MAILED
Aug 12, 2021
OAH - SEATTLE

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

IN THE MATTER OF RENTON SCHOOL DISTRICT	OSPI CAUSE NO. 2020-SE-0180 OAH DOCKET NO. 11-2020-OSPI-01208 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

A due process hearing was held before Administrative Law Judge (ALJ) Jacqueline Becker on June 9, 10, and 11, 2021, via videoconference. The Parent of the Student whose education is at issue[1] appeared and represented himself. The Renton School District (District) was represented by David Hokit, attorney at law. Also present for the District was Jennifer Traufler, Chief of Student Support for Special Education.

PROCEDURAL HISTORY OF THE CASE

The Due Process Hearing Request (Complaint) in this matter was filed with the Office of Superintendent of Public Instruction (OSPI) on November 13, 2020. The Complaint was assigned Cause No. 2020-SE-0180 and was forwarded to the Office of Administrative Hearings (OAH), which assigned the matter to ALJ Jacqueline Becker.

The Complaint was filed jointly by the Student's mother and his adult brother. By order dated January 4, 2021, the ALJ determined that the adult brother is a "parent" within the meaning of WAC 392-172A-01125 for purposes of this action because he has been granted authority by the Student's mother, pursuant to a valid power of attorney, to make all education, health, and legal decisions pertaining to the Student. The adult brother is hereinafter referred to as "Parent." The Student's mother is referred to as "Mother."

Multiple prehearing conferences were held to address a variety of issues. On May 24, 2021, an order was entered granting in part and denying in part the District's Motion for Partial Summary Judgment. Following the entry of that order, the five remaining issues were heard at the due process hearing,

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

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EVIDENCE RELIED UPON

Exhibits Admitted:

Parent's Exhibits: P1, P2 (pages 1-4, 6, 7, 14 and 15 only), P3, P6, P7, P9, and P21 (testimonies of Bell and Merrill only, at pages 285-298, 311-379, 425-448, and 610-624)[2]

District's Exhibits: D1-D12

Witnesses Heard (in order of appearance):

Wendy Merrill, Bremerton School District special education department clerical assistant
The Mother
Jonathan Bell, Bremerton School District Director of Special Services
Perlina Fugate, District special education teacher
Jesse Whiddon, Renton Park Elementary School office staff member
Jennifer Traufler, District Chief of Student Support for Special Education
Bailey Hudson, District speech-language pathologist
Denise Marrese, former District school psychologist
The Parent
Dr. Fan-Pei Kung, District occupational therapist

Post-Hearing Briefs

The due date for post-hearing briefs was set as July 23, 2021. The parties' post-hearing briefs were timely filed.

Due Date for Written Decision

The due date for a written decision in this case was continued to thirty (30) calendar days after the close of the record by order dated December 15, 2020. The record closed with the receipt of the post-hearing briefs on July 23, 2021, and the due date for the written decision is August 22, 2021.

[2] Several exhibits offered by the Parent were duplicates of exhibits offered by the District. In the case of duplicates, the District's versions of the exhibits were admitted and used during the hearing.

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ISSUES/REMEDIES

The issues considered at the due process hearing are:

(1) Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) from August 29, 2018, through October 2, 2018, and in April of 2019, by failing to provide Individualized Education Programs (IEPs) that contained sufficient specially designed instruction and related services in the areas of social/emotional, self-advocacy, fine motor, math, written language, adaptive behavior, reading, speech, communication, and occupational therapy to enable the Student to make appropriate progress in light of his circumstances.

(2) Whether the District violated the IDEA and denied the Student a FAPE from August 29, 2018, through October 2, 2018, and in April of 2019, by providing IEPs that were based on an inadequate evaluation of the Student.

(3) Whether the District violated the IDEA and denied the Student FAPE by failing to provide prior written notice of IEP meetings held in April of 2019.

(4) Whether the District violated the IDEA and denied the Student FAPE by failing to maintain proper educational records, and failing to notify the school district to which the Student transferred (Bremerton) that the Student was eligible for special education and related services.

(5) Whether any issues raised by the Parent are barred by the statute of limitations as set forth in WAC 392-172A-05080.

The relief requested by the Parent is:

(1) Declaratory relief finding that the District violated the IDEA and that the Student was denied FAPE.

(2) Compensatory education and related services for the Student to allow him to obtain the educational benefit he would have received but for the District's violations of the IDEA and denial of FAPE, specifically:

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(a). One hour of speech services per week, to include all the time at Renton School District (six months of enrollment)[3] as well as at Bremerton School District (seven months of enrollment), which totals roughly 13 months.

(b). An additional 12 months of speech services, for a total of 25 months. The prevailing rate in the Student's geographical area for a speech-language pathologist is $200 per hour, so approximately $20,000 for speech services.

(c). Tutoring in math by a special education tutor for 150 minutes per week; written language tutoring for 150 minutes per week; adaptive behavior tutoring for 30 minutes per week; and communication tutoring for 30 minutes per week, for a total of 360 minutes (six hours) per week, at $90 per hour, for 24 months, for a total of $56,160.[4]

(3) Reevaluations or reassessments of the Student every three months for the next 25 months, to be funded by the District.

(4) Such other relief as the ALJ may find just and equitable.

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 conflicts, the evidence adopted has been determined to be more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence is set forth below as necessary.

1. The Student is currently [redacted] and no longer resides in Washington. Tr. 573-74.[5] When he lived in Washington, the Student resided in several school districts. During the time period that is relevant to this action, the Student attended school in the Kent School District (Kent), the Federal Way School District (Federal Way), the District, and the Bremerton School District (Bremerton).

2. The Student [redacted]. D1 p.2.[6] He was initially referred for a special education eligibility evaluation when he was in

[3] The basis for the assertion of six months of enrollment is not clear.

[4] This total dollar figure was erroneously calculated as $54,000 in the original issue statement.

[5] The hearing transcript is cited as "Tr." with references to the page of the cited testimony. For example, a citation to "Tr. 80" is to the testimony at page 80 of the transcript.

[6] Exhibits are cited by party ("P" for Parent, "D" for District), exhibit number, and page number. For example, a citation to "P1 p.5" is to the Parent's Exhibit 1 at page 5.

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kindergarten in Kent. Academic testing administered at that time indicated the Student was delayed "across all domains of academic performance." *Id.* His kindergarten teachers reported concerns regarding his social interactions with peers, his ability to focus, and his communication skills. The Student was determined at that time to be eligible for special education, as well as occupational therapy, under the eligibility category of "Other Health Impairment." *Id.* at 1-2.

3. During the 2016-17 school year, the Student transferred to Federal Way. A triennial special education reevaluation (Reevaluation) of the Student was conducted by Federal Way in the spring of 2017 when the Student was in third grade. D1. The Reevaluation was conducted by Kate Silver-Heilman, M.Ed., school psychologist. The Reevaluation consisted of a review of existing data, and assessments in numerous areas. The Reevaluation determined that the Student continued to be eligible for special education services under the eligibility category of "Other Health Impairment." *Id.* at 1.

4. The Reevaluation report incorrectly states the Student's birth date is ████████ ████████████████████. D1; Tr. 573-74. The Reevaluation states that the Student is age ██ which was correct at the time the Reevaluation was conducted. D1 p.1. The Reevaluation states that the Student was tested with "norm referenced standardized assessments" that allow the Student's performance to be compared with "national norms for children the same age." *Id.* at 3. The Reevaluation noted that the Student could read almost at grade level, could speak in complete sentences, and had legible handwriting. It further noted that he exhibited weaknesses in memory, math, organization skills, following directions, and social interaction. *Id.* at 2.

5. The Parent could not explain, and did not present any evidence, as to how the inaccurate birth date in the Reevaluation may have rendered the Reevaluation inappropriate. Tr. 574-75.

