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STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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December 29, 2021

Parents



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In re: Cashmere School District
OSPI Cause No. 2021-SE-0059
OAH Docket No. 05-2021-OSPI-01320

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matter. This completes the administrative process regarding this case. Pursuant to 20 USC 1415(i) (Individuals with Disabilities Education Act) this matter may be further appealed to either a federal or state court of law.

After mailing of this Order, the file (including the exhibits) will be closed and sent to the Office of Superintendent of Public Instruction (OSPI). If you have any questions regarding this process, please contact Administrative Resource Services at OSPI at (360) 725-6133.

Sincerely,

A handwritten signature in cursive script that reads "Eric J. Roth".

Eric J. Roth
Administrative Law Judge

cc: Administrative Resource Services, OSPI

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

IN THE MATTER OF:

OSPI CAUSE NO. 2021-SE-0059

OAH DOCKET NO. 05-2021-OSPI-01320

CASHMERE SCHOOL DISTRICT

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

A due process hearing in this matter was held by videoconference before Administrative Law Judge (ALJ) Eric Roth on August 16, 2021, through August 20, 2021, September 14, 16, 20, and 30, 2021, and October 1, 6, 19, and 20, 2021. The Parents of the Student whose education is at issue¹ appeared and were represented by Shannon McMinimee and Alex Hagel, attorneys at law.² The Cashmere School District (District) was represented by Kevin O'Neill and Jon Dalley, attorneys at law.³ Also present on behalf of the District was Lisa Avila, Federal Programs Director. Administrative Law Judge Paul Alig observed the hearing on some dates but did not participate. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (Complaint) with the Office of Superintendent of Public Instruction (OSPI) on May 27, 2021. The Complaint was assigned Cause No. 2021-SE-0059 and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered June 1, 2021, that assigned the matter to ALJ Eric Roth.

Prehearing conferences were held on June 19, July 12, and August 12, 2021. The Parents amended their complaint on June 29, 2021. Prehearing orders were entered July 7 and July 16, 2021. Counsel for the District and the Parents appeared at all prehearing conferences.

As set forth in the First Prehearing Order, the written decision due date was continued at the District's request to thirty (30) calendar days after the hearing record closes. The hearing record closed on November 29, 2021, when the parties submitted closing briefs. The due date for the written decision is December 29, 2021.

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

² Ms. McMinimee was present throughout the hearing. Mr. Hagel was present on some days, but not others.

³ Mr. O'Neill was present throughout the hearing. Mr. Dalley was present on some days, but not others.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents' Exhibits: P-1 through P-42, P-44, P-45, P-46, P-47 (pages 1 through 30 only),⁴ P-48, and P-49.

District Exhibits: D-1, D-3, D-4, D-5, D-7, D-8, D-9, D-10, D-11, D-12, D-13, D-14, D-15, D-16, D-17, D-18, D-19, D-20, D-21, D-22, D-23, D-24, D-25, D-27, D-28, D-29, D-30, D-31, D-33, D-37, D-38, D-39, D-40, D-46, and D-47.⁵

The following witnesses testified under oath. Some were called to testify more than once. They are listed in order of their initial appearance:

Carla Myers, Owner/CEO of Discovery Behavior Solutions (DBS)
Mayra Hurtado, Assistant Clinical Director/BCBA at DBS
Stephanie Faust, counsel for the District
Melissa Trammell, BCBA, North Central Educational Service District
Heather MacNeil, Occupational Therapist, private practice, Can Do Kids Therapy Services
Kiersten Moholy, Occupational Therapist, Cashmere School District
Katherine Todd, Physical Therapist, Cashmere School District
Heidi Brown, Special Education Teacher, Cashmere School District
Kent Chalmers, Band Teacher, Cashmere School District
Emily Bushouse, former School Psychologist, Cashmere School District
Kristen Knoll, Speech Language Pathologist, Cashmere School District
Joanna (Jo) Ristow, Speech Language Pathologist, Seattle Therapy Skills for Life
Marilea Brock, Speech Language Pathologist, Communication Connection NW, LLC
Lisa Avila, District Federal Programs Director, Cashmere School District
Lionel Enns, Ph.D., Child Psychologist and BCBA
Student's Mother (the "Mother")
Student's Father (the "Father")
Robin Talley, BCBA, University of Washington Autism Center

⁴ More than one version of P-47 was submitted by the Parents. To make clear which portion of the exhibit was admitted, the pages referenced consist of the following: Lionel Enns, Ph.D. curriculum vitae (pp. 1-4), Carla-Marie C. Myers resume (pp. 5-8), Andrea Villines resume (pp. 9-10), Mayra Hurtado resume (p. 11), Robin Talley curriculum vitae (pp. 12-17), Heather MacNeil resume (pp. 18-25), Joanna Ristow resume (pp. 26-27), and Marilea Brock resume (pp. 28-30).

⁵ Exhibit D-46 is a chain of emails dated March 12, 2020. Exhibit D-47 is a chain of emails dated August 24, 2020. These exhibits were introduced by the District during the hearing on August 20, 2021, for the stated purpose of impeaching witness testimony. These documents were not exchanged with the Parents five business days before the start of the hearing. Ruling on their admission was reserved during the hearing. By this order, these exhibits are admitted for the purpose of impeaching witness testimony. The reasons for this are explained in the Conclusions of Law, below. These exhibits were not referred to as D-46 and D-47 during the hearing, so the numbers are assigned as of this Order. The District also introduced a third exhibit to impeach witness testimony—an email dated April 14, 2021. This exhibit was not admitted for the reasons explained in the Conclusions of Law, below.

ISSUES

The issues for the due process hearing were:

a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) since August 5, 2020, by:

i. Denying the Parents' request for compensatory occupational therapy services for the time during which the District's occupational therapist was at Discovery Behavior Solutions (DBS) investigating the educational placement and not serving the Student.

ii. Denying the Parents' request to replace the occupational therapist because of inappropriate conduct, and by the District's subsequent decision to stop providing occupational therapy services to the Student rather than replace the occupational therapist.

b. Whether the District violated the IDEA and denied the Student FAPE since May 21, 2021, by implementing an individualized education program (IEP) for the Student that does not include:

i. A year-round educational placement for the Student that includes 40 hours of Applied Behavior Analysis (ABA) programming per week at an ABA clinic until he is ready to transition to a school setting with support from Certified and/or Registered Behavior Technicians (CBTs and/or RBTs) working under the supervision of Board-Certified Behavior Analysts (BCBAs), with the BCBAs providing sufficient direct supervision of the CBTs and/or RBTs and support of the Student.

ii. All of the specially designed instruction that the Student needs, which consists of sufficient and scientifically sound specially designed instruction in academics (math, reading, and writing), adaptive, behavior, communication, gross motor, fine motor, and social emotional skills, provided by certificated and certified staff members rather than paraeducators.

iii. All of the related services that the Student needs, which consist of related services from a Speech Language Pathologist (SLP), Occupational Therapist, and Physical Therapist provided by certificated and certified staff members.

iv. The supplemental aids and services that the Student needs to be able to access education, which consist of the provision of the ABA services to the Student throughout his school day through CBTs and/or RBTs working under the supervision of BCBAs, with the BCBAs providing sufficient direct supervision of the CBTs and/or RBTs and support of the Student.

v. Appropriate supports to staff, which consist of provisional development and training considering the Student's unique needs.

vi. Appropriate goals for the Student that are measurable and not simply restating goals that the Student failed to master when he was served by the District previously.

vii. Opportunities to participate in non-academic activities and events with the support of CBTs and/or RBTs working under the supervision of BCBAs as appropriate for him.

c. Whether the District violated the procedural requirements of the IDEA and denied the Student FAPE by determining the following items in the IEP without meaningful input from the Parents, with limited input from members of the IEP team, and without input by the Student's service providers at the time:

i. What the Student's special education eligibility category would be at the conclusion of the District's most recent special education eligibility reevaluation.

ii. How the Student's disabilities that affect his ability to access education would be documented in the District's most recent special education eligibility reevaluation.

iii. That it would include inaccurate and misleading information in the District's most recent special education eligibility reevaluation.

iv. What specially designed instruction, related services, supplementary aids and services, and supports to staff would be included as a recommendation to the IEP team in the District's most recent special education eligibility reevaluation.

v. That it would not consider new goals for the Student, but would instead reuse goals that the Student had been unable to meet when he was served by the District previously.

vi. That it would not consider any educational placement for the Student that was not at a District school.

vii. That it would not consider continuing the Student's interim educational placement as his new educational placement.

viii. That one Educational Service District BCBA has sufficient availability and skill to support the Student in a District building in the same manner that the Student has been supported by multiple BCBAs at DBS.

ix. That District paraeducators have the same level of skill and expertise to support the Student in the same manner that he has been supported by RBTs and/or CBTs at DBS.

x. That one District special education teacher who serves students in three different grade levels has the same level of expertise and time to supervise the District paraeducators and support the Student in the same manner that he has been supported by multiple BCBAs supervising RBTs and/or CBTs at DBS.

xi. That it would not consider the recommendations of any of the BCBAs at the meeting regarding the amount of services from a BCBA that the Student needed.

xii. That it would not allow the Student's current BCBAs to speak about the amount of services that they provide to the Student.

xiii. That it would not consider the recommendations of the SLP who conducted the Independent Educational Evaluation (IEE) and the SLP who was serving the Student with respect to:

- A. the amount of direct services provided by an SLP that the Student needs, and
- B. the amount of indirect services provided to staff who work with the Student.

xiv. That it would not consider having the Student served by RBTs and/or CBTs working under the supervision of BCBAAs instead of District paraeducators.

xv. That it would not consider having the RBTs and/or CBTs, BCBAAs, and SLP who have successfully served the Student in his interim educational placement continue to serve the Student in the District's proposed educational placement instead of District staff, even though the District does not have similarly skilled, trained, and certified staff available who can provide the Student with the amount and intensity of services that he needs in the areas of adaptive, behavior, communication, and social emotional skills.

xvi. That the Student does not need a year-round educational program.

d. Whether the District has violated the procedural requirements of the IDEA and denied the Student FAPE since March 1, 2020, by denying the Parents and all relevant members of the Student's IEP team the opportunity to have access to all of the drafts of the reevaluation that was finalized by the District on or about March 3, 2021 and all of the drafts of the IEP that was implemented on May 25, 2021.

e. Whether the District violated the procedural requirements of the IDEA and denied the Student FAPE by denying the Parents and all relevant members of the Student's IEP team the opportunity to provide meaningful input by:

- i. muting the Parents and their counsel;
- ii. failing to allow the Parents to speak at IEP team meetings by not recognizing them when they requested to speak;
- iii. failing to allow the non-CSD members of the IEP team to speak by not recognizing them when they requested to speak; and
- iv. not allowing the non-CSD members of the IEP team to speak more than once on a topic during a meeting or to answer questions that the Parents had.

f. Whether the District failed to comply with the IDEA and WAC 392-172A-05090 by failing to "convene a meeting with the parent and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process hearing request" as determined by both the Parents and the District.

g. Whether the District has violated the procedural requirements of the IDEA and denied the Student FAPE by failing to comply with WAC 392-172A-05190 by not providing the Parents with “educational records relating to the student which are collected, maintained, or used by the district ... promptly and before any before any meeting regarding an individualized education program or hearing or resolution session relating to the identification, evaluation, educational placement of the student or provision of FAPE to the student, including disciplinary proceedings.”

h. Whether the District violated the procedural requirements of the IDEA and denied the Student FAPE by disenrolling the Student from the District on June 11, 2021, with two days’ prior written notice and after the Parents filed a due process hearing request on May 27, 2021 that invoked stay-put.

i. Whether the District has denied the Student FAPE since June 11, 2021 by disenrolling the Student from the District and failing to provide the Student with any further educational services, including services for the duration of the 2020-2021 school year and Extended School Year (ESY) services for the summer of 2021.

j. And whether the Parent is entitled to these requested remedies:

i. Declaratory relief finding that the District violated the IDEA, and that the Student was denied FAPE by the District’s actions.

ii. Compensatory education and supplemental services for the Student to allow him to obtain the educational benefit that he would have received but for the District’s violations of the IDEA and denial of FAPE.

iii. A revised reevaluation report that is complete and appropriate.

iv. An IEP moving forward that specifically includes:

A. A year-round educational placement for the Student that includes 40 hours of ABA programming per week at an ABA clinic until he is ready to transition to a school setting with support from CBTs and/or RBTs working under the supervision of BCBAs, with the BCBAs providing sufficient direct supervision of the CBTs and/or RBTs and support of the Student.

