guided Access on it that allowed the provider to lock the device so the Student could not navigate out of his communication software. She admitted this was not utilized 100 percent of the time, however, she also noted the AAC device was only used for communication during the speech sessions. T231-32, 234-35.

35. The Student was provided a second iPad device to use at school at some point during the school year. T237. The reason for providing the Student two iPads was so that one could be used strictly as a communication device, or AAC, while the other would be used for academic games or reward videos. T238. Ms. Dang opined that it was best for the Student's communication to know that his AAC device was only for communication and not also for games or videos. T238-39. However, the Student's AAC device was used for purposes other than communication during the 2019-2020 school year, even after the second iPad was provided. T239.

36. The Parents also expressed concern that the Student was being allowed to watch videos on his iPad as a way to keep the Student quiet, rather than as a reward for appropriate behavior. T90. District staff allowed the Student to watch videos on his iPad as a reward. T282, 297. It is not clear from the record whether these videos were watched on the Student's AAC device or on a different iPad. He was also allowed to watch videos on the iPad during circle time as a method of keeping the Student engaged. The Student's 1:1 aide found that the Student was better able to engage and participate in circle time if he was allowed to watch an educational video on mute. T297. This allowed the Student to participate with his peers without the video distracting the other students. T297-98, 323. The Student's general education teacher also stated that the Student's iPad was used as a reward for the Student complying or completing work. T320; D17p13.

37. Ms. Novak opined that the Student's behaviors interfered with his progress during the first semester of the school year as well as after winter break. T343. Ms. Novak also opined that the Student got more benefit from being in an educational environment with less distractions and where he could work at his own skill level. T277. For that reason, she felt he benefited from that time in the special education classroom to work on some goals. *Id.* She stated being in general education is also good for the Student, but the Student needs time in the special education setting for some direct instruction. *Id.* Because Ms. Novak is an experienced educator who spent a significant amount of time with the Student in different educational environments, her opinion is accorded significant weight.

COVID-19 Pandemic School Closure

38. The District closed its school buildings on March 12, 2020, through the end of the school year due to the COVID-19 pandemic. D1p1. No educational instruction was provided to students in the District until the week of April 27, 2020, when the District began providing Continuous Home Learning Plans for students. D20; T329; T361.

39. The District created a Continuous Home Learning Plan for the Student which began being implemented the week of May 4, 2020. D20p1. The Student was scheduled to have a Zoom check in with his 1:1 paraeducator and Ms. Novak at 10:30 a.m. Monday, Tuesday, Thursday,

and Friday each week.¹³ *Id.*; T330. One day per week, the Student had a class meeting at 10:30a.m. *Id.* These sessions lasted fifteen to twenty minutes and focused on skills in the areas of cognitive, daily living/adaptive, social/emotional, and behavior. *Id.*; T330. During these sessions the Student was able to participate “at least some of the” time, although notes indicate the Student often had a hard time paying attention. *Id.*; T330. The notes indicate the Student was more engaged when his Parents or his private behavioral technician attended the sessions. *Id.* The notes state the Student was “[v]ery compliant with BT!” and the “[Student] is more engaged when Dad is present.” *Id.* at 1-2.

40. During the school closure, the Student received special education services remotely via Zoom. D20, 21, 22, 23. His physical therapist, occupational therapist, and speech language pathologist all created continuous home learning plans for the remainder of the school year and delivered services between May 4 and June 19, 2020. P23; D21p2; T206; D22; T226. All of the providers stated that the Student was able to engage in the remote services and observed that he was receiving assistance from an adult in facilitating his participation. T186-87, 206, 227. All providers opined that the Student’s Parents would be capable of helping him access services in the Zoom format. T188, 206, 227. Ms. Dang further admitted that while all children the Student’s age would need assistance, the Student at issue would likely require more than the typical student. T233.

41. It is hard to determine how many sessions the Student attended with the physical therapist, occupational therapist, and speech language therapist. Based on the record, it appears he had six occupational therapy sessions, thirteen speech language sessions, and three physical therapy sessions during the school closure in spring 2020. D21, 22, 23. The Student’s physical therapy and speech sessions were fifteen to twenty minutes long. T189; 234. No testimony was provided regarding the duration of the Student’s occupational therapy services. However, based on the fact that all other Zoom sessions for the Student were limited to fifteen to twenty minutes, it is reasonable to assume those sessions were of a similar length.

42. The Student had a private CBT from Hopeful Hands that worked with him in the home for three hours a day, four days a week during remote learning in the 2019-2020 school year. T57-59, 97, 108, 171-72. This service was procured privately, and not provided by the District. *Id.* The Parents paid a reduced rate for these services, which was \$45.40 per day. P29; P30; T97. The Parents used funds received from the State Developmental Disabilities Administration (DDA) to pay for these services. T182. The Parents originally intended to use these funds to replace carpeting damaged by the Student, but that changed due to the need for assistance for the Student in remote learning. T182. The Student had this assistance from May 19 through June 18, 2020, for a total of 18 days. P29; P30.

43. CBTs or Registered Behavioral Technicians (RBT) hold similar certifications and provide Applied Behavior Analysis (ABA) therapy under the supervision of a BCBA. T137. The purpose of the supervision is to make sure the strategies and behavior management are appropriate, that the CBT or RBT is following the treatment plan appropriately, and that changes can be made if needed. T142. Ms. Waltz’s clinic employs CBTs, and, as of the date of the hearing, these

¹³ Exhibit D20 lists the service days as Monday, Wednesday, Thursday, and Friday. However, a review of the actual days services were provided implies the Student was served on Monday, Tuesday, Thursday, and Friday.

individuals are able to provide in-person, in-home services despite the COVID-19 pandemic. T145-56.

44. The Parents found remote learning to be extremely difficult for the Student. They had difficulty getting the Student to pay attention and sit through his Zoom sessions. T57-58. The Mother believes that a CBT aide would allow the Student to be able to better access his remote learning. T58. The Father observed that the Student did better in his remote sessions when the private CBT aide was available. T104.

Development of the Summer 2020 ESY and 2020-2021 IEP

45. On May 15, 2020, Ms. Novak emailed the Parents a copy of a draft IEP for the Student as well as a Parent Input Form for the Parents to complete. D14p1. The email also included an agenda for the upcoming IEP team meeting and asked the Parents to notify Ms. Novak if there was anything they would like added to the agenda. *Id.*

46. On May 17, 2020, the Parents completed a Parent Input Form as part of the IEP process. D16. The Parents requested that the Student's 1:1 aide be a skilled behavioral technician under the supervision of a BCBA. D16p3. They also requested the Student be retained in kindergarten and that his speech goals be updated in light of his diagnosis of speech sound disorder and mixed receptive expressive language disorder. *Id.* The District agreed to retain the Student in kindergarten per the Parents' request. T60-61.