6. The fine motor and occupational therapy portion of the Reevaluation was completed by Elissa Sander, a registered and licensed occupational therapist (OT). D1 p.4. She used the following tools to evaluate the Student: file review, Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI), Print Tool, handwriting samples, and the FWPS[7] Occupational Therapy Needs Grid. *Id.* at 4-6. The Print Tool compares the Student's performance to "handwriting expectations of a [sic] 8+ year old child." *Id.* at 5. Based on these assessment tools, Ms. Sander determined the Student's fine and visual motor skills,

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[7] "FWPS" is not defined in the record.

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and visual perception skills, were having an adverse impact on his ability to participate in his education. *Id.* at 6.

7. The communication portion of the Reevaluation was conducted by Katherine Hinkel, certified speech-language pathologist (SLP). She used the following assessments when evaluating the Student: the Clinical Evaluation of Language Fundamentals - 5th Edition, the Peabody Picture Vocabulary Test - Fourth Edition, and the Listening Comprehension Test - 2. D1 pp. 6-8. Based on her assessment, Ms. Hinkel determined the Student met special education eligibility criteria in expressive and receptive language because he ranked below the 7th percentile on several subtests. Accordingly, she determined that he required Specially Designed Instruction (SDI) in expressive and receptive language. *Id.* at 8-9.

8. For the adaptive behavior portion of the Reevaluation, Ms. Silver-Heilman used the Adaptive Behavior Assessment System – Second Edition (ABAS-II), and determined that the Student performed in the below average or average range in all assessed areas. D1 p.9. Accordingly, she determined that he required SDI in adaptive behavior. *Id.* at 14.

9. For the math portion of the Reevaluation, Ms. Silver-Heilman used the Kaufman Test of Educational Achievement – 3rd Edition (KTEA-III). The Student performed in the below average range on two of the three subtests, and Ms. Silver-Heilman recommended that he continue to receive SDI in math. D1 p.10

10. For the written language portion of the Reevaluation, Ms. Silver-Heilman used the KTEA-III and the Wechsler Individual Achievement Test (WIAT-III). The Student performed in the very low to average range on these assessments, and Ms. Silver-Heilman recommended that he continue to receive SDI in written language.[8] D1 pp. 10-11.

11. For the reading portion of the Reevaluation, Ms. Silver-Heilman used five KTEA-III subtests. The Student performed in the average range on all of them. D1 p.11. Ms. Silver-Heilman concluded the Student no longer required SDI in reading. *Id.*

12. For the cognitive portion of the Reevaluation, Ms. Silver-Heilman used the Differential Ability Scale, 2nd and 3rd editions (DAS-II and DAS-III). The Student was determined to be in the below average range of intellectual functioning based on these assessments. D1 pp.

[8] The Reevaluation report contains a typographical error in the "needs" paragraph of the written language section in that it says the Student performed "within the low range in the area of math." D1 p. 11. However, it is evident from the other verbiage that the report intends to convey that the Student continues to need SDI in written language.

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11-13. The Reevaluation determined that the Student's "General Conceptual Ability (Overall IQ)" was 78, which is below average and in the 7th percentile. *Id.*

13. The Reevaluation recommended that the Student receive the following special education and related services: occupational therapy in visual motor and visual perception; communication in expressive and receptive language; adaptive behavior; math; and written language. D1 pp.4-13. The Reevaluation recommended that the Student no longer receive SDI in reading. *Id.* at 11.

14. The Federal Way "Multidisciplinary Evaluation Team" that reviewed the Reevaluation consisted of the Mother, a general education teacher, Ms. Silver-Heilman, a special education teacher, Ms. Hinkel, and Ms. Sander. The Reevaluation report is dated May 1, 2017. It indicates that the Mother attended the evaluation team meeting "via phone conference" and "agreed" with the conclusions of the report. D1 p.17.

15. An IEP with a start date of May 2, 2017, was developed for the Student by Federal Way (Federal Way IEP). D2 p.1. This IEP contains goals in written language, math, adaptive behavior, self-advocacy, and communication. *Id.* at 2-7. It provides for SDI in written language, mathematics, adaptive behavior, and communication, as well as supplementary aids/services in occupational therapy for pencil grip. *Id.* at 12.

16. In September of 2017, the Student moved from Federal Way back to Kent. He was not identified as a special education student in Kent due to an error on the part of the school staff. D4 p.4. This error was apparently not identified until June of 2018.[9] *Id.*

17. The Student transferred from Kent to the District on August 29, 2018, when he was starting fifth grade. D8 p.2; Tr 280. The Student attended Renton Park Elementary School (Renton Park) in the District until he was withdrawn on October 2, 2018. D3 p.3; D8 p.2. During this enrollment, the Student was absent three times. He attended Renton Park on 22 school days, and was tardy on nine of those days. D8 p.2.

18. The Mother testified that she moved the Student to the District from Kent because "I was told by a person I was friends with that the District … cares about their students, and I thought that maybe I would get treated better and Student would get treated better" at the

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[9] A Kent prior written notice dated June 15, 2018, states: "[Student] enrolled at Covington [in Kent] in September of 2017 and was not identified by school staff as a special education student due to a staff error. His IEP is now expired and a new IEP will be created. There is not enough time in the current school year to compete a new IEP, therefore it will have to be written in the fall of the 18-19 school year." D4 p.4.

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District. Tr. 107-08. She testified that she contacted the District regarding issues she was having with Kent and Federal Way. She stated:

> I reached out to Renton School District in August because Student had multiple expulsions and issues at Kent School District with them not giving him his special education and expelling him for five months, and I had definite issues with the staff. So I got in my car and packed a tent and pitched it in Renton and told Renton that I needed help with getting Student his special education and that Student was being deprived of education.

Id. at 105.

19. The Mother testified that she told the District that Federal Way had created an inadequate IEP for the Student and would not correct it. Tr. 108-09. She testified that she told the District that Kent denied the Student special education and that she was going through a special education complaint against the Kent school board. *Id*. at 109. The Mother knew at the time she enrolled the Student in the District that if she had a complaint, she could go to the school district's board of directors. *Id.* at 343. She further testified that she "specifically told Renton School District that Student needed to be reevaluated and to not use any former IEPs because it wasn't correct." *Id.* at 110. The Mother also testified that she did not understand how to read an IEP when she enrolled the Student in the District. *Id.*

20. When the Student transferred into the District, a "transfer review" was conducted because the Student had been eligible for special education services in his previous district. D3. Denise Marrese,[10] the Renton Park school psychologist, conducted the transfer review. As part of the transfer review, Ms. Marrese read the Reevaluation in order to determine if it was comprehensive and complete, and to determine if the District could provide an appropriate special education placement for the Student. Tr. 510-13. Ms. Marrese looked at the qualifications of the professionals who conducted the Reevaluation, the assessment tools that were used, and the areas of concern that were assessed, among other things. *Id.* at 513-23. She determined the Reevaluation was comprehensive and appropriate, and that the Student qualified to receive SDI in the areas identified in the Reevaluation. *Id*. at 514, 523. She was unaware that the Student's birth date was incorrectly identified in the Reevaluation. *Id.* at 526.

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[10] Ms. Marrese has undergraduate and graduate degrees in elementary education and special education. She also has a graduate education specialist degree in school psychology. She is a licensed school psychologist. Tr. 511.

21. The transfer review was completed on September 17, 2018, without a meeting. D3 pp. 3, 5. The transfer review determined it was appropriate to continue the Student's Federal Way IEP until the District could develop a new one, and that the same special education eligibility category should be maintained.[11] *Id.* at 2-3.

22. A prior written notice (PWN) proposing to continue the Student's IEP and eligibility category, and proposing to create a new IEP based on the Reevaluation, was issued by the District on September 13, 2018. D3 p.3. Kim Daniels was the Student's special education teacher in the fall of 2018. Tr. 281. Ms. Daniels did not testify at the due process hearing.

23. A new IEP with a start date of October 2, 2018, (October 2018 IEP) was developed by the District based on the Reevaluation and the Federal Way IEP. Tr. 250. Perlina Fugate,[12] a special education teacher in the District, developed the IEP and chaired the IEP meeting that was held on October 2, 2018. D4 p.1; Tr. 191.