B. Sufficient and scientifically sound specially designed instruction in academics (math, reading, and writing), adaptive, behavior, communication, gross motor, fine motor, and social emotional skills, provided by certificated and certified staff members rather than paraeducators.

C. Related services from a Speech Language Pathologist, Occupational Therapist, and Physical Therapist provided by certificated and certified staff members rather than paraeducators.

D. Provision of the ABA services to the Student throughout his school day through CBTs and/or RBTs working under the supervision of BCBAs, with the BCBAs

providing sufficient direct supervision of the CBTs and/or RBTs and support of the Student.

E. Appropriate supports to staff, specifically provisional development and training considering the Student's unique and complex needs.

F. Appropriate goals for the Student that are measurable and that do not simply restate goals that the Student failed to master when he was served by the District previously.

G. Opportunities to participate in non-academic activities and events with the support of CBTs and/or RBTs working under the supervision of BCBA's as appropriate for the Student.

v. An Order that directs the District to provide all of the Student's educational records to the Parents.

vi. An Order that includes whatever additional relief the court may find just and equitable.

See First Prehearing Order dated July 7, 2021.

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 that a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence may be discussed regarding specific facts at issue.

Some of the evidence presented was hearsay. In administrative hearings, hearsay evidence is admissible if, in the judgment of the presiding officer, it is the kind of evidence on which reasonably prudent people are accustomed to rely in the conduct of their affairs. Revised Code of Washington (RCW) 34.05.452(1). Findings of fact may not be based exclusively on hearsay unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. RCW 34.05.461. To the extent any findings of fact below are based on hearsay, it is concluded that such findings did not unduly abridge the parties' opportunity to confront witnesses and rebut evidence.

Student's attendance at the District

1. In November 2018, the Student began attending Cashmere Middle School in the District. (Test. of Brown, Transcript ("Tr.") 1801:10-1802:3; 1948:23-1949:6.) The Student was in fifth grade and attended Heidi Brown's special education class at that time. (Test. of Brown, Tr. at 1801:10-1802:3.) The Student remained in Ms. Brown's class for the rest of his fifth-grade year through early in his sixth-grade year, which began in the fall of 2019. (Test. of Brown, Tr. at 1801:10-24.)

2. Ms. Brown is a certificated teacher for Kindergarten through eighth grade. (Test. of Brown, Tr. at 475:13–20; Test. of Avila, Tr. at 970:1–9, 2726:21–2728:1.) Ms. Brown is in the process of obtaining a special education endorsement. (Test. of Brown, Tr. at 475:13–20; Test. of Avila, Tr. at 2727:16–17.) Ms. Brown has received a special education pre-endorsement waiver from OSPI, which allows her to teach special education classes. (Test. of Brown, Tr. at 475:13–476:2; Test. of Avila, Tr. at 970:1–9, 2726:21–2728:1.)
3. While in Ms. Brown’s class, the Student worked toward the goals in his individualized education program (IEP). (Test. of Brown, Tr. at 1811:3-1814:7.) The Student also had opportunities to interact with typically developing peers. (*Id.*) These included the Student’s general education classes, elective classes such as band and P.E., and lunch and recess. (Test. of Brown, Tr. at 1812:9-19.) The Student also participated in activities such as school assemblies and other events. (*Id.*)
4. While in Ms. Brown’s class, the Student received support from a paraeducator. (Test. of Brown, Tr. at 1903:2-4.) In addition, the District agreed to allow behavior technicians from Discovery Behavior Solutions (DBS) to accompany the Student at school. (Test. of Avila, Tr. at 3020:17-3021:11.)
5. DBS is a clinic that provides applied behavior analysis (ABA) services, therapy, and behavior consultation in Washington and Oregon. (Test. of Myers, Tr. at 61:14-24.) DBS provides ABA services in a clinical setting for approximately 80 percent of its clients. (Test. of Myers, Tr. at 66:12-13.) DBS also provides home-based therapy and educational support in school settings. (Test. of Myers, Tr. at 66:13-15.)
6. DBS has a clinic in Wenatchee, Washington. (Test. of Myers, Tr. at 61:14-24, 66:5-8.) DBS has no special education teacher or paraeducators at its Wenatchee clinic. (Test. of Myers, Tr. at 110:21–111:6, 111:15-17.) It is a clinical facility, not a school. (Test. of Myers, Tr. at 107:17-25.) DBS does not serve students without disabilities. (Test. of Myers, Tr. at 110:8-12.)
7. Paraeducators in the District are trained to both deliver academic instruction and to promote appropriate interactions between students. (Test. of Brown, Tr. at 1854:2–1855:8.)
8. A registered behavior technician requires 40 hours of training, a high school diploma, and competency assessments. (Test. of Talley, Tr. at 1693:5–20.) The District’s paraeducators and special education teacher received approximately 40 hours of training that would qualify as training for a registered behavior technician. (Test. of Talley, Tr. at 1693:5–20; Test. of Brown, Tr. at 1849:5–21; Test. of Trammell, Tr. at 2541:11–2542:2.) The District’s paraeducators thus receive similar training to what behavior technicians at DBS receive. (Test. of Talley, Tr. at 1693:5–20; Test. of Brown, Tr. at 1849:5–21; Test. of Trammell, Tr. at 2541:11–2542:2.)
9. Behavior technicians do not necessarily have experience in providing academic instruction or in assisting students with generalizing their skills. (Test. of Brown, Tr. at 1854:2–1855:8.)
10. During the Student’s time in the District, District staff began to complain about the presence of the behavior technicians who served the Student at school. (Test. of Avila, Tr. at 2742:16–23.) District staff believed that the behavior technicians interfered with the Student’s school services and his socialization with peers. (Test. of Brown, Tr. at 1803:22–1805:3; 1809:5-1811:3; Test. of

Avila, 2463:6-2465:6.) In particular, District staff believed that the Student was calmer and interacted more naturally with his peers when the behavior technicians were not present. (Test. of Brown, Tr. at 1803:22–1805:3; 1809:5-1811:3.) District staff also believed that the Student became more dependent on prompts and guidance when behavior technicians were present. (Test. of Avila, 2467:2:6-2468:8.)

11. On October 30, 2019, the District sent DBS a letter stating that the District would not renew its agreement that allowed behavior technicians to accompany the Student at Cashmere Middle School. (P-26, p.3.) The District did so on the ground that the presence of the behavior technicians interfered with the Student’s services and socialization. (P-26, p.3.) The District also stated that it wished to continue collaborating with DBS to meet the Student’s needs. (P-26, p.3.)

Student’s move to private placement at DBS and settlement agreement

12. The Parents disenrolled the Student from the District on October 30, 2019, the same date as the District’s letter to DBS. (Test. of Brown, Tr. at 1801:22–24; 1808:17–1809:1.) October 30, 2019 was the last day the Student attended school in the District. (*Id.*)

13. In the fall of 2019, the District and the Parents filed due process complaints against each other. (Test. of Avila, Tr. at 2938:20–25.) The parties resolved those complaints when they entered into a settlement agreement on February 20, 2020. (P-1.)

14. As part of the February 20, 2020 settlement agreement, the District agreed to fund an Independent Educational Evaluation (IEE), complete its own reevaluation, and hold an IEP team meeting to review those evaluations and develop a new IEP. (P-1, pp. 1-4.) The District also agreed to place the Student in an interim educational placement until a new IEP was developed. (P-1, pp. 1-4.)

15. The District and the Parents agreed that the IEE would include assessments by Dr. Miriam Araujo in the areas of academics, adaptive, behavior, cognitive, executive functioning, neuropsychological, and social-emotional. (P-1, pp. 1-2.) The IEE would also include a functional behavioral assessment (FBA) at the Student’s interim educational placement, an oral-placement-movement assessment by Crossroads Therapy Clinic, an assessment by the Special Education Technology Center (SETC) of the Student’s assistive and augmentative communication needs, and an assessment of all other aspects of communication by Communication Connection NW. (P-1, pp. 1-2.)

16. The parties agreed that the District’s reevaluation would involve directly assessing the Student in the areas of occupational and physical therapy, reviewing the reports of the IEE providers, reviewing reports from any interim educational placement providers, and reviewing any report from the Student’s private providers. (P-1, pp. 1-2.)

17. The Student’s interim educational placement consisted of the Student receiving adaptive, behavior, social-emotional, and academic services at DBS, receiving communication services from Eloquent Speech and Language Therapy, and receiving occupational and physical therapy from Can Do Kids. (P-1, p. 3.) Under the settlement agreement, the Parents would fund the adaptive, behavior, and social services, and the District would fund the academic services. (P-1, p. 3.)

18. The settlement agreement required the parties to hold one IEP team meeting at which the team would review the IEE reports, review reports from the interim educational placement providers, review the District's reevaluation, and develop a new IEP. (P-1, p. 4.) The District would fund the participation of Dr. Araujo, the speech language pathologist (SLP) from Communication Connection NW, and the provider who conducted the FBA. (P-1, p. 4.)

The Student at DBS and IEEs

19. The Student began to receive services at DBS's Wenatchee clinic in April 2020. (Test. of Myers, Tr. at 79:17-20, 115:10-14; Test. of Avila, Tr. at 2842:15-16.)

20. On May 19, 2020, the SETC held a consultation meeting with the Mother; Lisa Avila, the District's Director of Federal Programs; Kristen Knoll, the District's Speech Language Pathologist; Heidi Brown, the District's Special Education Teacher; Kiersten Moholy, the District's occupational therapist (OT); and Gina Quin, a physical therapist (PT). (P-8.) The meeting participants discussed communication goals and identified a possible communication goal for the Student based on his needs. (P-8.)

21. Because of the COVID-19 pandemic, not all of the IEE providers were able to complete or begin their assessments of the Student as anticipated. (Test. of Avila, Tr. at 2842:12-19; P-1, p. 7.) This delayed the completion of the IEE, the District reevaluation, and a new IEP for the Student. (*Id.*).

22. On June 4, 2020, the parties entered into an addendum to the settlement agreement. (Test. of Avila, Tr. at 2842:12-19; P-1, pp. 7-10.) The addendum contained some of the same language as the original agreement. (P-1, pp. 7-10.) It also included some differences. (P-1, pp. 7-10.) These differences included the Student receiving communication services from Seattle Therapy rather than Eloquent Speech and Language Therapy. (P-1, p. 7.) The addendum also provided that the Student would receive occupational and physical therapy from District staff at DBS and occupational and physical therapy from Can Do Kids. (P-1, p. 8.)

23. During the spring and summer of 2020, Dr. Araujo, Marilea Brock, and Robin Talley conducted assessments and observations of the Student as part of their IEEs. (P-5, P-7, P-9.)

24. Dr. Araujo's IEE report indicated that Dr. Araujo examined the Student in May and June 2020. (P-5.) The report contained the following statement:

[The Student's] strength has long been noted to be [the Student's] social motivation and interest, [the Student] seeks out peers and enjoys sharing [the Student's] interests. In a prior rating of [the Student's] adaptive skills (2017) these skills were a notable strength in [the Student's] profile. [The Student] has not maintained that strength relative to current age expectations. This does not mean a regression in previous skills, but does indicate [the Student] is not maintaining the same pace in the development of [the Student's] social skills. It is concerning that within [the Student's] current placement (even without Covid restrictions) does not allow for more exposure to peers which will ultimately increase [the Student's] adaptability in community settings.

(P-5, p.5.)

25. Dr. Araujo's IEE report recommended that the Student spend the majority of the school day in a structured setting. (P-5, p. 6.) However, it also recommended that "it is necessary that [the Student] have regular exposure to peers in [the Student's] academic day. Obviously, this has to be restricted at this time due to quarantine, however, opportunities for socialization with typically and non-typically developing peers will be critical for [the Student] to ultimately function in the least restrictive school and community settings." (P-5, p. 6.)

26. Marilea Brock's IEE report indicated that Ms. Brock assessed the Student on June 24, 2020. (P-5.) Ms. Brock's report contained the following statement:

Communication and social opportunities with peers of similar age, skills, interests, and needs would be beneficial for functional social communication interventions. [The Student] does not currently interact or socialize with any peers during academic instruction or unstructured learning time. Any interactions observed and reported by [the Student's] team are with much younger children or adults. In order to develop meaningful social communication skills including verbal and nonverbal communication, [the Student] should have the opportunity to practice communication across recreational and academic activities with similarly aged and skilled peers. As [the Student's] skills develop, a structured social communication group of appropriately matched peers should be added to [the Student's] program.