47. On May 19, 2020, an ESY meeting was held and it was determined the Student qualified for ESY services in the area of behavior. D18p1. Both Parents attended the meeting. *Id.* The team noted the Student struggled with behavior after extended school breaks. *Id.* The Student was to receive 80 minutes weekly of behavioral services from a special education teacher from June 30, 2020, through August 28, 2020. *Id.*

48. An IEP team meeting was held on May 19, 2020, by video conference. Additional meetings were held on May 26 and June 5, 2020, also by video conference. D15p1; D17p27; P16p2. The Parents attended all three meetings. *Id.* Ms. Novak also attended all three meetings. T309.

49. A new IEP was created for the Student on May 28, 2020. D17. The IEP changed the number of minutes the Student would spend outside of the general education setting to 500, changing the percentage of time spent in the general education setting to 70.15 percent. D17p23. This change in the service matrix was set to take place on September 1, 2020. *Id.* at 22. The IEP maintained the Student's 1:1 paraeducator, however, the paraeducator minutes were increased to 1675 starting September 1, 2020. This included all of the Student's minutes in both special education and general education. *Id.* at 23. This IEP removed two of the Student's daily living/adaptive goals in the areas of self-advocacy and following directions. D17p10. The daily living/adaptive goal in the area of transition skills remained. *Id.*

50. Ms. Novak emailed the Parents on May 28, 2020. D16p5. Ms. Novak indicated that it was her understanding that the Parents' preference was to keep the Student from being pulled out of the general education setting more than 500 minutes per week. *Id.* She noted that the school team believed the Student should receive more frequent and intensive services and

recommended the Student be placed in the District's Blended Program. *Id.* at 6. However, in light of the Parents' preference, the IEP would reflect the request to keep the Student from being pulled out for more than 500 minutes per week. *Id.* In order to accommodate this, Ms. Novak suggested eliminating the Student's daily living goal related to safety directions from his IEP. *Id.* at 5. She believed that goal could not be properly worked on in the minutes requested by the Parents. She also indicated the Student's literacy goal may need to be adjusted once more data is collected. *Id.* Ms. Novak went on to state that the District does not have skilled behavior technicians that work with students in the general education setting. The District provides paraeducators who work under the guidance of special education teachers in the general education setting. *Id.* at 6.

51. The District's Blended Program is a program for students that need a highly staffed, controlled environment. It has small classroom sizes and is structured and developed for students with different levels of need. T313-14. Ms. Novak opined that it would be similar to the environment the Student was in at the day program with Ms. Waltz, based on the small class size, and high teacher to student ratio. T314-16.

52. The Parents did not want the Student placed in the District's Blended Program. The Mother observed the Blended Program for roughly twenty to thirty minutes in May 2019 before the Student started kindergarten and did not feel it was an appropriate placement for the Student. T65.

53. The Student's Father emailed Ms. Novak on June 4, 2020. D16p4. He stated that changing the "following safety directions" goal was not acceptable to the Parents. *Id.* He also requested the IEP include weekly collaboration between the school team and Ms. Waltz. *Id.* He stated that they did not want the Student in the Blended Program and believed it would result in the Student regressing. *Id.*

54. A PWN was issued on June 8, 2020, proposing to change the Student's IEP. D17p26. It indicated the team took the Parents' input and did not place the Student in the Blended Program or increase the Student's pull-out minutes to more than 500 per week. *Id.* The PWN indicates that the IEP goal related to following safety directions was eliminated to accommodate the Parents' request for fewer special education pull-out minutes. *Id.* The PWN indicates the team rejected the Parents' request that the Student's 1:1 paraeducator be a skilled behavior technician as the District does not employ those individuals to work with students in a general education setting. *Id.* It also stated the District does not hire BCBA's and rejected the Parents' request to include weekly collaboration with the Student's private BCBA because "it is not an IEP team decision." *Id.*

55. A second PWN was issued on June 8, 2020, related to the team's ESY determination. D18p2. The PWN indicated ESY was recommended for behavior only and the team rejected ESY services in the areas of communication, fine motor, gross motor, cognitive, daily living/adaptive, and social skills. *Id.* ESY services were rejected in the other areas because the Student did not show regression in those areas after extended breaks and he was not learning new skills that would need to be practiced. *Id.* The PWN noted that all instruction was being performed by video conference due to the COVID-19 shut down, and recommended sessions be limited to 15-20 minutes at a time due to the Student's attention span. *Id.* The PWN also noted the Student would

be receiving private behavior technician support and this person could help facilitate the distance learning for the Student. *Id.*

56. During the first semester of the 2019-2020 school year the Student's report card showed that he received a "1" or an "N" in all but one area of measurement. D19. A "1" indicates the "Student performance is below grade level standard for this semester." *Id.* "N" is used in grading behaviors and indicates the Student "Needs Improvement." *Id.* The Student received a "W" in the area of "participates actively and appropriately." *Id.* A "W" indicates the student is "working towards expectations." *Id.* The Student received "P" in all areas for the second semester of the 2019-2020 school year. "P" is the mark used to designate COVID-19 affected the student's engagement and progress during school closure. *Id.* The report card noted that during the second semester the "Student participated in Zoom class meetings. Student engaged in other lessons and activities provided by the family. There was limited evidence of student engagement in remote learning offered. Unable to measure progress." *Id.* at 2.

57. The District collected behavioral data on the Student through a system called SWIS. Behavioral data from the District's SWIS report shows that the Student had twenty-one behavioral incidents between the dates of November 14, 2019, and March 10, 2020. P14p1-2. The majority of these behaviors took place in the classroom and were believed to be done by the Student in an effort to avoid a specific task. *Id.* The Student had other behavioral issues during the school year that were not included in this report because school staff was trying to target only the bigger behavioral issues with the SWIS report. T334.

58. The Mother believes the Student regressed during the 2019-2020 school year. T66. She observed that the Student was engaging in more throwing and defying behaviors and that his speech had regressed. *Id.*

59. The Student began receiving ESY services remotely the week of July 6, 2020. D20p2. Services continued through the week of July 27, 2020. *Id.* at 3. The Student attended four sessions per week. D20p2-3. Each session lasted between fifteen and twenty minutes. D18p2. The Parents were unable to hire a CBT to assist the Student with these services, so the Parents attended the sessions with the Student. T104.