24. The "Team Considerations" and communication portions of the October 2018 IEP were drafted by Bailey Hudson,[13] District SLP. Tr. 434. As part of this process, Ms. Hudson reviewed the "communication" portion of the Reevaluation and the Federal Way IEP. *Id.* at 435-36. She opined at the due process hearing that the communication portion of the Reevaluation was comprehensive and complete. *Id.* at 437. Ms. Hudson developed the October 2018 IEP's communication goals based on performance data from Federal Way because that was the most recent data available. *Id.* at 439-42.

25. The fine motor portion of the IEP was drafted by Fan-Pei Kung,[14] District OT. Tr. 535–36. Dr. Kung reviewed the Reevaluation and the Federal Way IEP. She changed the occupational therapy (OT) fine motor services the Student was receiving pursuant to the October 2018 IEP to be a related service, rather than a supplementary service as it had been in Federal Way. *Id.* at 544-45. This would allow her to provide the Student with more support

[11] Because Kent had not developed an IEP in the 2017-18 school year due to the staff error mentioned above, the Federal Way IEP was the Student's most recent IEP.

[12] Ms. Fugate has a Bachelor of Arts degree in K-12 special education and in K-8 general education. She taught kindergarten through third grade as a general education teacher for 23 years, and has taught special education for seven years. Tr. 280.

[13] Ms. Hudson has a bachelor's degree in special education and a master's degree in speech-language pathology. Tr. 434, 420.

[14] Dr. Kung has undergraduate and master's degrees in occupational therapy, as well as a doctorate in occupational therapy. Tr. 554, 559-60.

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and to pull him out of his classroom to work with him, rather than providing OT in the general education setting. *Id.*

26. The present levels of educational performance in the October 2018 IEP were taken from data provided by Federal Way as of May 1, 2017. D4 pp. 4-7; Tr. 254.

27. The October 2018 IEP contains eight goals. The two math goals pertain to three-digit addition and subtraction. D4 p.8. The two writing goals pertain to correct capitalization and punctuation, and writing a complete paragraph with a topic sentence and three supportive sentences. *Id.* The adaptive behavior goal pertains to self-advocacy. The three communication goals pertain to working with a communication partner, following multi-step directions, and vocabulary. *Id.* at 9. The October 2018 IEP also provided for the Student to receive several accommodations and modifications. *Id*. at 10.

28. The service matrix in the October 2018 IEP provides as follows:

Services 10/02/2018 - 10/01/2019

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Related							
No	Fine Motor	OT	OT	15 Minutes / 1 Times Monthly	Special Education	10/02/2018	10/01/2019
Special Education							
No	Written Language	Special Ed Teacher	Special Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	10/02/2018	10/01/2019
No	Math	Special Ed Teacher	Special Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	10/02/2018	10/01/2019
No	Adaptive Behavior	Special Ed Teacher	Special Ed Teacher	30 Minutes / 1 Times Weekly	Special Education	10/02/2018	10/01/2019
No	Communicati on	Special Ed Teacher	Special Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	10/02/2018	10/01/2019

Total minutes per week student spends in school: 1735 minutes per week
Total minutes per week student is served in a special education setting: 483.75 minutes per week
Percent of time in general education setting: 72.12% in General Education Setting

D4 p.13. Notably, communication services are listed as being provided and monitored by the special education teacher. This is an error in that Ms. Hudson recommended that an SLP deliver and monitor the communication services. Tr. 444. She also recommended the frequency be 30 minutes one time weekly, not five times weekly as set forth in the matrix. *Id.* In Ms. Hudson's opinion, the errors in the communication portion of the service matrix rendered the communication portion of the October 2018 IEP, as written, inappropriate. *Id.* at 452.

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29. Members of the Student's IEP team included the Mother, Ms. Fugate, general education teacher Letta Steward, Ms. Marrese, Dr. Kung, and Ms. Hudson. D4 p. 1.

30. The IEP meeting held on October 2, 2018, was attended in person by all IEP team members except the Mother, who requested to attend by phone. D4 p.16. At the meeting, the team reviewed the entire IEP. Each service provider read their particular present levels of performance, goals, and recommended services, and asked for input from team members. Tr. 454-55. Ms. Hudson does not recall the Mother expressing concerns of any kind at the meeting. *Id.* at 423.

31. The Mother informed the IEP team during the meeting that the Student would be withdrawing from the District and moving back to Kent that same day. The Mother met with Ms. Fugate and Jo Kain, the Renton Park principal, later in the morning on October 2, 2018, to review and sign the IEP. D4 p.16; Tr. 252, 261. Ms. Fugate did not observe the Mother to indicate confusion or lack of understanding regarding the IEP. *Id.* at 261. The Mother did not ask any questions about the IEP and seemed to be in a rush. *Id.* at 282. The Mother's signature appears on the front page of the IEP, and also appears on the Medicaid Consent form.[15] D4 p.1; D5. Ms. Fugate witnessed the Mother sign those documents. Tr. 252. The front page of the IEP states clearly at the top, in bold lettering, "Individualized Education Program." D4 p.1.

32. The original draft of the October 2018 IEP called for 30 minutes four times per week of written language and math SDI (rather than five times per week). Tr. 257. In the District, Fridays are days on which "we really concentrate on our social skills and adaptive behaviors…We do intense groups on Fridays." *Id.* Consequently, SDI in other areas is not provided on Fridays. However, when Ms. Fugate learned the Student would be moving back to Kent, she changed the service matrix to provide written language and math SDI five times per week. She discussed this with the Mother and the Mother agreed that it should be changed so the Student could start services immediately and his IEP would not require any amendments. *Id.* at 258. Ms. Fugate advised the Mother to give the IEP, or a copy of it, to Kent when she registered the Student. *Id.* at 266.

33. The Mother testified that the District, specifically, Ms. Fugate, told her the District was going to reevaluate the Student due to errors in his previous IEP. The Mother said she told the District she wanted the Student reevaluated because he had missed a year of special education and five months of general education previously. Tr. 109-10, 116. The timing of

[15] The Medicaid Consent form permits the District to seek federal Medicaid reimbursement for health-related services provided to the Student pursuant to his IEP, such as occupational therapy. D5.

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the alleged communications regarding reevaluation is unclear. The Mother first contends Ms. Fugate agreed to reevaluate the Student when the Mother first enrolled him in August of 2018. *Id.* at 109. However, she later testified that she first met Ms. Fugate on October 2, 2018, the day she withdrew the Student, and that Ms. Fugate said on that day that she was going to "retest" the Student. *Id.* at 111, 169. The Mother further testified that she told the IEP team on October 2, 2018, that she wanted the Student reevaluated. *Id.* at 332.

34. Ms. Fugate wrote the PWN pertaining to the October 2018 IEP directly after the IEP meeting so the Mother could take it to Kent that same day. Ms. Fugate "had everything ready where [the Mother] could walk in the door with the registration and a new IEP for the following district." Tr. 201. She also gave the Mother a copy of the notice of procedural safeguards.[16] *Id.* Ms. Fugate testified that the Mother never asked her, or anyone else in the District as far as Ms. Fugate is aware, to reevaluate the Student. *Id.* at 283. Ms. Fugate testified that she never informed the Mother that a new evaluation of the Student had been performed by the District. *Id.* at 267. Ms. Fugate contends she spoke to and met the Mother only one time, on October 2, 2018. *Id.* at 247.

35. The Mother contends she was unaware that a transfer review had occurred in September. Tr. 111. The Mother testified that when she was on the phone for the IEP meeting, "I told them – 'I don't understand it. Just give him an evaluation and fix it' because I was like 'I don't understand what you guys are talking about.'" *Id.* at 320. According to the Mother, she does not understand "the fundamentals of an IEP" and she has "addressed that with every single school district." *Id.*

36. The Mother further testified that she met with Ms. Fugate, and another person who may have been Ms. Kain, in a small room by a copy machine on October 2, 2018, and Ms. Fugate handed her an envelope. According to the mother, "I went to Kent School District and gave it to the Kent School District. That is all I remember." Tr. 320. But the Mother also testified that she was not given a copy of the IEP that she signed on October 2, 2018. *Id.* at 111-112. She stated that she did not read the IEP and did not understand it. Tr. 117. According to the Mother:

> When I came in to sign – pick up Student, I – [Ms. Fugate] was there, and she went over with me the IEP and she had me sign it. She didn't give me a copy of the IEP. I told her I didn't understand the IEP. She knew I didn't understand any of that at that time, like anything about IEPs.