(P-7, p.10; Test. of Brock, Tr. at 831:20–832:23.)

27. Robin Talley, a Board-Certified Behavior Analyst (BCBA) and Behavior Education Consultant, observed the Student in May and June 2020 at DBS and prepared an IEE report. (P-9.) When Ms. Talley observed the Student, she did not see him interact with same-aged peers. (Test. of Talley, Tr. at 1659:9–16.) She did see the Student move through the same space as a couple of children who were younger than the Student, but other than that, Ms. Talley did not see the Student interact with other children. (Test. of Talley, Tr. at 1659:22–1660:4–9.)

28. Ms. Talley observed the classroom that the Student would be served in at Cashmere Middle School under the May 2021 IEP, including an observation of the special education teacher and paraeducators. (Test. of Talley, Tr. at 1634:9–23, 1699:15–24, 1700:1–25.)

29. Ms. Talley believes that it is important for the Student to interact with peers and not just adults, because a lack of such interactions leads to a lack of generalization and a delay in the development of social skills. (Test. of Talley, Tr. at 1664:21–1665:17.)

30. Ms. Talley believes that the Student could be appropriately supported by a District paraeducator with supervision from a BCBA. (Test. of Talley, Tr. at 1692:10-1693:3.)

31. Ms. Talley concluded that year-round educational placement of forty-hours of applied behavior analyses per week at an ABA clinic is not appropriate for the Student. (Test. of Talley, Tr. at 1702:22–1703:1.) Ms. Talley stated that this is "[b]ecause it is very difficult to replicate a natural setting that a person of his age might encounter, such as a school, in an ABA clinic. I have worked in the field for more than 20 years, and it is wonderful that [DBS is] setting up

opportunities for interactions with peers, but typically interactions and intervention is decontextualized. And some of the approaches [DBS was] using during my observation were sort of the most decontextualized type of intervention that we use in our field.” (Test. of Talley, Tr. at 1703:2–12.)

Parents’ withdrawal of consent for District’s occupational therapist

32. In July 2020, the District’s occupational therapist, Kiersten Moholy, and the District’s physical therapist, Katherine Todd, started serving the Student at DBS. (Test. of Moholy, Tr. at 411:1–6, 1403:20–1404:19; Test. of Todd, Tr. at 1556:1–17.) Ms. Moholy was the District’s only qualified occupational therapist. (Test. of Avila, Tr. at 2476:3–7; P-4.)

33. On July 22, 2020, the Mother sent an email to Ms. Avila about a report she had received from DBS regarding the District’s OT, Kiersten Moholy. (P-2, p. 1.) In the email, the Mother expressed concern about a report from DBS staff that alleged that Ms. Moholy had inappropriately attempted to direct how the Student received services at DBS. (*Id.*) The Mother believed that Ms. Moholy had interrupted the Student’s service at DBS and, in doing so, had overstepped the bounds of providing OT services. (*Id.*)

34. Ms. Avila received the Mother’s email and investigated. (Test. of Avila, Tr. at 2474:2–2475:2.) Ms. Avila called Carla Myers, the owner and CEO of DBS, and interviewed Ms. Moholy. (*Id.*) The incident involved a request by Ms. Moholy about whether she could observe the Student using a keyboard, followed by a discussion of whether doing so was permitted and how the time at issue should be billed. (Test. of Moholy, Tr. at 1406:19-1407:4; 1407:9-15.) Ms. Moholy then completed her occupational therapy session with the Student for that day. (Test. of Moholy, Tr. at 1408:17-24.) In speaking to Ms. Myers, Ms. Avila learned that Ms. Myers believed that the incident was a misunderstanding, that Ms. Myers had no concerns with Ms. Moholy, and that Ms. Moholy was welcome back at DBS. (Test. of Avila, Tr. at 2474:2–2475:2.) Ms. Avila concluded that Ms. Moholy did not act inappropriately and sent the Mother an email that explained why. (Test. of Avila, Tr. at 2475:3-7; P-2, p.2.) In response, the Mother asked that the Student be assigned a different OT. (P-2, p.2.) The Mother also suggested that the parties not meet outside of the IEP team or without counsel. (*Id.*)

35. On July 31, 2020, the Parents’ counsel sent a letter to the District requesting compensatory education for certain portions of Ms. Moholy’s time, withdrawing the Parents’ consent for Ms. Moholy to have access to the Student at DBS, and withdrawing consent for DBS staff to share information with Ms. Moholy. (P-3, pp. 3-4.) The Parents also proposed that the Student receive occupational therapy through Seattle Therapy Services or Can Do Kids, and that the Parents would unilaterally seek private occupational therapy services through one of those providers if the District rejected their proposal. (P-3, p. 4.)

36. After it received the letter from Parents’ counsel, the District issued two prior written notices dated August 5, 2020. (Test. of Avila, Tr. at 2476:24–2477:16; P-4.) The first informed the Parents that the District was denying their request for compensatory education for occupational therapy services. (P-4, p. 1.) The second informed the Parents that the District would no longer provide occupational therapy services at DBS. (P-4, p. 2.) The District took the second action on the ground that the Parents would not allow the district’s OT to provide services at DBS. (*Id.*)

The District also declined to assign a different OT on the ground that Ms. Moholy was competent and had done nothing to warrant the parents' refusal. (*Id.*)

November 2020 IEP meeting

37. In August 2020, Ms. Talley came to the District and observed Ms. Brown's classroom while Ms. Brown was working with students during an extended school year (ESY) program. (Test. of Talley, Tr. at 1634:9–23; P-47, pp. 12–17.) During Ms. Talley's observation, she found the students in Ms. Brown's class to be compliant and engaged. (Test. of Talley, Tr. at 1699:15–24.) She observed that students had individualized speech generating devices and visual supports. (Test. of Talley, Tr. at 1700:1–1701:2.) Ms. Talley also found that the paraeducators made good use of behavior-specific praise and delivered clear, concise cues to students to elicit skills during direct instruction. (Test. of Talley, Tr. at 1702:4–25.) In general, Ms. Talley found that some of the teaching were done correctly, but that there was room for improvement. (*Id.*)

38. The Parents declined an August 2020 request by the District to allow a psychology professor at Gonzaga University to observe the Student at DBS. (Test. of Avila, Tr. at 2654:22-2655:15.)

39. The Parents declined a 2020 proposal by the District to have the IEP meetings facilitated by an outside party. (Test. of Avila, Tr. at 2728:3-9.)

40. On August 25, 2020, Emily Bushouse, the District's school psychologist at the time, emailed the Parents and asked if they had any additional information that they would like the District to consider in preparing its reevaluation report. (Test. of Bushouse, Tr. 2236:13–2237:2.) The Parents did not provide any additional information. (Test. of Bushouse, Tr. 2237:15-18.)

41. On November 3, 2020, Ms. Avila sent an email to the members of the Student's IEP team that included the meeting notice, a draft evaluation report, and a draft IEP. (D-7.) The notice stated that a remote IEP meeting was scheduled for November 12, 2020, at 11 a.m. (the "November 12 meeting") to review IEE reports, determine eligibility, review educational progress, and develop a reevaluation report and IEP. (D-7, p. 2.) The notice also identified the individuals who were invited to attend the meeting. (*Id.*) These included the Parents and their counsel; Emily Bushouse; Lisa Avila; Mayra Hurtado, a BCBA from DBS; Robin Talley; Dr. Araujo; Marilea Brock; Kent Chalmers, the Student's sixth-grade band teacher; Heidi Brown; Carla Myers; Kristen Knoll, the District's SLP; Kiersten Moholy; Katherine Todd; and the District's counsel. (*Id.*)

42. On November 5, 2020, Ms. Avila sent the team members another email. (Test. of Avila, Tr. at 2478:22–2479:3.) In it, Ms. Avila stated that the documents attached to her prior email were drafts that the Parents could add to or clarify. (Test. of Avila, Tr. at 2479:1–20.) Ms. Avila also invited the Parents to provide any feedback before the November 12 meeting. (*Id.*) In Ms. Avila's experience, it was typical practice for the District to do this. (Test. of Avila, Tr. at 2479:21–2480:1.)

43. The November 12 IEP meeting was held via Zoom conference. (Text. Of Avila, Tr. at 2480:15–24.) Everyone who was invited attended. (*Id.*) The meeting was scheduled from 11 a.m. to 2 p.m. (Test. of Avila, Tr. at 2486:20–2489:5.) Ms. Avila facilitated the meeting. Test. of Brown, Tr. at 1818:1–2; Test. of Bushouse, 2238:17–18; Test. of Avila, 2480:8–10.)

44. Ms. Avila informed the participants that they would be using the hand-raise feature on Zoom during the meeting. (Test. of Todd, Tr. at 1732:23–1733:3.) The participants were muted and instructed to use a hand-raise feature if they wanted to be unmuted and speak. (Test. of Talley, Tr. at 1645:8–10.) Ms. Avila informed participants that the hand-raise feature would notify her if a participant wished to speak. (Test. of Brown, Tr. at 1819:8–13; Test. of Knoll, 2066:15–2067:23; Test. of Bushouse, 2241:12–16.) The team practiced using the feature at the beginning of the meeting. (Test. of Knoll, Tr. at 2067:14–17.) The District used the hand-raise feature because there were many participants in the meeting, and it wanted to ensure that everyone had a chance to speak. (Test. of Talley, Tr. at 1667:3–8; Test. of Brown, 1818:16–22; Test. of Knoll, 2066:19–2067:6; Test. of Bushouse, 2240:23–2241:4; Test. of Avila, 2487:20–24.) At the time, the District believed that this was the best way to keep the meeting orderly and obtain team members' input. (Test. of Avila, Tr. at 2488:5–6.)

45. The Parents objected to being muted and having to use the hand-raise feature at the November 12 meeting. (Test. of Brown, Tr. at 1819:17–1820:4.) Ms. Avila unmuted the Parents, and they were allowed to speak freely. (Test. of Talley, Tr. at 1667:23–1688:2; Test. of Brown, 1819:17–1820:4, 1930:9–13; Test. of Knoll, 2067:24–2068:2; Test. of Bushouse, 2241:19–23.) Ms. Avila also unmuted Carla Myers, who was participating by phone. (Test. of Myers, Tr. at 119:23–120:6.) All other participants, including the Parents' counsel, remained muted and had to use the hand-raise feature to gain the opportunity to speak. (Test. of Brown, Tr. at 1931:23–1932:5; Test. of Avila, 2488:24–2489:5.)

46. The Parents' counsel was able to speak multiple times during the November 12 meeting. (Test. of Avila, Tr. at 2489:11–14; 2490:15–17.) Of all the meeting participants, the Parents' counsel spoke the most during the meeting. (Test. of Todd, Tr. at 1564:9–13; Test. of Talley, 1668:15–19; Test. of Brown, 1820:8–10; Test. of Bushouse, 2242:5–8; Test. of Avila, 2490:17–18.)

47. The Parents and their counsel left the meeting early because they did not like the way the meeting was being facilitated, particularly the muting and the hand-raise feature, and the fact that the District did not unmute their counsel. (Test. of Brown, Tr. at 1818:8–15; Test. of Knoll, 2066:7–13; Test. of Bushouse, 2240:6–21, 2306:1–4; Test. of Avila, 2487:6–12.)

48. After the Parents and their counsel left the November 12 meeting, the meeting continued for several minutes, during which no decisions were made regarding the Student's reevaluation or IEP. (Test. of Talley, Tr. at 1668:20–1669:2; Test. of Todd, 1734:13–22; Test. of Knoll, 2069:5–8; Test. of Bushouse, 2242:14–22; Test. of Avila, 2490:21–2491:19.)

January 2021 IEP meeting

49. Another IEP team meeting was eventually scheduled for January 28, 2021, at 9 a.m. On January 26, 2021, Ms. Avila sent an email to Dr. Araujo, Marilea Brock, Jo Ristow, Andrea Villines, Mayra Hurtado, Carla Myers, Heather MacNeil, and the Parents in advance of this meeting. (D-8.) Among other items, Ms. Avila attached draft documents relating to the meeting and explained that they had not been updated, noted the District's efforts to solicit input from the Parents, and stated that the IEE providers would be able to speak about their reports. (D-8, p. 1.)