60. On July 8, 2020, Quinn Crosta, DNP, ARNP, wrote a letter to the principal at Meridian Park Elementary, at the request of the Parents. P20: T60. Ms. Crosta wrote that the Student was being followed by the Seattle Children's Neurodevelopment clinic and requested that the Student's paraeducator for the 2020-2021 school year be trained as a behavior technician under the supervision of a BCBA. She stated that the Student had shown behavioral improvements with the use of behavior therapy based on ABA. *Id.* She further stated that the Student's paraeducator needed specific training in order to allow the Student to maintain his behavioral progress. *Id.* Ms. Crosta stated it was her belief that the responses of the Student's paraeducators were actually reinforcing his negative behaviors. Ms. Crosta did not observe the Student in the school setting or have any communication with the school staff. *Id.* Because Ms. Crosta did not observe the Student in the school setting and no evidence has been provided that Ms. Crosta has any experience working in a public school setting, her opinion is accorded limited weight.

61. On August 5, 2020, the Washington Department of Health issued an updated document titled "Decision Tree for Provision of In Person Learning among K-12 Students at Public and

Private Schools during the COVID-19 Pandemic.” D2. It provided factors a school district should consider in determining when and how to return to in-person classes. *Id.* The Father was informed by the District that the District was using this decision tree to determine how to implement instruction during the 2020-2021 school year and that the Student could not have an in-person aide because aides were not allowed to be within six feet of students. T74.

62. In response to information provided by the District, the Parents reached out to the civil rights division of the Department of Health asking for clarification regarding the District’s interpretation of the decision tree document. T74-75.

2020-2021 School Year

63. The first day of school for kindergarten students in the 2020-2021 school year in the District was September 8, 2020. D1p2. As of the date of the hearing, the District is not providing in-person learning for any of its students. T372. The District is not providing any 1:1 paraeducators to Students in their home as part of remote learning. T392.

64. For the first semester of the 2020-2021 school year the Student was scheduled to have school resource room time related to daily living/adaptive skills from 10:25am to 11:45am Monday through Thursday. D30. The Student was scheduled to have resource room time to address cognitive skills from 11:50 to 12:10 on Tuesday and Thursday. The Student’s speech services were scheduled from 1:00pm to 1:20pm on Wednesday and Friday. His occupational therapy services were scheduled from 1:00pm to 1:20pm on Thursdays. His physical therapy services were scheduled from 1:50pm to 2:05pm on Wednesday and 1:20pm to 1:35pm on Thursday. *Id.*

65. The District asked Kerri Schloredt¹⁴, a behavior support teacher on special assignment, to observe the Student and help support the Student’s school team during the 2020-2021 school year. She was asked to help in developing an instructional plan for the Student and help in training the Student’s paraeducator. T245. Ms. Schloredt observed the Student in a Zoom environment on one occasion for fifteen minutes, but has otherwise had no involvement directly with the Student. T245. Ms. Schloredt opined that the Student’s 1:1 paraeducator would not need to be a CBT or RBT as long as the person was properly trained and supervised. T250. She also opined that the Student would need adult supervision to access remote learning, however a parent could fill that role. T256. Ms. Schloredt has limited interaction with the Student, however, based on her experience as a special education teacher and training as a BCBA, her opinion is accorded some weight.

Hayley Waltz

66. The Student began receiving treatment from Hayley Waltz¹⁵, a private BCBA, in June 2018. T124. Ms. Waltz has continued to work with the Student as of the date of the hearing.

¹⁴ Ms. Schloredt has a bachelor’s degree in psychology and a master’s degree in special education. She has worked in education for over twenty years and recently became a BCBA. T243-44.

¹⁵ Ms. Waltz has a bachelor’s and master’s degree in psychology with a specialization in ABA. P31p5. She is a BCBA and a licensed behavior analyst in the state of Washington. *Id.* She is currently the Executive Clinical Director at Hopeful Hands, Inc. P31p2.

During the 2019-2020 school year, the Student received services from Hopeful Hands¹⁶, Ms. Waltz's clinic, from January 27, 2020 through August 26, 2020. P12. Ms. Waltz and her clinic provide ABA therapy in different settings. In ABA therapy, a skill is broken down into its individual components and then each component is taught sequentially to the individual. The size of each component step is determined based on the ability of the individual. T125. ABA therapy may be an effective methodology for individuals with a variety of diagnoses. T127.

67. Ms. Waltz began seeing the Student more regularly in March 2020, after the schools were closed due to the COVID-19 pandemic. T128. At that point, Ms. Waltz noticed the Student had regressed in his behaviors and that many of the tools that had previously worked well with the Student were no longer effective. T128.

68. During the school closure, the Student received direct intervention from BCBA's and CBT's in the Hopeful Hands clinic. P12p4. Between March 16 and March 24, 2020, the Student was seen in the clinic six times. *Id.* The invoice for services lists the price for those sessions at \$918.00. *Id.*

69. At Hopeful Hands, the Student also attended a Day Program between the dates of May 13 and August 11, 2020. P12p1-2. This program is specifically for students age six and under who need intense behavior intervention. T172. The Day Program takes place in the Hopeful Hands clinic and provides each student with their own 1:1 CBT. T175. The classes have five to seven students and they meet as a group and do individual learning. *Id.* The program meets four days a week for three hours a day. *Id.* The Program works on different skills as determined by the Student's treatment plan. T172-73; P28. The Student's treatment plan included goals in the area of behavior management, functional and social communication, play and social skills, community/safety skills, and adaptive skills. P28. The Student attended the day program forty times. P12p1-2. The invoice lists the price for this program at \$508 per day for the first three days and \$506.92 for the remaining days, for a total cost of \$20,280.04. This program was a successful environment for the Student. T176.

70. In July 2020, Ms. Waltz and Grace Lee, a BCBA working with Ms. Waltz, created a behavior support plan for the Student. P22; T146. The plan describes the challenging behaviors observed from the Student, talks about what may happen prior to the behavior occurring, and lists the consequences of the behavior. T146. The plan also lays out multiple strategies used to help support the Student so as to avoid or reduce these behaviors. T147; P22p2-4.

71. In July 2020, Ms. Waltz wrote a letter expressing her opinion that the Student needed a "highly trained certified behavior technician that is supervised by a board certified behavior analyst" in order to meet the Student's educational needs. P21. She further stated that placement in a general education classroom would provide the Student with opportunities to learn from his peers and expand his skills. *Id.*

72. Ms. Waltz opined that the Student's "behavior is very socially mediated," and indicated the Student does not do well in environments without peers. In her opinion he performs better in environments with peers who have higher skill levels so he can be pushed to model and follow his peers. T128.