[16] The Mother testified at the due process hearing that she had also received procedural safeguards while the Student was in Federal Way in 2017. Tr. 338.

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Tr. 112.

37. The Mother subsequently testified she was given papers by Ms. Fugate but did not know what they were:

> I don't know what Ms. Fugate gave me… I thought it was an evaluation. I got into my vehicle and drove to the Kent School District. I do not know what was given to me. I was told to give it to Kent, period…I didn't look at what – I was told it was an evaluation. I don't know how to read an evaluation. So I didn't – there would be no purpose to it, to reading an evaluation…

Tr. 305. She subsequently testified that Ms. Fugate told her the papers were "the new evaluation." *Id.* at 334. But she then testified that she did not know an evaluation was "an actual physical document." She said she did not know that one could read an evaluation - she thought it consisted only of testing. *Id.*

38. The Mother thought the District had reevaluated the Student and that the October 2, 2018 meeting was an "evaluation IEP meeting." Tr. 173. The Mother said that on October 2, 2018, Ms. Fugate told her that the Student had been reevaluated. *Id.* at 116.

39. The Mother testified that she moved the Student back to Kent in October of 2018 because the person with whom she had previously been in a contentious relationship agreed to move out of the house, and the Mother could go back to her home. Tr. 328. She also thought the District had completed an evaluation of the Student. She wanted the District to do an evaluation of the Student because she "thought they would do it right" and she could then bring it back to Kent. *Id.* at 329.

40. The Mother testified that she has a GED degree and studied political science and government at Olympic college for a short period of time. Tr. 325. She has dyslexia but is able to read well enough to fill out forms. *Id.* at 328. According to the Mother, she started and owned a business called [redacted] before the Student transferred to the District. Tr. 142, 345. As part of her business, the Mother invited [redacted] She contends she conducted those business transactions herself. *Id.* at 345.

41. The Mother is found not to be a credible witness. Her testimony was highly inconsistent, and no exhibits corroborate her version of events. Much of the Mother's testimony was directly controverted by credible District witnesses. The Mother's testimony is therefore given little to no weight.

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42. It is found that the Mother never asked anyone in the District to reevaluate the Student. It is found that the Mother participated in the October 2, 2018 IEP meeting and was given the opportunity to ask questions and express concerns. It is found that Ms. Fugate reviewed the October 2018 IEP with the Mother after the IEP meeting and gave her a copy of it as well as the procedural safeguards. It is found that no one in the District told the Mother that the Student would be reevaluated or told her that he had been reevaluated. It is found that the Mother never told anyone in the District that the Federal Way IEP was inadequate or "wrong" and/or that it should not be used.

43. The Student never received special education services pursuant to the October 2018 IEP because he withdrew from the District before it could be implemented. Tr. 459, 492.

44. When the Student withdrew from the District on October 2, 2018, his classroom teacher filled out the "Renton School District Elementary Withdrawn Student Progress Report." P2 p.6. The form, dated October 4, 2018, indicates, via checked boxes, that the Student is "below grade level" in reading comprehension, reading fluency, math, writing, and conventions. It indicates that the Student "needs to improve" in Social Studies/Science/Health, and that "Tardiness is a hugh [sic] issue." *Id.* The form also indicates, via a confusing layout of checked boxes, that the Student "does" receive special services in special education and speech. *Id*. The "special services" portion of the form is difficult to read because the boxes for "does" or "does not" receive special services appear *before* the words "does" and "does not." However, the boxes to check in order to indicate what type of special service a student is receiving appear *after* the enumerated special services.

45. The Parent became the Student's guardian in March of 2019 because, according to the Parent, the Mother was going through [redacted] *Id.*

46. The Student was re-enrolled in the District on April 3, 2019. D7. At the time, [redacted] *Id.* at pp. 1, 6. The Student was present at school in the District for only one-half of one day in April of 2019, on the morning of April 19th. He was withdrawn on April 25, 2019. D8; Tr. 492.

47. The Student's IEP was amended twice in April of 2019. When Ms. Hudson reviewed the October 2018 IEP after the Student re-enrolled in the District, she noticed the errors in the communication portion of the service matrix as identified above. Tr. 445-56. According

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to a PWN issued by Ms. Hudson on April 15, 2019, an IEP amendment was completed on that date without a meeting.[17] The amendment corrected "a clerical error in the data matrix." D6 p.16.

48. The cover page of the first amended IEP, dated April 15, 2019, identifies the Parent as the Student's "parent/guardian," but identifies the Mother as the parent/guardian member of the IEP team. D6 p.1. Next to the listing of the Mother as an IEP team meeting participant, the cover page states "verbal consent" and shows a date of "4/15/19." *Id.* The "contact attempt report" of the IEP states that "letter[18] and phone" were used to attempt to contact the Parent on April 15, 2019, but he did not respond. It further states that contact was made with the Parent by phone on April 16, 2019, and his response to that contact was "parental permission to proceed without meeting." D6 p. 18. Ms. Hudson testified that she spoke with the Parent by telephone on April 16, 2019, and informed him of the error in the October 2018 IEP and the proposed amendment. She further testified that he agreed to the amendment and that a meeting was not necessary. Tr. 447-48. This conversation was the basis for the "verbal consent" notation next to the Mother's listing as an IEP team member.

49. The Parent denies ever being notified of the April 15, 2019 IEP amendment, and denies ever receiving a copy of the PWN related to the amendment. Tr. 571-72, 575. He does not recall ever speaking to Ms. Hudson.

50. The testimony of Ms. Hudson is supported by the contact attempt page of the IEP and is found to be more credible than the testimony of the Parent. It is found that the Parent was notified by telephone of the April 15, 2019 amendment to the IEP, agreed to it, and agreed that a meeting was not necessary.

51. It is found that a PWN regarding this amendment was issued by the District. It is also found that the Parent's testimony that he did not receive the PWN is not reliable, and it cannot be determined from the evidence presented whether or not the PWN actually made its way to the Parent.

52. As amended, the service matrix in the April 15, 2019 IEP reads as follows:

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[17] Ms. Hudson showed the amended IEP to each District team member and obtained their signatures, indicating their awareness of the changes. Tr. 457-58.

[18] The home address listed for the Student on the cover page is in Kent, Washington. D6 p,1.

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Services 04/15/2019 - 10/01/2019

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Related							
No	Fine Motor	OT	OT	15 Minutes / 1 Times Monthly	Special Education	04/15/2019	10/01/2019
Special Education							
No	Written Language	Special Ed Teacher	Special Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	04/15/2019	10/01/2019
No	Math	Special Ed Teacher	Special Ed Teacher	30 Minutes / 5 Times Weekly	Special Education	04/15/2019	10/01/2019
No	Adaptive Behavior	Special Ed Teacher	Special Ed Teacher	30 Minutes / 1 Times Weekly	Special Education	04/15/2019	10/01/2019
No	Communication	SLP	SLP	30 Minutes / 1 Times Weekly	Special Education	04/15/2019	10/01/2019

Total minutes per week student spends in school: 1735 minutes per week
Total minutes per week student is served in a special education setting: 363.75 minutes per week
Percent of time in general education setting: 79.03% in General Education Setting

D6 p.13. This service matrix differs from the matrix in the October 2, 2018 IEP in that communication services are changed to be delivered and monitored by an SLP, rather than a special education teacher. Communication SDI was also changed from five times weekly to one time weekly. The calculation of minutes per week the Student is served in a special education setting was consequently changed from 483.75 to 363.75, and his percentage of time in general education was increased from 72.12% to 79.03%. *Id*.; D4 p.13.

53. According to a PWN issued on April 19, 2019, another IEP amendment was completed on that date without a meeting to again correct "a clerical error in the data matrix." D6 p.34. The nature of the "clerical error" is not identified on the PWN. Ms. Hudson testified that Kim Daniels received permission from the Parent to proceed with this amendment without a meeting. Tr. 458-59.