50. The Parents responded to Ms. Avila's January 26, 2021 email, stating that no one from the District had contacted the Parents to solicit input. (D-10, p. 2.) Ms. Avila responded with an email detailing attempts by the District to solicit input from the Parents. (D-10, p. 1.)

51. A second IEP meeting was held on January 28, 2021 (the "January 28 meeting") via Zoom conference. (Test. of Brown, Tr. at 1825:13-15.) The meeting participants included the Parents, their counsel, Andrea Villines, Mayra Hurtado, Carla Myers, Katherine Todd, Jo Ristow, Heather MacNeil, Marilea Brock, Dr. Araujo, Heidi Brown, Kent Chalmers, Lisa Avila, Emily Bushouse, Kiersten Moholy, Melissa Trammell, and the District's counsel. (Test. of Moholy, Tr. at 1427:9-19; Test. of Todd, 1567:24-1568:2; Test. of Brown, 1825:18-1826:1; D-9; D-19, pp. 11-14.) Ms. Avila facilitated the meeting. (Test. of Brown, Tr. at 1825:16-17; Test. of Bushouse, 2244:3-5; Test. of Avila, 2497:6-8.) Ms. Knoll and Ms. Talley did not attend. (Test. of Talley, Tr. at 1669:9-1670:20; Test. of Knoll, 2069:15-23; Test. of Avila, 2636:10-15; D-19, p. 5.)

52. The January 28 meeting lasted for three hours. (Test. of Brown, 1826:2-4; D-9.) No one was muted or required to use the hand-raise feature. (Test. of Brown, Tr. at 1828:4-19; Test. of Bushouse, 2256:16-2257:4; Test. of Trammell, 2533:8-21; Test. of Avila, 2641:8-2642:6.)

53. At the beginning of the January 28 meeting, Ms. Avila reviewed the meeting agenda, which included behavior expectations. (Test. of Todd, Tr. at 1727:1-14; Test. of Brown, 1823:12-21; Test. of Bushouse, 2247:3-8; Test. of Avila, 2496:25-2497:3, 2634:21-23; D-8, pp. 72-73.) These expectations generally prohibited participants from interrupting each other and requested that they engage in a respectful and professional manner. (D-8, p. 72.) The District developed the expectations to allow all participants to speak, to discuss all necessary materials, and to prevent interruptions. (Test. of Bushouse, 2243:7-22; Test. of Brown, 1822:3-11.) The Parents' counsel had input on the expectations and agreed to them before the meeting. (Test. of Avila, 2492:3-2494:5; 2626:8-2627:2.)

54. As Ms. Avila reviewed the January 28 meeting agenda, she was repeatedly interrupted by the Parents' counsel. (Test. of Avila, Tr. at 2634:24-2635:8.) Parents' counsel also interrupted other members of the IEP team throughout the meeting. (Test. of Brown, Tr. at 1824:1-12; Test. of Bushouse, 2247:9-15; Test. of Avila, 2634:24-2635:8.) This conduct reduced the time available to discuss the documents and issues relating to the IEP. (Test. of Bushouse, Tr. at 2247:20-2248:6, 2257:10-22.)

55. At the January 28 meeting, the IEE providers had opportunities to share their results and provide input. (Test. of Bushouse, Tr. at 2250:21-2251:4; Test. of Trammell, 2517:9-2518:1; Test. of Avila, 2636:23-2637:10.) Dr. Araujo and Marilea Brock were able to share the results of their IEE assessment. (Test. of Brown, Tr. at 1826:13-16; Test. of Bushouse, 2248:11-14; Test. of Avila, 2637:20-2638:3.) Emily Bushouse shared the recommendations of Robin Talley, who did not attend. (Test. of Talley, Tr. at 1669:9-1670:20; Test. of Bushouse, 2251:5-22.)⁶

⁶ There was testimony about whether discussion of certain items at the IEP meetings were reflected in notes taken by Emily Bushouse. Ms. Bushouse's notes, which have been admitted as exhibits in the record, are helpful. However, they do not account for the entirety of the meeting discussions. Where testimony convincingly establishes that an item was discussed, that testimony can form the basis for factual findings.

56. The interim educational placement providers were given opportunities to share updates about their work with the Student at the January 28 meeting. (Test. of Myers, Tr. at 124:7–125:25; Test. of Brown, 1826:17–22; Test. of Bushouse, 2248:15–19.) This included Mayra Hurtado giving a report about how the Student was doing, showing a graph on the Student’s progress data, talking about the Student’s progress toward goals at DBS, and talking about the Student’s skills, abilities, and challenges. (Test. of Avila, Tr. at 2638:4–11.)

57. At the January 28 meeting, IEP team members who were not District employees had opportunities to speak more than once. (Test. of Brown, Tr. at 1826:23–1827:1; Test. of Bushouse, Tr. at 2255:7–12; Test. of Trammell, Tr. at 2518:6–9; Test. of Avila, Tr. at 2638:16–18.)

58. The Parents provided input at the January 28 meeting. (Test. of Brown, Tr. at 1827:2–14; Test. of Bushouse, 2248:7–10; Test. of Trammell, 2518:13–15; Test. of Avila, 2638:19–24.) They discussed how the Student’s anger and anxiety had decreased, how he would participate in the general education setting, how he used visual supports rather than visual schedules, and how he was a multimodal communicator. (Test. of Bushouse, Tr. at 2255:16–21; Test. of Trammell, 2518:16–25; Test. of Avila, 2639:12 – 23.)

59. The Parents’ counsel provided input on behalf of the Parents at the January 28 meeting. (Test. of Bushouse, Tr. at 2256:11–15; Test. of Avila, 2639:24–2640:2.) Parents’ counsel spoke more than anyone else at the meeting. (Test. of Brown, Tr. at 1827:24–1828:3.) Some meeting participants found Parents’ counsel aggressive, noted counsel’s interruptions and accusations, and found the meeting atmosphere uncomfortable because of these things. (Test. of Trammell, Tr. at 2522:10–16; Test. of Avila, Tr. at 2640:7–15; Test. of Trammell, 2522:23–2523:7; Test. of Avila, 2640:7–15.) This limited the time available to review evaluation materials during the meeting. (Test. of Trammell, Tr. at 2522:23–2523:7; Test. of Avila, 2640:7–15.)

60. At the January 28 meeting, no one raised concerns about the Student’s eligibility category, which was identified as Autism in the draft evaluation report. (Test. of Brown, Tr. at 1829:18–22; Test. of Bushouse, 2257:23–2258:2; Test. of Trammell, 2524:18–22; Test. of Avila, 2641:3–7; D-8, p. 10.) The team discussed how the Student’s disability would affect his access to education, including its impact on such things as communication, behavior, and daily routines. (Test. of Brown, Tr. at 1830:3–10; Test. of Avila, Tr. at 2641:8–11; Test. of Moholy, Tr. at 1434:22–1435:6; Test. of Todd, Tr. at 1574:5–16.) As part of the discussion, the team discussed how the Student is a multimodal communicator and needs to use assistive technology, structure, quiet settings, and opportunities to interact with peers. (Test. of Bushouse, Tr. at 2256:1–9; Test. of Trammell, Tr. at 2525:6–16; Test. of Todd, Tr. at 1574:17–1575:1; Test. of Avila, Tr. at 2641:12–17.)

61. At the January 28 meeting, the team identified the areas of services that the Student is eligible to receive. (Test. of Brown, Tr. at 1830:18–25; Test. of Bushouse, 2252:17–2253:7). No team member raised concerns about the Student’s recommended areas of specially designed instruction. (Test. of Brown, Tr. at 1830:22–1831:4; Test. of Bushouse, 2258:3–8.) No one raised concerns about the recommended areas of related services or the recommended areas of supplementary aids and services identified in the draft evaluation report. (Test. of Bushouse, Tr. at 2258:9–20).

62. After the January 28 meeting, the Mother emailed members of the IEP team and expressed her feeling that the District did not allow the Parents to meaningfully participate in the meeting. (D-11, p. 2.) Ms. Avila responded, expressing regret that the Parents felt that way and apologizing for any instances in which the Parents raised their hand and were not recognized. (D-11, p. 1.)

March 2021 IEP meeting

63. On February 4, 2021, Ms. Brown sent an email to the Mother asking whether she would like to hold a meeting to discuss goals and gather input about the Parents' concerns before the next IEP team meeting. (Test. of Brown, Tr. at 1832:9–1833:10; D-12.) Ms. Brown also invited written feedback about these things. (D-12.) The Parents did not agree to meet with Ms. Brown. (Test. of Brown, Tr. at 1833:11–14.)

64. On February 8, 2021, Ms. Moholy sent an email to the Mother and asked whether the District was authorized to speak directly with and review information from Heather MacNeil, the Student's outpatient occupational therapist (OT). (Test. of MacNeil, Tr. at 338:14-16; D-13.) Ms. Moholy invited written input to help develop the Student's OT goals, including posing specific questions for the Parents to answer. (D-13.) The Parents never authorized Ms. Moholy to communicate directly with Ms. MacNeil. (Test. of Moholy, Tr. at 1436:9–12.) The Parents revoked any release of communication and told Ms. MacNeil not to provide information to the District. (Test. of MacNeil, Tr. at 365:9–19.)

65. On February 22, 2021, Ms. Avila emailed Mayra Hurtado and the Parents, asked if Heidi Brown and Emily Bushouse could observe the Student at DBS and, if so, when. (D-14.) Ms. Hurtado responded that DBS would accommodate the District's request, but that she needed to check with the Parents. (Test. of Avila, Tr. at 2653:18–23.) Parents' counsel informed the District that they would not agree to an in-person observation by Ms. Brown because they believed that Ms. Brown would increase the Student's anxiety and that there might be confidentiality issues with other students at DBS. (Test. of Avila, Tr. at 2653:25–2654:18; P-30.) The Parents did not inform the District that an in-person observation would not be allowed because of COVID. (Test. of Avila, Tr. at 2654:19–21.)

66. On March 2, 2021, Ms. Avila sent an email to Marilea Brock, Jo Ristow, Heather MacNeil, Dr. Araujo, Mayra Hurtado, Carla Myers, Andrea Villines, and the Parents with a copy of the Student's final evaluation report attached. (D-16, p. 1.) Ms. Avila asked the recipients to sign the report if it represented their conclusions, and to provide a separate document representing their conclusions if it did not. (D-16, p. 1.)

67. On March 2, 2021, Parents' counsel responded to Ms. Avila's March 2, 2021 email and expressed the Parents' disagreement with the District's reevaluation. (P-33, p. 1.) Parents' counsel specifically argued that the Student needed the support of registered or certified behavior technicians. (*Id.*) Parents' counsel also objected to "misleading information", including such items as a statement about the Student's enjoyment of the general education setting and the amount of time the Student spent in general education classes. (*Id.*) Parents' counsel further objected to the lack of reports that reflected the Student's present levels of performance or progress and stated that the District's reevaluation did not reflect input by the Parents or decisions made by the IEP team. (*Id.*) The Parents provided more input about the evaluation on March 3, 2021. (D-17, p. 1.)

68. On March 2, 2021, Ms. Avila sent out an updated draft IEP and the meeting agenda for the March 11, 2021 IEP team meeting. (Test. of Brown, Tr. at 1834:3–7; Test. of Bushouse, 2264:3–5; Test. of Avila, 2657:3–16; D-20.) Before sending the draft, Ms. Avila and Ms. Brown updated the present levels of performance based on progress reports from DBS and ensured that the draft IEP referred to the Student as a multimodal communicator. (Test. of Brown, Tr. at 1833:15 – 1834:2; Test. of Avila, 2657:17–24.)

69. On March 4, 2021, Parents’ counsel sent an email that expressed the Parents’ concerns with the newest draft IEP. (P-35, p. 1.) Among the Parents’ concerns were that the District was “recycling” goals from previous IEPs, had “cut and pasted” from the Student’s goals at DBS, was serving the Student with paraeducators instead of Registered Behavior Technicians (RBTs), and was including goals that assumed skills that the Student did not yet have. (*Id.*)

70. On March 10, 2021, Ms. Avila responded to the Parents’ concerns about the District’s evaluation. (D-17, pp. 1–2.) Ms. Avila specifically disagreed that the District’s reevaluation report contained misleading or inaccurate information, and she stated that it contained the information that the District had at the time it issued the report. (*Id.*) Ms. Avila also stated that the recommendation of a paraeducator as a supplementary aide was shared with the Parents before the January 28 meeting. (*Id.*) Ms. Avila responded to a number of the Parents’ other concerns, including stating that the District had fully considered Ms. Talley’s recommendations and that the Student continued to be eligible for OT. (*Id.*) Ms. Avila also provided the Parents with all drafts of the District’s evaluation and IEP. (D-17, pp. 3–281.)