¹⁶ Hopeful Hands is a licensed behavioral health agency in the State of Washington. T171.

73. Ms. Waltz created a progress report for the Student focused on the time period of July 11, 2020 through September 17, 2020. P28. Ms. Waltz noted in this report that the Student made “excellent progress” toward his targeted goals and skills. P28p1. She noted he was showing improvements in his communication skills, social/play skills, sustaining engagement in preferred and non-preferred activities, adaptive skills, and behavior management. *Id.* She noted the Student had been receiving up to twelve hours of clinic-based 1:1 ABA over the last six months while the school was closed and that currently the Student was receiving up to fifteen hours of 1:1 ABA therapy weekly. *Id.*

74. Ms. Waltz opined that that the Student’s IEP would be better implemented if his 1:1 aide was a CBT or RBT. T150. Ms. Waltz opined that a CBT or RBT would be beneficial to the Student in the school setting because he or she could “make on-the-spot, informed, educated decisions on what to do to either stop the behavior from occurring, avoid the behavior once it has begun—or before it has begun and what to do afterwards to ensure reduction of the undesired behavior.” T137. She also noted that a CBT or RBT could develop a relationship with the Student which would allow them to better manage his behaviors. T150-51. Ms. Waltz also opined that without a CBT or RBT the student would experience regression and behavioral challenges. T153. Ms. Waltz’s opinion regarding the need for a CBT is given limited weight. Ms. Waltz had limited opportunity to observe the Student in the school setting and does not have experience as an educator in a public school setting.

75. Ms. Waltz opined that the Student would be able to make progress in a general education setting if he had a CBT or RBT, if appropriate supports were in place, and if his SDI was modified appropriately. T152. She also opined that she would not expect the Student to be able to be in general education for the entire school day. She would anticipate he would need to be out of general education to receive his speech, physical therapy, and occupational therapy services. T169. She also opined the Student would benefit from “some one-to-one instruction independently from the class period.” T169. She reasoned this would be appropriate because the Student’s ADHD diagnosis makes it difficult to focus especially when there is a lot going on in his environment. T169-170. She stated that providing the Student with a “sanitized environment” with reduced stimuli and fewer people for short breaks would help him reset and be successful in the general education setting. T170. She explained she would not recommend a sanitized setting for the entire day, but just for a quick reset or when learning challenging skills. T170. She opined he should not spend more than 10-15 percent of his day in a sanitized environment, not accounting for his speech, physical therapy, and occupational therapy services. *Id.* Ms. Waltz’s opinions regarding the Student’s need for special education services is given significant weight, as it is largely consistent with her observations at her own clinic and with the observations of the school staff.

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

The IDEA

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

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

Id. at 206-07 (footnotes omitted). For a school district to provide a free appropriate public education (FAPE), it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Id.* at 200-01.

4. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

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

Andrew F. v. Douglas County Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999-1000 (2017).

5. 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." *Andrew 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. on behalf of A.S. v. Issaquah Sch. Dist.*, 2019 WL 2023567 at *21, 119 LRP 18751 (W.D. Wash. 2019) (quoting *Endrew F.*, 137 S. Ct. at 994).

6. 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 decisionmaking 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.

7. Thus, not every procedural violation of the IDEA is sufficient to support a finding that the child in question was denied FAPE. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1129 (9th Cir. 2003)(quoting *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 887, 892 (9th Cir. 2001)).

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP for the 2020-2021 school year by not providing appropriate supplementary aids and services, namely 1:1 behavior support provided by a CBT under the supervision of a BCBA to effectuate the Student’s inclusion in the general education setting

8. In May 2020, the Parents asked the District to provide a CBT or similarly certified behavioral technician to be the Student’s 1:1 paraeducator for the 2020-2021 school year because the Parents believe it would allow the Student to be successful in the general education setting for eighty percent of the school day. The District denied the Parents’ request stating that the District does not hire CBTs to work with students in the general education setting. Parents argue this denial violated the IDEA because it amounted to a categorical denial of a service for the Student and did not look at the Student’s unique needs in making the determination.

9. The determination as to whether an IEP is reasonably calculated to offer a student FAPE, and thus appropriate, 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).

10. In developing a student’s IEP, WAC 392-172A-03110 requires the IEP team to consider:

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

Further, “[w]hen considering special factors unique to a student, the IEP team must...[c]onsider the use of positive behavioral interventions and supports, to address behavior, in the case of a student whose behavior impedes the student’s learning or that of others....” WAC 293-172A-03110 (2)(a)(i).

11. While the District denied the Parents’ request for a CBT because the District does not provide that type of service in the general education setting, that alone is insufficient to prove that the District failed to look at the Student’s unique needs when formulating his IEP. It is clear from the record that a great deal of time and effort was expended to create the Student’s May 2020 IEP. The IEP team held three different IEP meetings and requested a significant amount of input from the Parents. The team even agreed not to place the Student in the Blended Program, against the opinion of the school team members, and to keep the Student’s special education minutes to 500 per week in order to accommodate the Parents’ wishes. Further, the May 2020 IEP increased the Student’s 1:1 paraeducator minutes to cover his entire school day and the team contacted a BCBA within the District, Ms. Schloredt, to work with the school team and provide assistance to the paraeducator. Input from parents is vital in formulating an appropriate IEP. However, parents do not have veto power over individual provisions or the right to dictate any particular educational program. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003).

12. The Parents also argue that denial of a CBT for the Student violated the IDEA because the Student had success with ABA therapy in his private program, whereas the Student was not making progress with the paraeducator during the 2019-2020 school year.

13. School districts are generally entitled to deference in deciding what programming is appropriate for a student. *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1031 n.5 (9th Cir. 2009). For that reason, IEPs need not address the instructional method to be used unless a specific methodology is necessary for a student to receive an appropriate education. *See id.* at 1039; 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).

14. The Parents have not provided sufficient evidence to support a finding that ABA therapy is the only methodology that would be successful for the Student. While testimony from Ms. Waltz and the Parents demonstrates the Student had success with ABA therapy, the Student generally received ABA therapy in a 1:1 or small group setting. These settings are not comparable to a general education school setting, where the Student spent the majority of his time during the 2019-2020 school year.

15. Also, while all parties agree that the Student had difficulty during the 2019-2020 school year, the District staff opined that this difficulty was due to the Student having insufficient time to work in a special education setting rather than due to insufficient training of the paraeducator or failure to use ABA therapy. This contention is supported by testimony from Ms. Novak, who saw the Student on a daily basis and is an experienced special education teacher. It is also supported by Ms. Waltz, the Student’s private BCBA, who opined the Student would need some time in a “sanitized” environment in order to be successful in school. Additionally, the Student’s success with ABA therapy in small or 1:1 settings demonstrates that at least some of his challenges in the 2019-2020 school were the result of insufficient time in a special education setting.