54. The cover page of the second amended IEP, dated April 19, 2019, identifies the Parent as the Student's "parent/guardian," but identifies the Mother as the parent/guardian member of the IEP team. D6 p.19. Next to the listing of the Mother as an IEP team meeting participant, the cover page states, "ok to proceed via phone" and shows a date of "4/19/19." *Id.* The "contact attempt report" of the IEP states that phone was used to attempt to contact the Parent on April 18, 2019, but he did not respond. D6 p. 36. It further states that contact was made with the Parent by letter and phone[19] on April 19, 2019, and his response to that contact was "parental permission to proceed without meeting." *Id.*

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[19] It is unclear from the contact attempt report whether the Parent was successfully contacted by phone *and* letter on April 19, 2019, or only by phone. However, it is not reasonable to find that a parent would respond to

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55. The home address listed for the Student on the cover page of the April 19, 2019 IEP is in Kent, Washington. *Id.* at 1. However, the cover page of an unsigned draft of that IEP, which was produced to the Parent in the course of this litigation, shows the Student's home address as being in Renton, Washington. P7-3 p.3.[20] The Renton address listed is the address of the [redacted] . Tr. 400-01. There is no evidence as to why the addresses on the two versions of the IEP differ, and no evidence regarding the address to which the PWN pertaining to the April 19, 2019 IEP amendment was mailed.

56. The Parent denies ever being notified of the April 19, 2019 IEP amendment, and denies ever receiving a copy of the PWN related to the amendment. Tr. 571-72, 575. The testimony of Ms. Hudson is supported by the contact attempt page of the IEP and is found to be more credible than the testimony of the Parent. It is found that the Parent was notified by telephone of the April 19, 2019 amendment to the IEP, agreed to it, and agreed that a meeting was not necessary.

57. It is found that a PWN as to this amendment was issued by the District. It is also found, as was found above, that the Parent's testimony that he did not receive the PWN is not reliable, and it cannot be determined from the evidence presented whether or not the PWN actually made its way to the Parent.

58. As amended, the service matrix of the April 19, 2019 IEP reads as follows:

Services 04/19/2019 - 10/01/2019

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Related							
No	Fine Motor	OT	OT	15 Minutes / 1 Times Monthly	Special Education	04/19/2019	10/01/2019
Special Education							
No	Written Language	Special Ed Teacher	Special Ed Teacher	30 Minutes / 4 Times Weekly	Special Education	04/19/2019	10/01/2019
No	Math	Special Ed Teacher	Special Ed Teacher	30 Minutes / 4 Times Weekly	Special Education	04/19/2019	10/01/2019
No	Social/Emotional	Special Ed Teacher	Special Ed Teacher	30 Minutes / 1 Times Weekly	Special Education	04/19/2019	10/01/2019
No	Communication	SLP	SLP	30 Minutes / 1 Times Weekly	Special Education	04/19/2019	10/01/2019

Total minutes per week student spends in school: 1735 minutes per week
Total minutes per week student is served in a special education setting: 303.75 minutes per week
Percent of time in general education setting: 82.49% in General Education Setting

a letter on the same day as that letter was issued, as seems to be indicated at D6 p. 36. It is therefore concluded that the Parent responded only by phone on April 19, 2019.

[20] Exhibit P7 is marked in a confusing fashion, with pages marked as P7, P7-2, and P7-3. The page referenced above is the third page of the "P7-3" section of the exhibit.

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D6 p.31. This amendment changed the written language and math SDI frequencies from five times per week to four times per week, consistent with the Student's IEP before the team learned he was moving out of the District. The calculation of minutes per week the Student was served in a special education setting and his percentage of time in general education were changed accordingly. "Adaptive behavior" services were also changed to be referred to as "social/emotional" services throughout the April 19, 2019 IEP and on the service matrix. No evidence was presented as to why this change was made. The IEP goal pertaining "adaptive behavior" was not changed but was renamed "social/emotional." *Id.* at pp.26-27.

59. There is no evidence that the Student ever received services pursuant to either of the IEPs created in April of 2019. He attended school in the District only for one morning in April of 2019.

60. The Student was withdrawn from the District on April 25, 2019, near the end of his fifth grade year. D8. He was subsequently enrolled in the West Hills STEM Academy in Bremerton within a few days. As part of that enrollment, the Parent signed a "Request for Student Records" that was filled out by Bremerton and faxed to the District on May 2, 2019. D9. That form states at the top, "Please send all records for this student" and indicates the school to which records should be sent via a checked box under the name, address and fax number of the school. The form asks that certain records be "included," such as immunization and discipline records. In the case of this Student, the completed form has a checked box asking that immunization records be faxed "ASAP to expedite student enrollment." The standard language on the form then directs the recipient school district, in bold, italicized print, to ***"Send all special education records to: Special Education Services Attn: Wendy Merrill"*** and provides a fax number. *Id.*

61. In response to this request form, Bremerton received approximately three pages of records pertaining to the Student from the District. Tr. 147. One document is a "Renton School District Elementary Withdrawn Student Progress Report." P3. That report is signed by teacher Letta Steward, as well as the principal of Renton Park, and is dated April 25, 2019. As had been the case when Ms. Steward filled out this report in October of 2018, the form indicates via checked boxes that the Student is "below grade level" in reading comprehension, reading fluency, math, writing, and conventions. It indicates that the Student "needs to improve" in Social Studies/Science/Health. It also indicates, again via the confusing layout of checked boxes, that the Student "does" receive special services in "LAP/Title I."[21] *Id.* At

[21] "LAP" is a state-funded learning assistance/intervention program. Title I is a federally funded intervention program for students who meet the qualifications to receive free and reduced lunch. P21 p. 367. Neither of these programs constitute special education under the IDEA.

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first glance, the Student appears to have been receiving speech therapy in the District based on the layout of the form. Only with closer inspection does the reader realize that the form shows the Student was receiving LAP/Title I services. Special education is listed as a "special service" but the box after the words "Special Education" is not checked, even though this box was checked on the identical form in October of 2018. Similarly, the "speech" box is not checked, although it was checked in October of 2018. *Id.* The form appears to have been hastily completed in that the Xs in various boxes are off-center and barely within the boxes. Other boxes have large check marks rather than Xs. *Id.*

62. It is undisputed that no special education documents pertaining to the Student were sent by the District to Bremerton in response to the Request for Student Records. Tr. 59, 96, 484.

63. As part of the Student's enrollment in Bremerton, the Parent filled out a "Needs Assessment Intake" form. Although that form provided the opportunity to notify Bremerton that the Student had received special education services in the past, the Parent did not check the box next to "special education services." The Parent did check boxes next to transportation, medical records, and other listed needs. Tr. 158; P21 pp. 368-69.

64. Jonathan Bell is the Bremerton Director of Special Services.[22] P21 p.285. He is responsible for the delivery of special education in the Bremerton schools. *Id.* at 348. According to Mr. Bell, Bremerton assumes the documents it receives from a previous school district in response to the "Request for Student Records" constitute a student's complete record from that district unless there are "glaring absences." *Id.* at 288. He expects that a former school district receiving the request for records form would provide Bremerton with a student's special education records in response. *Id.* at 353. According to Wendy Merrill, in her experience as clerical assistant for Bremerton's special education department, Bremerton receives special education records from transferring districts in response to this records request form.[23] *Id.* at 621-22. According to Mr. Bell, Bremerton was unaware when the Student enrolled that he was eligible for special education services, so staff "had no reason to believe [they] needed to reach out to the special ed[ucation] department" of the District to specifically ask for special education records. *Id*. at 327.

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[22] Mr. Bell has Bachelor of Science Degrees in history and physics, and a master's degree in educational leadership. P21 p.285.

[23] Ms. Merrill has served as the Bremerton special education department's clerical assistant for seven years. P21 p.610.