71. The third IEP meeting was held remotely on March 11, 2021 (the “March 11 meeting”). (Test. of Moholy, Tr. at 1440:8–10; Test. of Talley, 1671:4–6; Test. of Brown, 1831:22 –23, 1835:22–24; Test. of Bushouse, 2263:20–21; Test. of Trammell, 2527:19–21.) Ms. Avila facilitated the meeting. (Test. of Moholy, Tr. at 1440:20–21; Test. of Talley, 1671:7–8; Test. of Bushouse, 2265:8–10; Test. of Trammell, 25257:16–18; Test. of Avila, 2658:5–6.) The meeting lasted for three hours. (Test. of Brown, Tr. at 1841:25 – 1842:1; Test. of Avila, 2663:3–4.) No one was muted during this meeting, and the team members were not required to use the hand-raise feature. (Test. of Knoll, Tr. at 2079:14–25; Test. of Bushouse, 2267:13–2268:2; Test. of Trammell, 2535:6–20.)

72. Near the beginning of the March 11 meeting, Ms. Avila sent out another updated draft of the IEP. (Test. of Brown, Tr. at 1835:17–21; Test. of Bushouse, 2264:9–12). The updates were based on progress reports from DBS that the District had received shortly before the meeting. (Test. of Avila, Tr. at 2660:11–23, 2837:5–2839:5.) Ms. Avila sent the draft out during the meeting because she had not had a chance to do so before the meeting, and she wanted to explain to the IEP team what had changed since the previous draft. (Test. of Avila, Tr. at 2838:19–2839:5.)

73. Near the beginning of the March 11 meeting, the Parents provided uninterrupted input about their concerns for approximately 15 minutes. (Test. of Brown, Tr. at 1836:8–24; Test. of Knoll, 2075:2–10; Test. of Bushouse, 2265:1–6; Test. of Avila, Tr. at 2658:24–2659:5.) The Mother also interjected input at other points in the meeting about items such as IEP goals. (Test. of Brown, Tr. at 1836:24–1837:2.) The Parents’ counsel provided input throughout the meeting. (Test. of Avila, Tr. at 2662:9–16.)

74. During the March 11 meeting, the IEP team reviewed the “Team Considerations” section of the IEP, provided input about annual IEP goals, the Student’s strengths, and the Parents’ concerns, and discussed the Student’s present levels of educational performance. (Test. of Myers, Tr. at 129:20–24; Test. of Talley, 1671:20–23; Test. of Brown, 1837:5–14; Test. of Knoll, 2075:15–18; Test. of Bushouse, 2265:11–19; Test. of Trammell, 2528:4–7; Test. of Avila, 2659:6–11.)

75. At the March 11 meeting, the IEP team discussed the Student’s communication needs. (Test. of Talley, Tr. at 1671:24 – 1672:10; Test. of Brown, 1837:15–19; Test. of Knoll, 2075:19–21, 2076:6–2077:3; Test. of Bushouse, 2265:20–22; Test. of Trammell, 2528:11–13; Test. of Avila, 2659:12–15). This included discussion of the Student using assistive technology devices, his need for functional communication training, and the need to update his communication goals. (Test. of Brown, Tr. at 1837:20–23; Test. of Knoll, 2075:22–24; Test. of Bushouse, 2265:23–25; Test. of Trammell, 2529:11–2530:17; Test. of Avila, 2659:16–19.)

76. At the March 11 meeting, the IEP team talked about the Student being exposed to peers. (Test. of Talley, Tr. at 1676:22–1677:15; Test. of Brown, 1838:20–1839:3.) In particular, Dr. Araujo and Robin Talley recommended that the Student should have exposure to and interactions with peers. (*Id.*)

77. At the March 11 meeting, consistent with the recommendations of Robin Talley, the IEP team discussed incorporating a structured teaching model that relies on visual supports into the IEP, using demand modifications with the Student, and that Student’s motivation should be increased through reinforcement. (Test. of Talley, Tr. at 1676:14–21, 1677:22–1678:13; Test. of Brown, 1838:10–19, 1839:4–18.)

78. At the March 11 meeting, IEP team members discussed the Student’s special education service areas and annual IEP goals. (Test. of Brown, Tr. at 1837:24–1838:2; Test. of Knoll, 2075:25–2076:2; Test. of Bushouse, 2266:1–3; Test. of Trammell, 2528:14–16; Test. of Avila, 2659:20–22.) The team specifically discussed updating the Student’s goals in the areas of academic, social-emotional, behavior, and communication. (Test. of Brown, Tr. at 1840:19–22; Test. of Avila, 2660:2–10.) The team made changes to the Student’s communication goals based on the recommendations from Marilea Brock and Jo Ristow. (Test. of Knoll, Tr. at 2076:14–23.) The team also discussed the accommodations that should be included in the Student’s IEP. (Test. of Brown, Tr. at 1838:3–9; Test. of Bushouse, 2266:4–7; Test. of Trammell, 2528:17–22; Test. of Avila, 2659:23–2660:1.)

79. At the March 11 meeting, IEP team members who were not District employees had opportunities to speak more than once. (Test. of Moholy, Tr. at 1443:10–13; Test. of Todd, Tr. at 1587:13–17; Test. of Brown, Tr. at 1841:18–21; Test. of Bushouse, Tr. at 2267:5–9; Test. of Trammell, Tr. at 2532:20–23; Test. of Avila, Tr. at 2662:5–8.)

80. The IEP team did not complete its discussion of the proposed IEP at the March 11 meeting because the Parents’ counsel left, and the Parents did not agree to continue the meeting without counsel. (Test. of Brown, Tr. at 1842:2–14; Test. of Knoll, 2080: 1–17; Test. of Bushouse, 2268:16–23; Test. of Trammell, 2536:6–12; Test. of Avila, 2663:19–2664:2.) The District offered to complete the discussion without any counsel present, but the Parents did not agree to this. (*Id.*) The District did not threaten to continue the meeting without the Parents, nor did it tell them

that it would not agree to meet after the March 2021 meeting. (Test. of Talley, Tr. at 1689:1–12; Test. of Brown, 1842:15–18; Test. of Knoll, 2080:18–21; Test. of Bushouse, 2268:3–7; Test. of Trammell, 2536:13–16; Test. of Avila, 2664:3–6, 2664:21–24.)

81. After the Parents and their counsel left the March 11 meeting, those still present remained for approximately 10 minutes, talked about what needed to happen next, and discussed meeting again to finish the IEP. (D-21; Test. of Brown, Tr. at 1842:19–22, Test. of Knoll, 2080:24–2081:2; Test. of Bushouse, 2268:24–2269:2; Test. of Trammell, 2537:20–25; Test. of Avila, 2664:7–20.) No decisions about the IEP were made during this time. (Test. of Todd, Tr. at 1748:16–1749:7; Test. of Brown, 1842:24–1843:7.)

82. The team was unable to complete its discussion of the Student's IEP at the March 11 meeting in part because of Parents' counsel's interruptions. (Test. of Avila, Tr. at 2663:5–1). Those interruptions impeded the progression of the meeting. (Test. of Brown, Tr. at 1840:13–18.) They set a confrontational tone and impaired meaningful discussions about the items at issue. (Test. of Brown, Tr. at 1840:2–15; Test. of Trammell, Tr. at 2531:20–2532:11; Test. of Avila, Tr. at 2696:9–21.)

83. On March 12, 2021, the day after the March 11 meeting, the Parents filed a due process complaint. (Test. of Avila, Tr. at 2665:10–16, 2689:23–25.) No IEP had been proposed at that time. (Test. of Avila, Tr. at 2665:10–16.)

84. When the Parents filed their complaint, the District was funding the Student's placement at DBS based on the settlement agreement between the parties. (Test. of Avila, Tr. at 2688:14–2689:8; P-1, p. 3.) After the Parents filed their complaint, the District stopped funding the Student's placement at DBS because, according to the settlement agreement, the interim placement was not considered to be the Student's stay-put placement. (Test. of Avila, Tr. at 2691:12–21.) Based on the Student's most recently implemented IEP, the Student's stay-put placement was in the District. (Test. of Avila, Tr. at 2692:14–2693:2.)

85. Within approximately one week after filing their complaint, the Parents voluntarily dismissed it. (Test. of Avila, Tr. at 2693:4–7, 2695:12–13.) After that, the District continued to fund the Student's placement at DBS. (Test. of Avila, Tr. at 2695:17–20.)

District's 2021 evaluation report

86. On March 26, 2021, Ms. Avila sent the Parents the District's signed evaluation report. (D-19.) The following individuals signed the report: Kristen Knoll, Lisa Avila, Kiersten Moholy, Heidi Brown, Emily Bushouse, Katherine Todd, Melissa Trammell, Carla Myers, Kent Chalmers, Mayra Hurtado, Dr. Araujo, Marilea Brock, and Jo Ristow. (Test. of Brown, Tr. at 1831:5–10; Test. of Knoll, Tr. at 2074:5–8; Test. of Bushouse, Tr. at 2259:19–21, 2260:19–2261:20; Test. of Avila, Tr. at 2649:6–2650:16; D-19, pp. 11–14.) Neither Heather MacNeil nor Andrea Villines signed the report, and neither provided a dissenting opinion. (Test. of Avila, Tr. at 2651:24–2652:5, Tr. at 2650:18–25.)

87. On March 26, 2021, the Parents requested that the District provide them with any version of the March 2021 evaluation report that had not been shared with them, and the District provided documents responsive to the Parents' request. (D-39, p. 1; Test. of Avila, Tr. at 2723:19–2723:5.)

88. The prior written notice that accompanies the evaluation report shows that the District made several changes to the report based on feedback received from the IEP team, including the Parents. (Test. of Bushouse, Tr. at 2259:3–18; Test. of Avila, Tr. at 2648:11–22; D-19, p. 29.) These included clarifying that the Student was a multimodal communicator, correcting errors, and correcting a chart provided by Dr. Araujo. (*Id.*)

May 2021 IEP meeting

89. On May 13, 2021, after the District had renewed its request to observe the Student in person, the Parents allowed Ms. Brown and Ms. Bushouse to conduct an hour-long remote, rather than an in-person, observation of the Student at DBS. (Test. of Brown, Tr. at 1859:2–7; Test. of Bushouse, Tr. at 2269:15–20, 2273:5–7; Test. of Avila, Tr. at 2696:23–2698:8, 2699:6–12; D-22.) Not being able to observe the Student in person made it difficult for the District to clearly observe the setting at DBS and how it addressed the Student’s needs. (Test. of Avila, Tr. at 2700:8–18.)

90. During their May 13, 2021, remote observation of the Student at DBS, Heidi Brown became concerned that DBS staff were not appropriately teaching academics or functional life skills. (Test. of Brown, Tr. at 1870:22-1871:2.) Ms. Brown had several specific concerns, including that the Student was not being effectively taught math skills or how to count, and that staff’s reliance on extra verbal prompts called into question the Student’s reading comprehension. (Test. of Brown, Tr. at 1867:15-1872:9.)

91. The District scheduled and held a fourth IEP meeting on May 18, 2021, from 9 a.m. to 10:30 a.m. (the “May 18 meeting”). (D-23; Test. of Brown, Tr. at 1844:8–11; Test. of Trammell, Tr. at 2538:4–8; Test. of Avila, Tr. at 2704:20–25.) The meeting was held remotely via Zoom. (Test. of Moholy, Tr. at 1445: 17–25; Test. of Talley, Tr. at 1689:19–23; Test. of Brown, Tr. at 1845:5–7.) Ms. Avila facilitated the meeting. (Test. of Brown, Tr. at 1845:8–9; Test. of Bushouse, 2274:17–18; Test. of Trammel, 2538:14–16; Test. of Avila, 2704:20–23.)

92. The Parents provided input at the May 18 meeting. (Test. of Talley, Tr. at 1690:1-3; Test. of Brown, Tr. at 1845:15–17; Test. of Knoll, Tr. at 2081:21–23; Test. of Bushouse, Tr. at 2274:23–25; Test. of Avila, Tr. at 2706:19–21.) Parents’ counsel also spent a significant amount of time providing input. (Test. of Bushouse, Tr. at 2279:18–24.)