16. Further, while the Student's IEP does not call for ABA therapy or assign a CBT for the Student, it appears that during the 2019-2020 school year, the District was using many of the strategies and recommendations it received from Ms. Waltz and Ms. Claus, both of whom are BCBA's. The District also reached out to Ms. Schloredt to support the Student's team and programming during the 2020-2021 school year.

17. While the Student's private BCBA, Ms. Waltz, opined that the Student would need a CBT supervised by a BCBA to be successful, her opinion is given limited weight. As stated previously, Ms. Waltz is not a teacher and only observed the Student at school a few times during the 2019-2020 school year. Ms. Schloredt, while having limited interaction with the Student, has the experience as both a teacher and a BCBA and is familiar with the District's curriculum and school setting. In her opinion, the Student's paraeducator would not need to be a CBT, and could be properly trained and supervised without that credential. Based on her knowledge and experience as an educator, her opinion is accorded more significant weight.

18. The Parents have not proven by a preponderance of the evidence that a CBT aide was required for the Student to receive an appropriate education. Thus, the District's failure to provide for a CBT in the Student's IEP does not constitute a violation of the IDEA or denial of FAPE.

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP for the 2020-2021 school year by increasing minutes outside of the general education setting and reducing goals without completing the agreed FBA and without attempting revisions to supplementary aids and services or the BIP

19. The Parents argue the Student's May 2020 IEP was inappropriate because it reduced the Student's time in general education without first revising his supplementary aids, namely changing his 1:1 paraeducator to a CBT.

20. 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.

21. 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.

22. 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 student 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).

23. During the 2019-2020 school year, the District placed the Student in the general education setting for 80 percent of the school week at the request of the Parents. The Student's IEP included 1:1 support from a paraeducator and the District sought and implemented recommendations from Ms. Claus and Ms. Waltz in developing appropriate behavior interventions for the Student. Despite this, the Student's behaviors made it difficult for him to make progress during the 2019-2020 school year. The Parents contend the Student would have been successful in general education 80 percent of the time had his paraeducator been a trained CBT. However, the evidence in the record does not support this contention.

24. As discussed above, while there is evidence that the Student had success with ABA therapy, those successes were primarily seen when services were provided in a 1:1 or small group setting such as the Day Program at Hopeful Hands. These settings are not comparable to a general education kindergarten classroom, and the Student's success there does not prove that a CBT-certificated paraeducator would have made the Student successful in a classroom.

25. Further, the record supports the District's contention that the Student needed additional time in a special education setting to obtain an educational benefit. Ms. Kiyonaga worked with the Student both in the general education setting and special education setting and found he was more successful when his services were delivered partially in a special education setting. Ms. Novak also opined that while it was important for the Student to have time in general education, he would benefit from some time in an educational environment with less distractions where he could work at his own skill level. Further, Ms. Waltz, opined the Student would need to be in a "sanitized" environment for 10-15 percent of the school day, not including his OT, PT, and SLP services. She also expressed that he did well in the Day Program at her clinic, which is a setting that involves 1:1 and small group instruction.

26. The evidence does not support a finding that had the Student been provided a CBT, he would have been successful in the general education setting for eighty percent of the school week. Further, the May 2020 IEP, which took into consideration the Parents' preference for general education time, only reduced the Student's general education time to 70.15 percent of the week, while increasing the paraeducator minutes. The District did increase the Student's supplementary aid in an attempt to allow the Student to be successful in the general education setting without any further reduction. The Parents have not established that the May 2020 IEP was inappropriate or denied the Student FAPE.

27. The Parents also argue that the change in the Student's goals in the May 2020 IEP was not based on the Student's unique needs, thus denying the Student FAPE. They argue that if the Student was provided a CBT, his goals would not need to be reduced in order to be accomplished in the general education setting.

28. An IEP must contain a statement of annual goals, including academic and functional goals designed to meet the student's needs that result from his disability to enable him to be involved in and make progress in the general education curriculum and meet each of a student's other educational needs that result from the student's disability. WAC 392-172A-03090(1)(b)(i); 34 § CFR 300.320(a)(2).

29. In the May 2020 IEP, the goal related to following safety directions was eliminated. This was done because the school team did not feel they would have sufficient time to work on this goal based on the Parents' request to keep the Student's special education minutes to 500 or less. Given that the District IEP team members believed the Student should be in the Blended Program, or in a more restrictive placement with more special education minutes, it is reasonable that the Student's goals would need to be changed to accommodate less time in the special education setting, as requested by the Parents. The evidence shows the Student needs time in a special education setting to learn new skills, so a reduction in that time would reasonably correlate to a reduction in related goals. Thus, the elimination of one of the Student's goals was based on his unique needs and his ability to accomplish the goal in his educational placement. The reduction in the Student's goals does not amount to a denial of FAPE.

30. Finally, the Parents argue that the District was required to conduct an FBA and develop a BIP prior to reducing the Student's time in general education. However, the District conducted an FBA prior to the start of the Student's 2019-2020 school year and a BIP was referenced in the Student's October 2019 IEP. The Parents asked if a new FBA could be done in February 2020 in an email to Ms. Novak. The District did not agree to perform an FBA at that time. Ms. Novak said she would "collaborate" with someone else at the school about that, but went on to say that she believed she understood the reason behind the Student's behaviors, namely that he wanted to avoid doing a specific task. The Student's current FBA already identified attention seeking and communication of task preference as the underlying causes of the Student's behavior. The Parents do not argue that this is an incorrect assessment. Thus, the evidence does not support a finding that a new FBA would have been necessary or helpful for the Student.

31. The BIP was not provided by either party as part of the record. Regardless, the Parents have provided no evidence to explain why the existing BIP was inappropriate and needed to be adjusted. As such, the Parents have not established that the District's failure to perform an FBA and create a new BIP prior to reducing the Student's minutes in general education was a violation of the IDEA.

32. The Parents have not provided sufficient evidence to show that the reduction in general education minutes and reduction in goals in the May 2020 IEP was inappropriate. The evidence supports a finding that the Student would benefit from some time in the special education setting and that his goals would need to be adjusted to be measurable and achievable based on the Student's placement. The Parents have not established the District violated the IDEA or denied the Student FAPE with respect to this issue.