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65. Jesse Whiddon was an office assistant at Renton Park during the 2018-19 school year. Tr. 352. Ms. Whiddon was responsible for gathering records of students who withdrew from Renton Park and sending them to the District headquarters. *Id.* at 354. These records would include everything kept at the school building, such as a student's cumulative file, attendance records, health records, and special education records. *Id.* at 354-55, 364-65. According to Ms. Whiddon, "At the building level, there is a special education folder for every student that receives services that has printouts of the different things that have gone into the IEP, the evaluation, things like that. " *Id.* at 387. The "processing team" at the District headquarters would then send the records to the student's new district. *Id.* Ms. Whiddon is likely the person who processed Bremerton's records request pertaining to the Student. *Id.* at 376. She believes she looked for the Student's special education records when Renton Park received the records request. She interprets the records request to encompass special education records. *Id.* at 379-80. Ms. Whiddon stated, "We followed normal procedure, so everything, to my knowledge…would have been done and then put all together in one packet to send out for processing." *Id.* at 379. Ms. Whiddon did not offer an explanation as to why the Student's special education records were not provided to Bremerton.[24]

66. Jennifer Traufler[25] was the Executive Director of Student Services for the District during the 2018-19 school year. Tr. 385. She was in charge of special education that year and continues to hold that position although her title changed to Chief of Student Support in 2019. Tr. 387-88, 497. Ms. Traufler has seen the Bremerton records request and interprets it to encompass special education records. *Id.* at 501-02.

67. The Student left the Bremerton district on January 22, 2020. P21 p.359. It is undisputed that Bremerton did not receive any special education records pertaining to the Student from the District during the entire time the Student was enrolled in Bremerton. Tr. 77. It is undisputed that the Student did not receive special education services of any kind while he was enrolled in Bremerton. It is also undisputed that the Student's special education records from the District were not sent to Bremerton until August 26, 2020, well after he had left that district.[26] *Id.* at 160, 416, 575-76.

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[24] No health records pertaining to the Student were provided to Bremerton by the District, either. P21 p.337.

[25] Ms. Traufler has bachelor's and master's degrees in education, and holds a superintendent's certificate. Tr. 496.

[26] Bremerton sent a new request for records to the District special education department after the Parent called Bremerton during the summer of 2020 and inquired about the Student's special education records. P21 pp.614, 616, 618, 623. Special education records were sent by the District to Bremerton on August 26, 2020. Tr. 484.

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68. According to Mr. Bell, the Parent never informed Bremerton that the Student had qualified for special education services in a previous school district, and never asked Bremerton to evaluate the Student for special education eligibility. Tr. 161-62. The Parent contends he informed Bremerton the Student should be receiving special education services, but he never discussed with Bremerton staff members the services the Student was or was not receiving because he assumed, mistakenly, that the Student was getting appropriate special education. *Id.* at 576. Mr. Bell is more credible as to this issue, and the Bremerton enrollment documents support Mr. Bell's version of events. It is found that neither the Parent nor the Mother ever informed Bremerton that the Student had qualified for special education services in the District.

69. The Student began to have outbursts and more fights with his brother at home in 2020. The Parent contends the Student regressed in 2020 due to not receiving special education services while in Bremerton. Tr. 532. The Parent further contends the District's actions have "affected [the Student] every step of the way since he was in the District" although no specifics as to these alleged affects were offered by the Parent. *Id.* at 569.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings 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 IDEA; Chapter 28A.155 Revised Code of Washington (RCW); Chapter 34.05 RCW; Chapter 34.12 RCW; and the regulations promulgated pursuant to these statutes, 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, 126 S. Ct. 528 (2005). Since the Parent is the party seeking relief in this case, he has the burden of proof. Neither the IDEA nor OSPI regulations specify the standard of proof required to meet a party's burden of proof in special education hearings before OAH. Unless otherwise mandated by statute or due process of law, the U.S. Supreme Court and Washington courts have generally held that the burden of proof to resolve a dispute in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981*); Thompson v. Department of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Department of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011). Therefore, the Parent's burden of proof in this matter is preponderance of the evidence.

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The IDEA and FAPE

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

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

Rowley, 458 U.S. at 206-207 (footnotes omitted).

4. A free appropriate public education (FAPE) consists of both the procedural and substantive requirements of the IDEA. The *Rowley* court articulated the following standard for determining the appropriateness of special education services:

> [A] "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" [FAPE] as defined by the Act.

Id. at 188-189.

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

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

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

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 decision-making process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefit.

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

Whether any issues raised by the Parent are barred by the statute of limitations as set forth in WAC 392-172A-05080[27]

7. The Washington regulation concerning the IDEA statute of limitations provides, in pertinent part:

> The due process hearing request must be made within two years of, and allege a violation that occurred not more than two years before, the date the parent or school district knew or should have known about the alleged action that forms the basis of the due process complaint except the timeline does not apply to a parent if the parent was prevented from filing a due process hearing request due to:
>
> (a) Specific misrepresentations by the school district that it had resolved the problem forming the basis of the due process hearing request; or
>
> (b) The school district withheld information from the parent that was required under this chapter to be provided to the parent.

[27] For clarity of analysis, the issues are addressed in a different order than they were listed in the issue statement.

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WAC 392-172A-05080(2).

8. The Ninth Circuit Court of Appeals addressed the IDEA statute of limitations[28] in *Avila v. Spokane School District 81*, 852 F.3d 936 (9th Cir. 2017). In that case, the court held that the "discovery rule" applies to the IDEA's statute of limitations, and that courts should bar only claims brought more than two years after a student's parents knew or should have known about the actions forming the basis of their complaint. *Id.* at 945. The "knew or should have known" (KOSHK) inquiry is an element of the discovery rule, meaning that "the statute of limitations is triggered when 'a plaintiff discovers, or reasonably could have discovered, his claim.'" *Id*. at 940 (citing *O'Connor v. Boeing N. Am., Inc.,* 311 F.3d 1139, 1147 (9th Cir. 2002)). Once a parent believes or reasonably should have come to believe that a school district has denied their child FAPE, the parent has two years to take action by filing a due process complaint.

9. Parents cannot simply assert they were unaware that a school district was denying their student FAPE. Rather, parents must exercise "due diligence" to discover critical facts that form the basis of their complaint. *O'Connor v. Boeing N. Am., Inc.,* 311 F.3d at 1147; *Klein v. City of Beverly Hills*, 865 F.3d 1276, 1278 (9th Cir. 2017). As the district court articulated in *Avila* on remand from the Ninth Circuit, it is often difficult for a court, from its retrospective position, to determine the date on which a parent KOSHK about the alleged actions that form the basis of their complaint. 2018 U.S. Dist. LEXIS 14152 *21.

> On the one hand, parents should not be "blamed for not being experts about learning disabilities." *Draper v, Atlanta Indep. Sch. Sys*., 518 F. 3d 1275, 1288 (11th Cir. 2008). On the other hand, statutes of limitations "serve the policies of repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and defendant's potential liabilities." *Young v. United States,* 535 U.S. 43, 49, 122 S. Ct. 1036, 152 L. Ed. 2d. 79 (2002).

Avila at *21-22.

10. In the present case, the Parent contends he and the Mother were unaware of the alleged FAPE denials set forth in the Complaint until they sought medical care for the Student at Seattle Children's Hospital in late 2020, well after the Student left the District. Parent's

[28] Although the *Avila* Court considered the statute of limitations under the federal IDEA, WAC 392-172A-05080 is substantially similar to the federal statute of limitations and is subject to the same legal interpretation as its federal counterpart with respect to when a claim accrues.

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Post Hearing Summary Brief (Parent's Brief) at 7.[29] This contention is not persuasive. The Mother reasonably could have discovered her claims years before the Complaint was filed on November 13, 2020. With respect to the first issue for hearing, that the District allegedly failed to provide an appropriate IEP in 2018, the Mother believed when the Student first came to the District that the IEPs he had been provided by previous school districts were "not correct" and should not be used. However, the District's October 2018 IEP was based on the same evaluation as the previous 2017 Federal Way IEP, and the October 2018 IEP provided SDI and related services in the same areas as did the 2017 Federal Way IEP. The Mother admits that she did not read the October 2018 IEP. Had she read it, or asked questions about it at the IEP meeting or at her meeting with Ms. Fugate, she would have known in October of 2018 that the IEP the District had developed was "not correct," in her opinion. The Mother did not exercise due diligence. The contention that she acted reasonably in not discovering this claim until 2020 is not supported by the evidence.