93. During the May 18 meeting, the IEP team discussed the Student’s accommodations, special education services, and placement. (Test. of Talley, Tr. 1690:4–12; Test. of Brown, Tr. at 1845:18–22; Test. of Knoll, Tr. at 2081:24–2082:2; Test. of Bushouse, Tr. at 2275:1–4; Test. of Trammell, 2539:24–2540:3; Test. of Avila, Tr. at 2706:22–25.)

94. During the May 18 meeting, the IEP team discussed and considered the amount of specially designed instruction that the Student would receive. (Test. of Talley, Tr. at 1690:13–16; Test. of Todd, Tr. at 1754:8–23; Test. of Brown, Tr. at 1845:23–1846:2; Test. of Bushouse, Tr. at 2275:5–8; Test. of Trammell, Tr. at 2540:4–7; Test. of Avila, Tr. at 2707:1–4.) The team went through the draft IEP to see if there were any objections to the specific amounts of services identified in the service matrix, and communication was the only area where concerns were raised. (Test. of Brown, Tr. at 1987:13–20, 1988:18–1989:13; Test. of Knoll, Tr. at 2199:13–2200:11; Test. of Bushouse, Tr. at 2275:9–11; Test. of Trammell, Tr. at 2540:15–17; Test. of Avila, Tr. at 2707:5–8.)

95. The IEP team discussed the amount of specially designed instruction the Student should receive in the area of communication at the May 18 meeting. (Test. of Brown, Tr. at 1846:9–13; Test. of Knoll, Tr. at 2082:3–6; Test. of Bushouse, Tr. at 2277:4–8.) Ms. Brock and Ms. Ristow recommended that the Student receive three thirty-minute sessions a week of speech and language services and that staff receive thirty minutes of training twice per month. (Test. of Ristow, Tr. at 744: 16–745:23; Test. of Brown, Tr. at 1846:15–25; Test. of Knoll, Tr. at 2084:19–2085:8; Test. of Bushouse, Tr. at 2277:9–14; Test. of Avila, Tr. at 2710:22–2711:10.) The IEP was updated to incorporate these recommendations. (Test. of Brown, Tr. at 1847:6–9; Test. of Knoll, Tr. at 2085:14–20; Test. of Avila, Tr. at 2712:9–2713:11; D-28, pp. 39, 41, 45.)

96. The IEP team discussed what supplementary aids and services the Student needed at the May 18 meeting. (Test. of Brown, Tr. at 1847:10–15; Test. of Knoll, Tr. at 2082:7–2084:18; Test. of Bushouse, Tr. at 2275:12–2276:14; Test. of Trammell, Tr. at 2540:22–2542:20; Test. of Avila, Tr. at 2707:9–2708:19.) The discussion focused on whether a paraeducator or a behavior technician should provide the Student one-to-one support. (*Id.*) Some of the team members believed that the Student should be served by a paraeducator; others believed that the Student should be served by behavior technicians. (Test. of Brown, Tr. at 1847:16–24; Test. of Knoll, Tr. at 2083:14–21; Test. of Trammell, Tr. at 2541:1–10; Test. of Avila, Tr. at 2707:22–2708:6.) The team talked about the difference between paraeducators and behavior technicians and the training that they receive. (Test. of Myers, Tr. at 141:25–143:13, 144:18–145:11; Test. of Talley, Tr. at 1691:25–1693:3; Test. of Brown, Tr. at 1848:9–1849:21; Test. of Trammell, Tr. at 2542:3–2543:3.) The team also discussed behavior technicians and BCBA's from DBS working with the Student at Cashmere Middle School. (Test. of Avila, Tr. at 2713:17–2714:1.) The District believed that it would be difficult to take staff from the clinical setting and have them work in a public-school setting. (Test. of Avila, Tr. at 2714:3–16.)

97. As part of the discussion about paraeducators and behavior technicians, Dr. Araujo suggested that the District should clarify the amount of supervision that paraeducators would receive from a BCBA and recommended that the District follow national guidelines on such supervision. (Test. of Avila, Tr. at 2708:20–2709:2.) The team attempted to discuss the amount of supervision, but did not because of interruptions, many by Parents' counsel. (Test. of Avila, Tr. at 2709:3–18; Test. of Trammell, Tr. at 2546:7–2547:21.) The District ultimately followed Ms. Araujo's recommendation and included two-and-a-half hours a week of BCBA consultation with staff in the Student's IEP. (Test. of Trammell, Tr. at 2544:23–2546:6; D-28, pp. 39 & 45.)

98. At the May 18 meeting, the team discussed the Student's educational placement. (Test. of Todd, Tr. at 1785:20–1786:17; Test. of Trammell, Tr. at 2543:23–2544:6; Test. of Myers, Tr. at 151:12-14; Test. of MacNeil, Tr. at 373:10-18; Test. of Brown, Tr. at 593:22-594:8.) The team opened up the meeting for discussion on placement and invited anyone to provide input. (Test. of Brown, Tr. at 2008:8–21; Test. of Knoll, Tr. at 2191:2–9.) The Parents and DBS staff shared that they wanted the Student to stay at DBS, and the district members of the team believed the Student's least restrictive environment was Cashmere Middle School. (Test. of Moholy, Tr. at 1452:16-1453:1; Test. of Todd, Tr. at 1590:25-1591:12; Test. of Talley, Tr. at 1698:13–21; Test. of Brown, Tr. at 1851:5–15, 2008:8–21; Test. of Knoll, Tr. at 2089:11–16; Test. of Bushouse, Tr. at 2277:21–2278:11; Test. of Avila, Tr. at 2714:17–2715:4, 2716:6–11.) The team also discussed transitioning the Student from DBS to Cashmere Middle School, and a transition plan was included in the IEP. (Test. of Knoll, Tr. at 2089:17–2090:4; Test. of Bushouse, Tr. at 2279:2–5; Test. of Trammell, Tr. at 2547:22–2548:5; Test. of Avila, Tr. at 2716:11–17; D-28, p. 43.)

99. Parents' counsel interrupted other meeting participants multiple times during the May 18 meeting. (Test. of Avila, Tr. at 2709:15–22.) The interruptions by Parents' counsel made it difficult for every team member to provide input and inhibited the team's communication. (Test. of Avila, Tr. at 2710:6–21.)

100. Throughout the 2020–2021 school year, the District had difficulty scheduling IEP meetings with the Parents and their counsel because Parents' counsel often had less availability than other meeting invitees. (Test. of Avila, Tr. at 2494:17–2495:25.) The District offered several times to meet with the Parents without counsel from either side in attendance. (Test. of Avila, Tr. at 2496:1–24.) The District also asked the Parents whether there was another attorney who could represent the Parents at a meeting. (*Id.*) The Parents did not agree to these proposals. (Test. of Avila, Tr. at 2496:14–20.)

The IEP: May 2021

101. On May 20, 2021, Ms. Avila sent the Parents a copy of the proposed IEP that was developed at the March 11 and May 18 IEP meetings. (D-25.) The District proposed that the IEP would take effect May 25, 2021. (D-25, p. 46.) On May 26, 2021, Ms. Avila sent the May IEP to the Parents with some corrected dates. (D-28.)

102. The May 2021 IEP provided for the Student to attend Cashmere Middle School for a portion of his school day, and to spend the rest of his day at DBS through the end of the 2020-2021 school year. (D-28, p. 42.) The IEP then provided for a transition plan for the Student to attend school in the District full-time beginning in the 2021-2022 school year. (*Id.*)

103. The May 2021 IEP provided for specially designed instruction in the areas of adaptive, math, speech and language, behavior, social-emotional, and reading. (D-28, p. 41). It also provides for related services in the areas of gross motor (physical therapy), fine motor (occupational therapy), and speech and language services. (D-28, pp. 41-42; Test. of Moholy, Tr. at 1456:10–22; Test. of Todd, Tr. at 1600:16–26; Test. of Knoll, Tr. at 2090:16–23.)

104. The May 2021 IEP incorporated the recommendation of Jo Ristow and Marilea Brock on Augmentative or Alternative Communication (AAC) support by providing 60 minutes per month of AAC training as a support for staff. (D-28, pp. 39 and p. 45; Test. of Ristow, Tr. at 745:9–746:25; Test. of Brown, Tr. at 1847:6–9; Test. of Avila, Tr. at 2712:9–2713:11.)

105. The May 2021 IEP provided that a special education teacher or paraeducator would provide most of the Student's specially designed instruction. (D-28, pp 41-42). The special education teacher would supervise that instruction. (Test. of Brown, Tr.at 601:5–21.)

106. The May 2021 IEP included two-and-a-half hours of weekly supervision or consultation with a BCBA. (D-28, pp. 39, 45.) This incorporated the recommendations of Dr. Araujo, Robin Talley, and Melissa Trammell. (Test. of Avila, Tr. at 2707:22–2708:6, 2708:20–2709:2; Test. of Trammell, Tr. at 2544:23–2546:6; Test. of Talley, Tr. at 1703:24–1704:5.) The IEP uses both the terms "consultation" and "supervision" to refer to this provision, but they are functionally the same for purposes of the IEP. (P-28, pp. 39, 45; Test. of Avila, Tr. at 2969:4–25, 3011:17–3013:3.)

107. The May 2021 IEP included at least 22 annual goals for the Student. (D-28, pp. 14-37.) Some of the goals were updated to address the Student's present levels of performance, including in the areas of communication, occupational therapy, and behavior. (Test. of Brown, Tr. at 1841:9-13; Test. of Knoll, Tr. at 2076:3-2077:3; Test. of Moholy, Tr. at 1441:15-24; Test. of Todd, Tr. at 1586:17-1587:8; Test. of Talley, Tr. at 1687:4-11.)

108. The District staff believed that the May 2021 IEP would benefit the Student by allowing opportunities to participate in general education classes like P.E. and music. (D-28, p. 41.) The District staff believed that the May 2021 IEP gave the Student opportunities to participate in lunch with peers and opportunities to interact with students in the hallway or as they came in and out of the classroom. (Test. of Todd, Tr. at 1716:23-1717:7.)

109. The May 2021 IEP gave the Student opportunities to attend activities that the Student participated in when the Student previously attended school in the District, including assemblies, fun runs, and field events. (Test. of Brown, Tr. at 1812:6-19, 1853:8-14.) The District understood that the Student had previously enjoyed these activities, and that other students enjoyed being around the Student, as well. (Test. of Brown, Tr. at 1812:20-1813:13; Test. of Knoll, Tr. at 2098:12-2099:24; Test. of Avila, Tr. at 2461:1-7, 3009:20-12.)

110. The May 2021 IEP allowed the Student opportunities to generalize skills and carry them over from one setting to another. (Test. of Todd, Tr. at 1582:25-1583: 6; Test. of Brown, Tr. at 1453:5-1454:6, 1855:16-1856:6, 1857:2-1858:1.) This is a key goal of educators. (Test. of Knoll, Tr. at 2094:2-5, 2904:15-25; Test. of Moholy, Tr. at 1458:23-7; Test. of Todd, Tr. at 1713:2-21, 1713:23-1714:1.) It allows a student to practice skills in a variety of environments in school. (Test. of Todd, Tr. at 1714:1-3.) This is distinct from a clinical setting, such as DBS, which tends not to promote generalization of skills, and provides less opportunity for students to work toward independence. (Test. of Trammell, Tr. at 2548:12-2549:3; Test. of Bushouse, Tr. at 2282:19-2283:7; Test. of Brown, Tr. at 1853:15-1854:1, 1856:12-17, Test. of Todd, Tr. at 1581:20-1582:7, 1582:21-24, 1604:12-1605:1; Test. of Knoll, Tr. at 2098:12-18.) The IEP allowed service providers to work together to promote carryover and generalization. (Test. of Moholy, Tr. at 1459:8-1460:3; Test. of Brown, Tr. at 1856:18-24; Test. of Trammell, Tr. at 2549:5-16.)

Student's departure from the District

111. Ms. Avila learned that the Parents intended to enroll the Student part-time in the District. (Test. of Avila, Tr. at 1121:10-18.) Because of this, on May 25, 2021, Ms. Avila sent the Parents an email explaining what they needed to do to enroll the Student part-time. (D-27.)