Whether the District violated the IDEA and denied the Student FAPE by failing to implement the Student's IEP during the 2019-2020 school year by using his AAC accommodation for reward videos and games

33. Material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2007).

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

. . .

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

Van Duyn, 502 F.3d at 821 and 822 (italics in original).

34. The Student's June 2019 evaluation recommended he be provided a dedicated AAC device. Both the Student's October 2019 and January 2020 IEPs included an accommodation of an AAC device in the form of an iPad with ProLoQuo2Go software to be available all day and in all school settings. The Parents do not allege that the Student was denied his AAC device. Instead, they argue that allowing the Student to use this device for other purposes amounts to a material failure to implement the IEP. However, the evidence does not support the Parents' claim.

35. While the Student was able to use his AAC device to watch videos and play games at times, a plain reading of the IEP does not indicate this is prohibited. The IEP requires the Student to have access to the AAC device all day and in all school settings. No evidence was provided to indicate this was not provided to the Student.

36. Further, there is no evidence to support a finding that the use of the AAC device for other purposes hindered the Student's ability to communicate. The Student is able to communicate in other ways, including physical gestures and speech approximations. Also, when the Student was receiving his speech services, the device was only used for communication purposes. Ms. Dang observed that the Student had made progress in his speech goals during the 2019-2020 school year, further demonstrating that the use of the AAC device for other purposes did not negatively affect the Student's ability to communicate.

37. The Parents also allege that the Student's behavior challenges were a result of the inappropriate use of his AAC device. However, there is no evidence to support this contention. The Student was diagnosed with behavioral difficulties when he was evaluated in July 2018, well before the start of his 2019-2020 school year. Further, he exhibited more behavior challenges after returning from winter break, and there is no indication he was using his AAC device for videos on a more frequent basis, or at all, during that time.

38. The Parents have not provided sufficient evidence to show that the use of the Student's AAC device to watch videos or play games amounted to a failure to implement the Student's IEPs. Thus, no violation of the IDEA or denial of FAPE is found.

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP and failing to educate the Student in his least restrictive environment during the 2019-2020 school year by failing to meaningfully revise his educational program responsive to ongoing behavior issues and improperly rewarding the behavior

39. The Parents argue the District denied the Student FAPE by failing to revise the Student's educational programming in response to his behavioral issues. Specifically, they argue a new FBA should have been performed.

40. As stated above, while the Parents inquired about a new FBA in February 2020, the District did not agree to perform one at that time. The Student had an FBA performed as part of a comprehensive evaluation in June 2019. The FBA identified that the Student's behaviors functioned as a way to seek attention and to communicate task preference. Ms. Novak stated in her reply to the Parents in February 2020 that the Student's behaviors appeared to be functioning in the same way. No other evidence was provided to demonstrate the need for a new FBA.

41. The Parents also argue that a new BIP was required in order to correct the Student's behavioral challenges. However, the BIP that was in place for the Student during the 2019-2020 school year is not part of the record and Parents provide no evidence as to what they found inappropriate about the current BIP or what would need to be in a new BIP.

42. Finally, the Parents appear to argue in their closing brief that a new BIP was required in this case because the inappropriate use of the Student's AAC device and the time he spent in the Cheetah room amounted to a disciplinary removal of the Student. The Parent cites to regulations pertaining to disciplinary removals and related manifestation determinations including 34 CFR § 300.530. However, there is no indication in the record that the Student was ever disciplined or removed from his educational placement. The use of his AAC device to watch videos as reward or as a way to keep him attentive in general education is not a disciplinary removal from school.

43. Regardless of the FBA or BIP, the District did make efforts to respond to the Student's behaviors during the 2019-2020 school year. The District reached out to Ms. Claus for recommendations for the Student and implemented the vast majority of the strategies that were suggested. The District also implemented many recommendations provided by Ms. Waltz, including the use of visual schedules and token systems.

44. The Parents have not proven that the District's failed to meaningfully revise the Student's educational program or improperly rewarded his behaviors. Thus, the Parents have not established that the 2019-2020 IEPs were inappropriate or denied the Student FAPE.

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP and failing to educate the Student in his least restrictive environment during the 2019-2020 school year by failing to make meaningful progress on the Student's IEP goals with only 3 of 17 being reported as sufficient progress and none being met

45. The Parents argue that the fact the Student made little progress on his IEP goals during the 2019-2020 school year shows that the Student's IEPs were inappropriate. They argue that this, in combination with other alleged violations, amounts to a denial of FAPE.

46. When determining whether an IEP is appropriate, the "question is whether the IEP is reasonable, not whether the court regards it as ideal." *Rowley*, U.S. at 206-07. The determination of the reasonableness of an IEP 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.* For this reason, courts have found that while actual progress can demonstrate that an IEP provided FAPE, the inverse of the rule is not always true. *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008).

47. The Student's failure to make progress on many of his goals does not by itself demonstrate that the IEPs were inappropriate. The Parents argue the Student was not able to make progress because of his behavior, and his behavior was not under control because the IEPs failed to include appropriate behavioral supports. However, as stated previously, the Parents have not shown that the failure to conduct a new FBA or provide a CBT denied the Student FAPE.

48. The Parents also argue that in combination with other alleged IDEA violations related to the use of his AAC and frequent time in the Cheetah room, the Student's failure to make progress on his goals proves the IEPs were inappropriate. However, as discussed previously, these alleged violations do not show the District denied the Student FAPE. Thus, the Student's lack of progress on his IEP goals during the 2019-2020 school year does not establish a denial of FAPE.

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP and failing to educate the Student in his least restrictive environment during the 2019-2020 school year by failing to provide any services required by his IEP during the Covid-19 school closure and failing to provide accessible alternatives during that time period

49. The Parents argue the District failed to implement the Student's IEP during the school closure due to COVID-19 in the spring of 2020 because the Student was not provided all SDI and related services required by his IEP. The District contends that it materially implemented the IEP to the maximum extent possible, and thus did not violate the IDEA.

50. The District was ordered to stop all in-person educational programs on March 12, 2020, by proclamation from the Governor of Washington State. Governor Proclamation 20-08, 20-09.1. The U.S. Department of Education (DOE) issued guidance that same day stating,

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

U.S. Dep't of Education, Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak (March 2020) at p. 2.