11. With regard to the second issue for hearing, that the Reevaluation was allegedly inappropriate, the Parent's only allegation as to why the Reevaluation is inappropriate is that the Student's birth date is incorrect on the Reevaluation report. The birth date is at the top of the first page of the Reevaluation. A reasonable parent exercising due diligence would have discovered this error at or around the time she received the Reevaluation report, not three years later. The contention that the Mother acted reasonably and with due diligence in not discovering this claim until 2020 is not supported by the evidence.

12. The Parent has not established that either of the two exceptions to the two-year statute of limitations set forth in WAC 392-172A-05080 apply. To the extent the Parent argues that the Mother was not provided with procedural safeguards as required by the IDEA and this constituted the withholding of information within the meaning of WAC 392-172A-05080(2)(b), this argument is not persuasive. School districts are required to provide a copy of the procedural safeguards one time per school year to parents of a student eligible for special education, and upon initial referral, upon a parent's request for evaluation, and upon a parent's request for the procedural safeguards (as well as under other circumstances that do not apply here). WAC 392-172A-05015(1). As found above, the District provided the Mother with procedural safeguards on October 2, 2018.

13. Additionally, there is no evidence that the District misrepresented that it had resolved the alleged problems that form the basis of the Parent's Complaint. Therefore, the first exception to the statute of limitations does not apply in the present case, either.

[29] Parent's Brief does not contain page numbers, so the page numbers referenced herein refer to the first page, second page, third page, etc., as counted by the ALJ.

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14. It is concluded that the Mother failed to exercise the due diligence that a reasonable parent would have exercised to discover the necessary facts that form the basis of the present claims. Accordingly, it is concluded that WAC 392-172A-05080(2) bars all of the Parent's claims that date back more than two years prior to the filing of this action on November 13, 2020.

<u>Whether the District violated the IDEA and denied the Student FAPE from August 29, 2018, through October 2, 2018, and in April of 2019, by failing to provide IEPs that contained sufficient specially designed instruction and related services in the areas of social/emotional, self-advocacy, fine motor, math, written language, adaptive behavior, reading, speech, communication, and occupational therapy to enable the Student to make appropriate progress in light of his circumstances</u>

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

16. The Parent contends that the IEPs provided to the Student from August 29, 2018, through October 2, 2108, and in April of 2019, did not provide the Student with sufficient SDI and related services in ten areas. As determined above, the portion of this claim that pertains to August 29 through October 2, 2018, is barred by the statute of limitations and will not be considered.

17. With respect to the April 2019 time period, there is no evidence whatsoever to support the claim that the SDI and related services contained in the two amended IEPs was insufficient or was otherwise not reasonably calculated to enable the Student to make appropriate progress in light of his circumstances. Likewise, there is no evidence that the Student ever received services from the District pursuant to these IEPs, and consequently no evidence that the content of the IEPs led to a denial of FAPE.

18. For these reasons, it is concluded that the Parent has not met his burden of proving by a preponderance of the evidence that the District denied the Student FAPE by failing to provide IEPs that contained sufficient specially designed instruction and related services.

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Whether the District violated the IDEA and denied the Student FAPE from August 29, 2018, through October 2, 2018, and in April of 2019, by providing IEPs that were based on an inadequate evaluation of the Student.

19. The Parent contends the 2017 Federal Way Reevaluation of the Student was inadequate and inappropriate, and consequently the IEPs that were based on that Reevaluation denied the Student FAPE. As determined above, the portion of this claim that pertains to August 29 through October 2, 2018, is barred by the statute of limitations and will not be considered.

20. The IDEA requires that a school district's reevaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related service needs. WAC 392-172A-03020. When a school district conducts a special education evaluation, a "group of qualified professionals selected by the school district" must use a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent . . . ." *Id.* The group cannot use "any single measure or assessment as the sole criterion" for determining eligibility or educational programming. *Id.* The evaluation must utilize "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." *Id.* Additionally, reevaluations must review existing evaluation data on the student and, on the basis of that review and input from the parent, identify what additional data, if any, may be needed. WAC 392-172A-03025.

21. As stated above, the Parent's only allegation as to why the Reevaluation of the Student is inappropriate is that the Student's birth date is incorrect on the Reevaluation report. No evidence was presented as to how this error rendered the Reevaluation inadequate in any way. The Student's age, which is referred to at points in the Reevaluation, was correctly listed as eight years. There is no evidence that the roughly five-month discrepancy in the birth date, which made the Student appear older than he actually was, impacted the results of the Reevaluation.

22. The evidence demonstrates that the Reevaluation met the criteria set forth in WAC 392-172A-03020. The Reevaluation was comprehensive and was conducted by qualified professionals. It used a variety of assessment tools and strategies that were technically sound. Several qualified professionals from the District reviewed the Reevaluation and determined it to be appropriate.

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23. There is no evidence that the IEPs provided to the Student by the District in April of 2019 were based on an inadequate evaluation, or that Student was denied FAPE as a result. The Parent has not met his burden of proof as to this issue.

<u>Whether the District violated the IDEA and denied the Student FAPE by failing to provide PWN of IEP meetings held in April of 2019</u>

24. The IDEA's requirements regarding the provision of PWN are enumerated in WAC 392-172A-05010(1). That regulation provides, in part:

> (1) Written notice…must be provided to the parents of a student eligible for special education, or referred for special education a reasonable time before the school district:
> (a) Proposes to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student; or
> (b) Refuses to initiate or change the identification, evaluation, or educational placement of the student or the provision of FAPE to the student.

25. Failure by a District to provide PWN as required is a procedural violation of the IDEA. As noted above, procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they impeded a child's right to FAPE, impeded a parent's opportunity to participate in the decision-making process as to their child, or caused a deprivation of educational benefits.

26. In the present case, the evidence demonstrates that the District issued PWNs pertaining to the two amendments made to the Student's IEP in April of 2019. The Parent has therefore not met his burden to establish a violation of the IDEA.

27. While it cannot be determined whether the PWNs were received by the Parent, the IDEA does not impose an obligation on a school district to make certain that PWNs it issues are actually received by parents. Moreover, even if he had proven he did not receive the PWNs and established this was a procedural violation of the IDEA, the Parent has not shown a denial of FAPE as a result. The Parent was notified of the two amendments via phone, agreed to them, and agreed that IEP meetings were not necessary. If the Parent had objected to either IEP amendment, he could have informed the District of his objection when he was contacted by phone. There is no evidence that the Parent was denied an opportunity to participate in the decision-making process as to the Student when the IEP amendments were made.

28. Likewise, there is no evidence that the Student ever received any special education services pursuant to the April 2019 IEPs. Consequently, it is concluded that the Student was

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not deprived of an educational benefit and his right to FAPE was not impeded even if the Parent did not receive the two PWNs.

29. For these reasons, it is concluded that the Parent has not met his burden of proof as to this issue.

Whether the District violated the IDEA and denied the Student FAPE by failing to maintain proper educational records, and failing to notify the school district to which the Student transferred (Bremerton) that the Student was eligible for special education and related services

30. Under the IDEA, a school district that receives a student from another district is obligated to take reasonable steps to promptly obtain the student's records from the previous district, including IEPs and supporting documents and any other records relating to the provision of special education to the child. WAC 392-172A-03105(6). The previous district then has an obligation to "take reasonable steps to promptly respond" to the request from the new district. *Id.* In the present case, Bremerton took reasonable steps to obtain the Student's records from the District. Not only did the District fail to provide the Student's special education records in response to Bremerton's request, the District provided a document affirmatively indicating that the Student was *not* receiving special education services. The District concedes this was a procedural violation of the IDEA. Renton School District's Post-Hearing Brief (District's Brief) at 16.