112. In her May 25, 2021 email to the Parents, Ms. Avila stated that to be a part-time student, the Student must be either (1) attending a private school and enrolled in the District for any courses or ancillary service, (2) enrolled exclusively in the District but participating in a work-training program, or (3) receiving home-based instruction and enrolled in the District for course or ancillary service. (D-27, p. 1.) Ms. Avila stated that, to her knowledge, the first two conditions did not apply. (D-27, p. 1.) Ms. Avila provided the Parents with forms regarding home-based instruction and part-time enrollment, asked the Parents to sign and return them, and stated that until then, the District would continue to provide the Student services under the May 2021 IEP. (D-27, pp. 1-2.) Ms. Avila stated that once the Parents signed and returned the forms, the parties

could schedule an IEP meeting to discuss what services the District would provide the Student. (D-27, pp. 1-2.)

113. The Parents never returned the forms that Ms. Avila provided in her May 25, 2021 email. (Test. of Avila, Tr. at 1121:1–9, 1122:20–24.) The Parents’ attorney informed the District that the Student would not be attending school in the District, and that the Student was enrolled full-time elsewhere. (Test. of Avila, Tr. at 1121:1–3.)

114. The Parents filed a due process hearing request in this matter on May 27, 2021.

115. The parties scheduled a resolution meeting on the Parents’ due process hearing request on June 3, 2021. (D-30, Test. of Avila, Tr. at 2724:13-2726:11).

116. On June 8, 2021, the District sent the Parents a prior written notice informing them that the District was disenrolling the Student effective June 11, 2021, which was after the last day of the school year. (D-1; D-29, p. 2.) The prior written notice also informed the Parents that the District was ready to provide special education and related services to the Student under the May 2021 IEP if the Parents re-enrolled him in the District. (D-29, p. 2.)

117. On August 5, 2021, Dr. Lionel Enns observed the Student at DBS for about two hours. (Test. of Enns, Tr. at 997:15-998:5; 1041:9-11.) Dr. Enns observed the Student with two behavior technicians. (Test. of Enns, Tr. at 998:6-999:8.) Dr. Enns did not speak to the Student’s special education teacher, general education teachers, or paraeducators. (Test. of Enns, Tr. at 1042:5-1043:16.) Dr. Enns also did not speak to the Student’s speech and language pathologists, occupational therapist, or physical therapist who worked with the Student in a school setting. (*Id.*) Dr. Enns is a psychologist and a Board-Certified Behavioral Analyst Doctoral (BCBA-D). (Test. of Enns, Tr. at 993:16-995:5.) Dr. Enns believes that the Student requires a highly restrictive setting with substantial BCBA support, such as the environment at DBS. (Test. of Enns, Tr. at 1007:13-1009:21.)

CONCLUSIONS OF LAW

Jurisdiction

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

Burden of Proof

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Neither the IDEA nor OSPI regulations specify the standard of proof in special education hearing 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. *Tacoma Sch. Dist.*, 119 LRP 31908 (SEA WA 2019) (citing *Steadman v. SEC*, 450 U.S. 91, 98-102, 101 S. Ct. 999 (1981); *Thompson v. Dept. of Licensing*, 138 Wn.2d 783, 797, 982 P.2d 601 (1999); *Hardee v. Dept. of Social & Health Services*, 172 Wn.2d 1, 256 P.3d 339 (2011)). In this case, the Parents seek relief and bear the burden to prove their claims by a preponderance of the evidence.

3. This tribunal must base findings of fact only on evidence from the record of the adjudicative proceeding. RCW 34.05.461(4). In addition, the tribunal "is not required to wade through the record to find evidence to support claims." *Seattle Sch. Dist.*, 120 LRP 36916 (SEA Wash. 2020) (citing *E.M. v. Pajaro Valley Unified Sch. Dist.*, 652 F.3d 999, 1010–11 (9th Cir. 2011)).

The IDEA and FAPE

4. School districts "shall provide every student who is eligible for special education between the age of three and twenty-one years, a free appropriate public education program (FAPE)....A FAPE is also available to any student determined eligible for special education even though the student has not failed or been retained in a course or grade and is advancing from grade to grade." WAC 392-172A-2000; RCW 28A.155.090; 34 C.F.R. Part 300.

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

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

Rowley, supra, 458 U.S. at 206-207 (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." *Rowley*, 458 U.S. at 200 - 201.

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

7. The next question is whether the District violated the substance of the IDEA. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

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

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

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential.

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 2017 U.S. App. LEXIS 9359, at 22 (9th Cir. 2017). The determination of reasonableness is made as of the time the IEP was developed. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is "a snapshot, not a retrospective." *Id.* In addition, "[t]he educational benefits flowing from an IEP must be determined from the combination of offerings rather than the single components viewed apart from the whole." *Hockinson Sch. Dist.*, 120 LRP 32846 (SEA Wash. 2020); *J.M. v. New York City Dep't of Educ.*, 171 F. Supp. 3d 236, 247–48 (S.D.N.Y. 2016) ("An IEP must be considered as a whole; its individual parts cannot be judged in isolation.").

Evidentiary Ruling

8. The District offered Exhibits D-46 and D-47 in evidence during the hearing.⁷ These exhibits were not included among the District's proposed exhibits that were exchanged five business days before the hearing. Exhibit D-46 is a chain of emails dated March 12, 2020, that concerns implementation of a settlement agreement between the parties. The District offered it to rebut the Parent's unanticipated testimony on that subject, which was not identified as an issue in the case. Exhibit 47 is a chain of emails dated August 24, 2020, that concerns a request to have Mark Derby observe the Student. The District offered it to rebut the Parent's unanticipated testimony that the District never asked that one of its consultants be allowed to observe the Student at DBS.⁸ The Parent objected to the admission of these exhibits based on the five business-day rule, which provides:

Any party to a due process hearing has the right to . . . [p]rohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing . . .

⁷ As explained previously, these exhibits were not designated by these numbers during the hearing; the numbers are assigned by this Order.

⁸ The District also sought to introduce a third document to impeach witness testimony. That document was not admitted, as explained below.

WAC 392-172A-05100(1)(c); see 34 CFR §300.512.⁹

9. The District argued that Exhibits D-46 and D-47 were offered for impeachment purposes and were therefore admissible under WAC 10-08-140(2), which provides in pertinent part:

(2) Where practicable, the presiding officer may order:

(a) That all documentary evidence which is to be offered during the hearing or portions of the hearing be submitted to the presiding officer and to the other parties sufficiently in advance to permit study and preparation of cross-examination and rebuttal evidence;

(b) That documentary evidence not submitted in advance as required in (a) of this subsection be not received in evidence in the absence of a clear showing that the offering party had good cause for his or her failure to produce the evidence sooner, *unless it is submitted for impeachment purposes*;

(Emphasis added.) The matter was taken under advisement, to be ruled on in this decision.

10. Rebuttal or impeachment evidence¹⁰ is admitted to allow a party to rebut a new, unanticipated matter presented by the opposing party. See *State v. White*, 74 Wn.2d 386, 394, 444 P.2d 661 (1968).

Genuine rebuttal evidence is not simply a reiteration of evidence in chief but consists of evidence offered in reply to new matters. The plaintiff, therefore, is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of defendant's case.

Id., 74 Wn.2d at 394-395. See *State v. Dixon*, 37 Wn. App. 867, 877, 684 P.2d 725 (1984) (“The testimony of Ms. M.’s sister appears to have been true rebuttal testimony offered in reply to a new matter raised by the defense not anticipated by the State.”)

11. Impeachment evidence under Washington law is also governed by Evidence Rule (ER) 607, which provides: “The credibility of a witness may be attacked by any party, including the party calling the witness.” Witnesses may be impeached by their own prior inconsistent statements or by extrinsic evidence. See *Tamburello v. Dept. of Labor and Industries*, 14 Wn. App. 827, 828-829, 545 P.2d 570 (1976) (motion picture of plaintiff engaging in physical activities that he testified he was incapable of performing was properly admitted as extrinsic impeachment evidence). When extrinsic evidence is used for impeachment, “[i]n a sense these exhibits are merely items

⁹ The five business-day rule in the IDEA itself covers only the disclosure of *evaluations* prior to hearing. See 20 USC 1415(f)(2). The U.S. Department of Education regulations implementing the IDEA expanded the five business-day rule to cover all proposed exhibits, and Washington State regulations did the same. See 34 CFR §300.512; WAC 392-172A-05100(1)(c).

¹⁰ The terms “rebuttal” evidence and “impeachment” evidence are used interchangeably in this discussion.

of rebuttal in impeachment form.” *Jacqueline’s Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 788, 498 P.2d 870 (1972). The court in *Jacqueline’s* went on to hold: “[E]vidence properly admitted to impeach by mere contradiction constitutes an exception to the general rule and is competent to prove the substantive facts encompassed in such evidence.” *Id.* at 789. In other words, such evidence may be considered for the truth of the matter asserted, not solely for the limited purpose of attacking credibility.

12. Two IDEA cases address the intersection of the five business-day rule and the general rules on the admission of previously undisclosed rebuttal or impeachment exhibits. One confronted the question directly. See *Blue Springs R-IV Sch. Dist.*, 63 IDELR 272 (SEA MO 2014). In *Blue Springs*, a school district witness testified that during development of the IEP, the parents’ expert requested only a few items be included in it. The parents then offered notes the expert had prepared about the IEP to prove that she had requested that more items be included. The commissioner hearing the case at first excluded the notes based on the five business-day rule. However, on reconsideration, the commissioner admitted the notes as a rebuttal exhibit, stating:

Upon reconsideration, we reverse our ruling. After researching the issue, we have found no case law that would prohibit the introduction of rebuttal evidence in IDEA cases, notwithstanding the rule set forth in 34 CFR 300.512(a)(3) [the five business-day rule].

Id.

13. The second case on the question addressed it indirectly. In *Somerset County Public School System*, 21 IDELR 942 (SEA MD 1994), the state review board found that the hearing officer erred by not allowing the parents to see documents that were shown to district witnesses to refresh their memory during testimony. The documents had not been disclosed five business days before the hearing and were not exhibits in the case. The state review board held that the parents were entitled to see the documents and would also have been entitled to “introduce relevant parts of [them] for impeachment purposes.” *Id.* (internal citations omitted). Thus, documents that were not disclosed five business days before the hearing would have been admissible as impeachment exhibits if the parents, upon seeing them, wished them to be admitted.

14. The regulation relied upon by the District, WAC 10-08-140(2), is an administrative version of the common court rule that impeachment exhibits need not be – and as a practical matter cannot be – disclosed as exhibits prior to trial. See, e.g., Federal Rule of Civil Procedure (FRCP) 26(a)(3)(A); (which creates an exception to the requirement of pre-trial disclosure of exhibits for impeachment exhibits). While the five business-day rule, which applies only to IDEA hearings, is more specific than WAC 10-08-140(2), which applies to all administrative hearings, the U.S. Department of Education, in adopting the five business-day rule, must have been aware of the Federal Rules of Civil Procedure. If the Department had intended its rule to abrogate a Federal Rule of Civil Procedure, the Department would most likely have said so in the rule.

15. The decisions in *Blue Ridge* and *Somerset County* are sound. They conform to general civil and administrative procedure rules. Also, if impeachment evidence is barred unless disclosed prior to the hearing, parties would have an incentive to put every shred of paperwork into the record in case a witness unexpectedly testifies to something that might be addressed in a

document. Excluding all undisclosed impeachment exhibits can also provide an incentive to save surprise testimony for the hearing, instead of sharing the matter during resolution sessions and settlement negotiations.

16. For the above reasons, the District properly offered Exhibits D-46 and D-47 as impeachment exhibits. The District did not know, nor did it have reason to know, that the Mother would testify as she did during the hearing and had no reason to list the documents among its proposed exhibits. For these reasons, Exhibits D-46 and D-47 are admitted as extrinsic evidence to impeach the Parent's unanticipated testimony.

17. The District introduced a third document, an email chain dated April 14, 2021, to impeach the Mother's testimony on August 20, 2021. The Parents correctly objected that this document was actually used to refresh the Mother's memory, not to impeach her testimony. Because of this, that document is not admitted into the record.

Issues

1. The Parents have not established that the District denied the Student FAPE since August 5, 2020 with respect to occupational therapy services.

Issue (a)(i): The Parents have not established that the District denied the Student FAPE since August 5, 2020 by denying the Parents' request for compensatory occupational therapy services.