51. The Washington Office of Superintendent of Public Instruction also issued guidance stating, “There remains an expectation that individualized education program (IEP) services will be delivered to the maximum extent possible during the pandemic while adjusting delivery methods to comply with state and local health/safety restrictions.” OSPI, Questions and Answers: Provision of Services to Students with Disabilities During COVID-19 in Summer and Fall 2020 (released 3/24/20, last updated 8/26/20). This guidance further recognized that there have been no changes made to the IDEA or its implementing regulations, thus, school districts are not relieved of their obligation to comply with said laws. *Id.*

52. Here, it is clear from the DOE guidance that the District was required to provide special education services to the Student during the time period in which the District was providing educational services to other students. In this case, that was from April 27, 2020, through June 19, 2020. During that time period, the District was providing the Student with services under a Continuous Home Learning Plan. The question is whether the services provided satisfied the District’s obligation to implement the Student’s IEP, and if not, whether any failure to implement the IEP was a material failure. See *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007).

53. The Student received services for seven weeks as part of his Continuous Home Learning Plan. During this period, his SDI in the areas of cognitive, daily living/adaptive, social/emotional, and behavior skills, were delivered congruently in fifteen to twenty minute sessions, four days per week without an in-person 1:1 aide. The Student attended twenty-five sessions which, at most, amounted to 500 service minutes. In contrast, his January 2020 IEP called for 280 minutes per week in cognitive, 350 minutes per week in behavior, 150 minutes per week in social/emotional, and 200 minutes per week in daily living/adaptive. When combined, the Student’s IEP called for 980 minutes per week or 6,860 minutes during the relevant time period. The IEP also included a 1:1 paraeducator for 1340 minutes per week.

54. As part of his Continuous Home Learning Plan, the Student also received services in the areas of gross motor, fine motor, and communication. During the seven-week period, the Student received roughly 120 minutes of fine motor services from his occupational therapist, whereas his IEP called for 120 minutes monthly. The Student received 260 minutes of communication services from his speech language pathologist, whereas his IEP called for 120 minutes weekly, or 840 for seven weeks. Finally, the Student received 60 minutes of gross motor services from his physical therapist, whereas his IEP called for 30 minutes per week, or 210 minutes total.

55. While the school closure due to COVID-19 was in no way the District’s fault, it is hard to see how the limited services provided to the Student did not amount to a material failure to implement his IEP. This is especially clear in regards to the dearth of minutes provided in the area of cognitive, daily living/adaptive, social/emotional, and behavior skills.

56. The District argues that despite the discrepancy between the services provided and the services called for in the Student’s IEP, the District did not fail to materially implement the IEP because it provided services to the maximum extent possible, especially given his challenges attending to even those minimal services without a 1:1 aide.

57. Very few cases have decided this issue. In *Denver Public Schools District 1*, the Colorado Department of Education found that while the district failed to provide the Student with all service

minutes called for in the IEP, the failure to implement was not material and did not constitute a denial of FAPE because the Student demonstrated educational progress. 120 LRP 29273 (2020).

58. The case at hand is distinguishable from that in *Denver*. First, in *Denver*, the student missed a total of 260 minutes during the two-month school closure period, whereas, the Student in the present case missed more than 7,000 services minutes. Further, while the student in *Denver* demonstrated educational progress during the school closure, that is not the case with the Student at issue. In the present case, there is no evidence to show that the Student made any progress during this time period. At best, the District can point to notes that the Student was able to attend the remote learning sessions and at times participate with the help of a Parent or his private CBT. The Student's report card even specifically notes that "[t]here was limited evidence of student engagement in remote learning offered" and that they were "unable to measure progress."

59. The District did not fully implement the Student's IEP from April 27 to June 19, 2020. The services that were provided were significantly less than what was called for in the IEP and the evidence does not support a finding that the Student made progress during that time period. As such, the District's failure to implement was material and denied the Student FAPE.

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP and failing to educate the Student in his least restrictive environment during the 2019-2020 school year by failing to provide meaningful or accessible ESY services in the summer of 2020 as required by the Student's IEP

60. The Parents argue the District violated the IDEA by failing to provide ESY services that were accessible and reasonably calculated to confer an educational benefit to the Student. Parents argue that the failure to provide the Student with a CBT in his home made the remote services inaccessible for the Student and that the quantity of services was insufficient to confer an educational benefit.

61. ESY services are services provided to students eligible for special education beyond the normal school year and in accordance with a student's IEP. WAC 392-172A-02020(1). The purpose of ESY services is the maintenance of a student's learning skills or behavior, not the teaching of new skills or behaviors. *Id.* at (5). ESY is provided either based on a child's regression without adequate recoupment following school breaks, or "based upon the professional judgment of the [IEP] 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." *Id.* at (6).

62. The IEP team determined the Student needed ESY services in the area of behavior based on his past regression in this area after winter break. In June of 2020, the IEP team determined how ESY would be provided. The ESY services consisted of fifteen-minute Zoom sessions four days a week for four weeks. The PWN indicated the Student would have access to a private CBT provided by his Parents to assist in these services. However, it appears this was not actually available. The Student's Parents helped facilitate his participation. The District did not provide the Student with any 1:1 paraeducator support to access these services.

63. At the time the Student's ESY program was developed, the District was shut down due to COVID-19 and the Student had already been engaging in remote learning for roughly a month.

As stated previously, the Student had difficulty accessing these services and making progress in this format even with the assistance of a private CBT procured by the Parents. While the school year was not over, the IEP team had information indicating the Student would have difficulty accessing ESY services in the remote setting without behavioral supports.

64. Also, while the PWN makes clear the District believed the Student was going to have assistance from a CBT during ESY, this was not a services provided by the District. The District was aware of the Student's behavior issues and his need for support from a 1:1 aide, as evidenced by the inclusion of this service in the Student's IEP. Further, the Student's May 2020 IEP, developed at nearly the same time as the ESY services, actually increased the number of minutes for the Student's 1:1 aide.

65. The failure to provide the Student with a 1:1 aide to help him access his ESY services resulted in the services being inaccessible for the Student. Further, at the time the services were developed, the District was on notice that remote learning, especially without a 1:1 aide, would be difficult for the Student to access. As such, the District's provision of ESY was inappropriate and denied the Student FAPE.

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP and failing to educate the Student in his least restrictive environment during the 2019-2020 school year by denying Parents' request for ESY services in areas other than behavior, despite emerging skills being reported and behavioral regression resulting in regression of other areas

66. The Student's IEP team determined he qualified for ESY services for behavior only. This was based on the fact that the Student appeared to have greater behavioral struggles after the winter break. The Parents requested ESY in the areas of communication, fine motor, gross motor, cognitive, daily living/adaptive, and social skills. The IEP team rejected this request because it found that the Student did not show regression in those areas after extended breaks and he was not learning new skills in those areas that would need to be practiced. The Parents argue this determination violated the IDEA and that the severe nature of the Student's disability necessitated ESY in other areas beyond behavior.