31. The District argues that this procedural violation did not amount to a denial of FAPE to the Student. This argument is not persuasive. The evidence clearly establishes that the Student did not receive special education services of any kind while he attended school in Bremerton. Immediately prior to transferring to Bremerton, the Student's IEP called for him to receive 303.75 minutes of SDI and related services per week, in five areas. It would defy reason to conclude that a sudden cessation of all special education services, for which the Student had been eligible since kindergarten, did not constitute a denial of educational benefit to the Student. FAPE consists of "educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to 'benefit' from the instruction." *Rowley,* 458 U.S. at 188-89. The Student did not receive SDI or related services while in Bremerton. Therefore, he did not receive FAPE, and the District was partly responsible for this at the time the Student initially transferred to Bremerton.

32. It is concluded that the District's failure to provide the Student's special education records to Bremerton was a procedural violation of the IDEA that impeded the Student's right

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to FAPE and led to a deprivation of educational benefits. The Parent may, therefore, be entitled to a remedy.

33. When a parent proves a violation of the IDEA, a tribunal may "grant such relief as the court determines is appropriate" based on the evidence. 20 U.S.C. § 1415(i)(2)(C)(iii). Relief is "appropriate" if it furthers the purposes of the IDEA and helps to ensure that a student receives the education to which he was statutorily entitled at the time of the violation*. Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 719 (3d Cir. 2010). Compensatory education is an appropriate remedy when a student has been denied FAPE in that "[c]ompensatory education is an equitable remedy that seeks to make up for 'educational services the child should have received in the first place,' and 'aim[s] to place disabled children in the same position they would have occupied but for the school district's violations of the IDEA.'" *R.P. v. Prescott Unified Sch. Dist.,* 631 F.3d 1117, 1125 (9th Cir 2011) (quoting *Reid v. Dist. of Columbia,* 401 F.3d 516, 518 (D.C. Cir. 2005)).

34. Because compensatory education is an equitable remedy, the tribunal must consider all relevant factors and weigh the equities on both sides of the case when determining whether compensatory education should be awarded. *Forest Grove Sch. Dist. v. T.A.,* 638 F.3d 1234, 1239 (9th Cir. 2011). One such factor to be examined and weighed is the Parent's course of action, or lack thereof. After the Student's initial period of enrollment in Bremerton, it became incumbent on the Parent to ascertain whether the Student was receiving FAPE. "[A]lthough a child's right to special education under the IDEA does not turn on parental vigilance, parental vigilance is vital to the preservation and enforcement of that right." *G.L. v. Ligonier Valley Sch. Dist. Auth.,* 802 F.3d 601, 625 (3rd Cir. 2015) (citations omitted). An appropriately vigilant parent of a student eligible for special education would inquire about the provision of such services to their student within a reasonable period of time after the transfer to a new district. The fact that the Parent never did so contributed to the denial of FAPE and is not the fault of the District.[30]

35. Another factor to be weighed is Bremerton's obligation under the Child Find provision of the IDEA to identify and evaluate a student for special education eligibility once it has reason to suspect the student has a disability. WAC 392-172A-02040(1). The fact that

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[30] The District argues the Mother informed Bremerton of the Student's eligibility for special education services and, "despite this notice," Bremerton did not provide the Student with special education services. District's Brief at 17. The District goes on to argue, "The Parent did not offer any evidence that additional notice in the form of special education records provided by the District would have caused [Bremerton] to provide the Student with special education services." *Id.* This argument assumes the Mother's testimony as to what she told Bremerton is accurate and reliable. As determined in the Findings of Fact, above, the Mother was not a reliable witness and her testimony warrants little to no weight. The District's argument is therefore based on a faulty premise and fails accordingly.

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Bremerton never suspected the Student had a disability, and/or failed to identify and evaluate him the entire time he was enrolled, is also not the fault of the District. As the District correctly argues, "To the extent this [Child Find] duty arose, it would operate as an interceding event that would limit the District's liability and scope of a compensatory education remedy. To the extent the duty never arose, the reason therefore would be material to the Student's level of need for special education services, and therefore material to the calculation of any remedy." District's Brief p.18 n7.

36. In weighing the equites, the ALJ notes that the Student transferred to Bremerton in late April, i.e. fairly near the end of the school year. The Student then moved from fifth grade to sixth grade, which was likely a move to middle school that may have changed the design of the Student's general education program. For these reasons, it is concluded that the Parent, or Bremerton, or both, should have recognized the Student was not receiving FAPE within four school months of the time he transferred, i.e. by late October of 2019.[31] The Student is therefore entitled to an award of compensatory education equivalent to four months (calculated as sixteen weeks) of the SDI and related services he would have received under the District's April 19, 2019 IEP.[32]

37. Students generally progress more rapidly with one-on-one instruction as opposed to instruction in a classroom, even in a small group, so an hour-for-hour award of compensatory education is generally not appropriate. Consequently, the ALJ adopts a 1:2 formula whereby one hour of compensatory education is awarded for every two hours of SDI that the Student missed, with the exceptions of fine motor and communication which appear to have been 1:1 services in the IEP and for which a 1:1 formula is adopted. The Student is therefore entitled to **16 hours of compensatory education in written language** (120 minutes x 16 weeks, divided by 60 to yield hours, divided by 2); **16 hours in math** (same calculation as written language); **four hours of social/emotional** (30 minutes x 16 weeks, divided by 60 to yield hours, divided by 2); **one hour of fine motor** (15 minutes x 4 months), **and eight hours of communication** (30 minutes x 16 weeks, divided by 60 to yield hours).

38. The compensatory education shall be provided as follows: The service providers for written language, math and social/emotional shall be certificated teachers or persons who possess comparable training and experience in the specific subject area. The Parent shall identify two qualified potential service providers for each subject area who are located in the

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[31] Absent the summer break and the move up to sixth grade, the period in which the Parent and/or Bremerton should have recognized the Student was not receiving FAPE may have been shorter than four months.

[32] This IEP is the best information available regarding the services the Student should have been receiving during the relevant time.

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Student's geographical vicinity, and the District shall choose the provider(s) from the Parent's options. The District shall contract with and pay the service providers directly at a rate not to exceed $120 per hour unless the parties agree otherwise. If the Parent has not identified qualified potential service providers in one or more subject areas within six weeks of the date of this order, the District shall identify qualified services providers in those areas, who are located in the Student's geographical vicinity, within ten weeks of the date of this order and contract with them to provide services as set forth above.

39. The service provider for fine motor shall be an OT and the service provider for communication shall be an SLP. Selection of these providers shall occur as described above. The District shall contract with and pay the service providers directly at a rate not to exceed $250 per hour unless the parties agree otherwise.

40. Once the schedule for delivery of compensatory education services is established, the Parent shall give notice 24 hours in advance of a scheduled session if the Student needs to reschedule, or shall otherwise comply with the cancellation requirements of the service providers. Without such notice, any missed session will count toward the compensatory education award.

41. The parties are ORDERED to work together cooperatively to develop a plan for services, and the compensatory education plan shall be finalized within ten weeks of the date of this order. All compensatory education shall be delivered within nine months of the date of this order.

42. The parties are free to change any aspect of this award of compensatory education by mutual agreement.

43. 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 Parent has proven by a preponderance of the evidence that the Renton School District violated the IDEA and denied the Student FAPE when it failed to provide the Student's special education records to the Bremerton School District.

2. The Student is entitled to an award of compensatory education funded by the District as set forth above.

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3. The remainder of the Parent's requested remedies are DENIED.

Served on the date of mailing.

Jacqueline H. Becker
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

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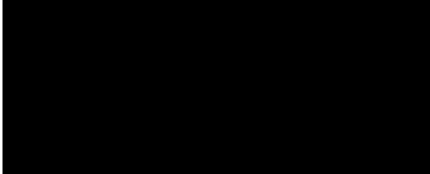
DECLARATION OF SERVICE

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.

Sent via secure email & US mail to:



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Dated August 12, 2021, at Seattle, Washington.

Representative
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cc: Administrative Resource Services, OSPI