67. The Parents point to the Student's slow progress on his goals, which is one factor used by an IEP team to determine the need for ESY. However, the IEP team had documented evidence of how the Student regressed during breaks, and found that such regression was only found in the area of behavior. The Parents have provided no further evidence to support a finding that ESY was necessary for the Student in other areas.

68. The Parents have not established that the District violated the IDEA when it denied the Parents' request for ESY in other areas.

Whether the District violated the IDEA and denied the Student FAPE by failing to provide an appropriate IEP and failing to educate the Student in his least restrictive environment during the 2019-2020 school year by failing to provide meaningful participation of Parents in addressing behavioral issues through misrepresentations regarding steps being taken to address the issues

69. The Parents argue the District violated the IDEA by misrepresenting steps it was taking to address the Student's behavioral challenges. First they argue the District misrepresented its intention to modify the Student's BIP. The Parents point to a statement in the Student's June 2019 evaluation which states, "A Behavior Intervention Plan (BIP), which is based upon the findings of the FBA is recommended. For more information, please refer to the accompanying Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP)."

70. If the Parents are arguing that a BIP was never created for the Student, the evidence in the record does not support this finding. While the record does not include a BIP, the Student's October IEP lists the BIP as an accommodation. Further, notes from Ms. Novak in the October IEP state that the Student's BIP is being implemented by his paraeducator.

71. If the Parents are arguing that the District misrepresented its intention to modify an existing BIP, there is also insufficient evidence to support that claim. The only evidence provided by the Parents to support this contention is the statement from the Student's October 2019 IEP stating that a BIP based on an FBA is recommended, as quoted above. This statement in the October 2019 IEP appears to be cut and pasted from the Student's June 2019 evaluation. Further, as discussed above, it appears there already was a BIP being implemented for the Student that was based on the findings of the FBA performed in June 2019. No further evidence was provided to show that Parents requested a new BIP. The Parents have not proven that the District misrepresented its intention to perform or modify the Student's BIP.

72. The Parents also argue that the District misrepresented its intention to perform a new FBA in February 2020 after a request from the Parents. However, as discussed previously, the District did not agree to perform a new FBA and instead agreed to consult with someone else in the District about the necessity of a new FBA. Parents have not established that the District misrepresented its intention to perform a new FBA.

73. The Parents further argue the District misrepresented that it would exclusively be working with a District BCBA and would not allow Ms. Waltz to observe the Student in November 2019. However, the record shows that Ms. Waltz did observe the Student at school prior to November 2019 and had offered recommendations to Ms. Novak. Ms. Novak confirmed by email to the Parents that she was utilizing those recommendations and informed the Parents the District would also be working with a District BCBA, Ms. Claus, to get further support for the Student. The evidence does not show that the District ever told the Parents Ms. Waltz could not observe or that it would only work with a District BCBA.

74. The Parents argue that these misrepresentations and Ms. Waltz's lack of observations limited their ability to fully participate in the January 2020 IEP meeting. However, the Parents have not established any misrepresentations by the District. Further, Ms. Waltz was able to observe the Student prior to the January 2020 IEP meeting and she was able to attend and participate in that meeting. Additionally, the Parent's requested an FBA in February 2020, after the January 2020 IEP meeting, so it is unclear how this would have affected the Parents' ability to participate at the January IEP meeting.

75. The Parents have not established that the District misrepresented the actions being taken to address the Student's behavioral issues. Thus, the Parents have not established that the District violated the IDEA in this regard.

Whether the Parents are entitled to their requested remedies

76. The Parents have proven that the District violated the IDEA and denied the Student FAPE when it failed to fully implement the Student's IEP in the spring of 2020 and when it failed to provide accessible ESY in the summer of 2020. As such, the Parents are entitled to remedies.

77. The Parents have requested multiple remedies including reimbursement for services privately procured by the Parents and compensatory education. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005), *cited with approval in R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. 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). Flexibility rather than rigidity is called for. *Reid v. District of Columbia*, 401 F.3d at 523-524. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Id.* at 524.

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

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

631 F.3d at 1126.

79. The District is not currently providing any in-person services to students due to the COVID-19 pandemic, and likely will not be for some time. However, the Parents have been able to secure private in-person services for the Student and evidence shows that these services have been beneficial to the Student. As discussed previously, remote services are of limited value to the Student, especially given the limited duration of remote services available due to the Student's attention issues. As such, compensatory education in the form of reimbursement for private services paid for by the Parents is an appropriate form of compensatory education in this instance.

80. This private CBT service used by the Student from May 19 to June 18, 2020, allowed him to attend and participate in the limited remote services provided by the District during the spring of 2020. Because this service was available to the Student for three hours per day, it appears the CBT was also able to provide additional ABA services to the Student outside of the remote learning sessions. As such, reimbursement of this service is appropriate to partially compensate the Student for SDI missed during this time period. The District shall reimburse the Parents for the cost incurred to hire the private CBT during the remote learning period between May 19 and

June 18, 2020. The Parents paid \$45.40 per day for eighteen days for a total cost of **\$817.20**. The District shall provide this reimbursement within thirty days after issuance of this order.

81. Further, the Day Program attended by the Student provided additional ABA therapy during the end of the school year and throughout the summer. This program provided the Student with a dedicated CBT and involved 1:1 and small group sessions to work on different skills identified in his treatment plan. The Student attended this program for forty days, for a total of 120 hours. While this is significantly fewer hours than the number of service hours the Student missed during the spring and summer, students generally progress more rapidly with 1:1 instruction as opposed to instruction in a general education setting. As such, reimbursement for this service is appropriate to compensate the Student for services missed during the spring and summer of 2020. The District shall reimburse the Parents for their out of pocket cost of the Day Program attended between the dates of May 13 and August 11, 2020. The total cost incurred for this program was **\$20,280.04**. The District shall provide this reimbursement within thirty days after issuance of this order.

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

ORDER

1. The Shoreline School District violated the IDEA and denied the Student FAPE during the 2019-2020 school year by:
 - a. Failing to fully implement the Student's IEP during the school closure due to the COVID-19 pandemic during the 2019-2020 school year, and
 - b. Failing to provide accessible ESY services in the summer of 2020.
2. The Parents are awarded the remedies at Conclusions of Law 80 and 81.
3. All other remedies requested by the Parents are denied.

Served on the date of mailing.



Dana Diederich
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

DECLARATION OF SERVICE

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

Parent



Amy Vujovich, Director of Student Services
Shoreline School District
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Dated November 25, 2020 at Seattle, Washington.

lan

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

cc: Administrative Resource Services, OSPI