18. The Parents argue that in July 2020, the District's OT, Kiersten Moholy, spent time "investigating" the Student's educational placement rather than providing OT services. The Parents have requested compensatory OT services for this time. The Parents have not established that Ms. Moholy was investigating the Student's educational placement. The only firsthand evidence of this concerns a single incident in July 2020 in which Ms. Moholy asked to observe the Student using a keyboard. (Test. of Moholy, Tr. at 1406:19-1407:4; 1407:9-15.) After investigation, this incident appeared to be a misunderstanding. (Test. of Moholy, Tr. at 1406:19-1407:4; 1407:9-15; see also Test. of Avila, Tr. at 2474:2-2475:7; P-2, p. 2.) The evidence also fails to establish that the Student missed any occupational therapy time because of this incident, since Ms. Moholy completed her occupational therapy session with the Student. (Test. of Moholy, Tr. at 1408:17-24.) The District's firsthand testimony is entitled to greater weight than the Parents' hearsay testimony, which consists of an unspecific report relayed by the Mother. (P-2, p. 1.) The Parents have thus failed to prove by a preponderance of the evidence that the Student missed any OT services that would entitle the Parents to relief.

Issue (a)(ii): The Parents have not established that the District denied the Student FAPE since August 5, 2020 by denying the Parents' request to replace the occupational therapist.

19. Under the IDEA, a school district may generally select the staff that serves a student. *Mercer Island Sch. Dist.*, 119 LRP 21258 (SEA Wash. 2019). Unless only one particular individual can provide the services a student needs to receive FAPE, school districts retain the right to select staff to provide instruction and services to a student eligible for special education. (*Id.*) As long as a classroom teacher is properly qualified, the IDEA provides no authority for parents to request one teacher over another. (*Id.*; see also *Morton Sch. Dist.*, 106 LRP 18808 (SEA Wash. 2006)

“Case law is clear, school districts have the sole discretion to hire and assign staff.”). In addition, a school district does not bear fault when the parents prevent the district from implementing the IEP. *Downingtown Area Sch. Dist.*, 113 LRP 34703 (SEA Pa. 2013) (“The District cannot be faulted for not doing what the Parents prevented it from doing.”); *Bethlehem Area Sch. Dist.*, 109 LRP 21907 (SEA Pa. 2007) (“Having thus handcuffed the District, [the Parents] cannot now be heard to complain that the inclusion aspect of the program was not implemented appropriately.”).

20. The Parents argue that the District unilaterally removed OT services from the Student in August 2020. The evidence does not support this claim. Rather, the evidence shows that the Parents prevented the District from providing those services after July 2020. The District had one qualified occupational therapist: Kiersten Moholy. (Test. of Avila, Tr. at 2476:3–7; P-4.) The Parents withdrew their consent for Ms. Moholy’s services on July 31, 2020. (Test. of Mother, Tr. at 1194:15–22; Test. of Moholy, 1405:21–23; Test. of Avila, Tr. at 2473:14–2474:1; P-3, pp. 3-4.) The Parents have not shown that Ms. Moholy was not qualified to serve the Student, and they may not hold the District responsible for their own refusal of Ms. Moholy’s services. The preponderance of the evidence fails to show a denial of FAPE on this ground.

2. The Parents have not established that the May 21, 2021 IEP denied the Student FAPE.

Issue (b)(i): The Parents have not established that the District denied the Student FAPE since May 21, 2021 by failing to place the Student in the least restrictive environment.

21. An IEP team must consider the least restrictive environment requirements under the IDEA when determining a student’s educational placement. WAC 392-172A-02060(2). Those requirements include the following:

...school districts shall ensure that the provision of services to each student eligible for special education services . . . shall be provided:

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

WAC 392-172A-02050(1)–(2).

22. A school district must also provide students who are eligible for special education services appropriate opportunities to participate in extracurricular services and activities with nondisabled students.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, each public agency must ensure that each student eligible for special education services participates with

nondisabled students in the extracurricular services and activities to the maximum extent appropriate to the needs of that student.

WAC 392-172A-02065.

23. The Ninth Circuit uses a four-factor test to determine whether a student's placement is the least restrictive environment. *M.S. v. Vashon Island*, 337 F.3d 1115, 1136–37 (9th Cir. 2003); *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). Those factors include the educational benefits of placement full-time in a regular class, the non-academic benefits of such placement, the negative effects the student had on the teacher and children in the regular class, and the costs of mainstreaming the student. *Id.* In this case, the evidence in the record does not address the latter two factors, so only the first two factors are evaluated below.

24. The testimony of the District's witnesses receives greater weight with respect to this issue for two reasons. First, the District's personnel focus on the Student's education, whereas the evidence indicates that DBS staff focus primarily on the Student's behavior. Second, District staff, as well as Robin Talley, have had the opportunity to observe the Student both in the District and at DBS. By contrast, Dr. Lionel Enns, who admittedly has substantial training and experience as a BCBA, did not observe the Student in a school setting and did not speak with District staff. (Test. of Enns, Tr. at 1042:5-1043:16.) His testimony therefore receives limited weight compared to the testimony of those who worked with the Student in a school setting, or those who observed the Student in both settings.

25. The Parents argue that the Student must be placed in a highly structured environment with substantial ABA therapy, such as DBS, and that placement in the District is not the Student's least restrictive environment. The preponderance of the evidence fails to support the Parents' claim for the following reasons.

26. First, the first factor of the Ninth Circuit test weighs in favor of the May 2021 IEP as the Student's least restrictive environment. The preponderance of the evidence shows that DBS is a much more restrictive environment than the District. For instance, at DBS, the evidence shows that the Student was more dependent on prompts from others to give appropriate responses. Moreover, DBS is a clinical facility, not a school. (Test. of Myers, Tr. at 107:17-25.) It has no special education teacher or paraeducators at the clinic where the Student received services. (Test. of Myers, Tr. at 110:21–111:6, 111:15-17.) The Student also has more opportunity to generalize his skills and carry them over to other settings in the District than at DBS.

27. The second factor of the Ninth Circuit test also weighs in favor of the May 2021 IEP as the Student's least restrictive environment. The preponderance of the evidence establishes that the Student will receive greater non-academic benefits under the May IEP. Under the IEP, the Student would have the opportunity to take general education classes such as P.E. and music. He would have the chance to have lunch with typically developing peers and interact with them between classes. He would also have the chance to enjoy activities that he had previously enjoyed at the District, such as school assemblies. Conversely, the evidence fails to show that DBS provides these opportunities. DBS does not serve students without disabilities. While placement at DBS may serve the Student well in some ways, it does not provide comparable non-academic benefits for the Student, particularly with respect to his exposure to general education peers.

28. While the evidence shows that the Student has benefitted behaviorally from time at DBS, for the above reasons, the Parents have not shown that placement in the District was not the Student's least restrictive environment. The District thus did not deny the Student FAPE on this ground.

29. This decision does not question whether DBS has provided, or can provide, valuable services to the Student. It only concludes that the placement established in the District's May 2021 IEP does not deny the Student FAPE.

Issue (b)(ii): The Parents have not shown that the May 21, 2021 IEP does not include all of the specially designed instruction that the Student needs or that such instruction is not provided by qualified District staff.

30. School district personnel who provide special education services or related services must have "substantial professional training". WAC 392-172A-02090. A teacher with a pre-endorsement waiver from Washington's special education office is considered to have met the requirements for "substantial professional training" for the appropriate endorsement to teach special education under WAC 392-172A-02090." WAC 181-82-110(2)(a). In addition, paraeducators may help to provide special education services "provided that the instruction is designed and supervised by special education certificated staff." WAC 392-172A-0290(1)(i).

31. The May 2021 IEP provides for specially designed instruction in the areas of adaptive, math, speech and language, behavior, social-emotional, and reading. (D-28, p. 41). It also provides for related services in the areas of gross motor and fine motor. (*Id.*) The Parents did not present any evidence to establish that the Student needs specially designed instruction beyond these areas.

32. The IEP also provides that a special education teacher or paraeducator will provide most of the Student's specially designed instruction. (D-28, pp 41-42). The special education teacher would supervise that instruction. (Test. of Brown, Tr.at 601:5-21.) The District's special education teacher, Heidi Brown, is a certificated teacher and has received a special education pre-endorsement waiver from OSPI, which allows her to teach special education classes under the applicable laws. The Parents have failed to show by a preponderance of the evidence that the May 2021 IEP failed to include all necessary SDI or that the staff providing the SDI lacked proper qualifications.

Issue (b)(iii): The Parents have not shown that the May 21, 2021 IEP does not include all of the related services that the Student needs.

33. The May 2021 IEP provided for the Student to receive related services in the areas of gross motor (physical therapy), fine motor (occupational therapy), and speech and language services. It also provided for AAC training as a support for staff. The preponderance of evidence fails to show any other related services that the IEP needed to include.

Issue (b)(iv): The Parents have not shown that the IEP must include services from behavior technicians throughout the school day to provide the supplementary aids and services that the Student needs.

34. Supplementary aids and services are “aids, services, and other supports that are provided in education-related settings to enable students eligible for special education services to be educated with nondisabled students to the maximum extent appropriate in accordance with the least restrictive environment requirements in WAC 392-172A-02050 through 392-172A-02065.” WAC 392-172A-01185.

35. The evidence fails to show that the Student required behavior technicians to be present throughout the school day. Rather, the evidence established that paraeducators are trained in both how to deliver academic instruction and how to promote appropriate social interactions between children. Moreover, evidence showed that the Student was at times more relaxed around peers, and less dependent on prompts from adults, when behavior technicians were not present. Ms. Talley, in particular, persuasively testified that a District paraeducator supported by a BCBA could appropriately support the Student. Whether or not behavior technicians can provide useful services to the Student, the evidence fails to show that the IEP denied the Student FAPE because it did not include the services of behavior technicians throughout the school day. The Parents have failed to prove by a preponderance of the evidence that provision of supplementary aids and services from a paraeducator rather than a behavior technician denied the Student FAPE.

Issue (b)(v): The Parents have not shown that the May 21, 2021 IEP does not include appropriate provisional development and training.

36. The May 2021 IEP includes AAC consultation for staff of 60 minutes per month and behavior consultation from a BCBA of two and one-half hours per week. The evidence fails to show that these amounts are inappropriate for the Student’s needs. Marilea Brock and Jo Ristow recommended AAC training. Dr. Araujo, Robin Talley, and Melissa Trammell recommended the behavior consultation. While the words used in the IEP for these items vary between “consultation”, “training”, and “supervision”, the evidence fails to show a substantial distinction between these terms. Further, the evidence does not support a finding that the amount of provisional development and training in the IEP was inappropriate. The Parents have not proven by a preponderance of the evidence that the professional development and training provided for in the IEP denied the Student FAPE.

Issue (b)(vi): The Parents have not shown that the May 21, 2021 IEP lacks appropriate measurable goals.

37. The May 2021 IEP included at least 22 annual goals for the Student. (D-28, pp. 14-37.) Some of the goals were updated to address the Student’s present levels of performance, including in the areas of communication, occupational therapy, and behavior. The evidence fails to show that any of these goals were not measurable or appropriate. The Parents argue that some of the goals were recycled from past IEPs, but the evidence fails to show which goals the Parents refer to, or why continuing with certain goals was inappropriate for the Student. The preponderance of the evidence thus fails to show a denial of FAPE on this ground.

Issue (b)(vii): The Parents have not shown that the May 21, 2021 IEP lacks appropriate opportunities for the Student to participate in non-academic activities and events.

38. The preponderance of the evidence establishes that the placement in the IEP offered the Student opportunities to participate in a variety of nonacademic events. These included such things as school assemblies, fun runs, lunch, P.E. and music classes, and opportunities to interact with peers outside of the classroom. The preponderance of the evidence fails to show why the opportunities offered by the IEP are inappropriate, and thus fails to show a denial of FAPE on this ground.

3. The Parents have not shown that the District's procedural violations of the IEP denied the Student FAPE.

39. The IDEA requires that parents have the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." WAC 392-172A-03100. To comply with this requirement, parents must be invited to IEP meetings and have the opportunity to meaningfully participate in the formulation of the IEP. *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed. Appx. 342 (9th Cir. 2007). However, although "[p]arents have the right to meaningful participation, ... they do not have veto power over individual provisions or the right to dictate any particular educational program." *Mercer Island Sch. Dist.*, 121 LRP 1640 (SEA Wash. 2020) (citing *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003)).

40. Neither the IDEA nor Washington special education law specifically define "meaningful participation". Determining what is "meaningful" requires balancing of the totality of the circumstances specific to an IEP meeting. *Mercer Island Sch. Dist.*, 121 LRP 1640 (SEA Wash. 2020). In reviewing and balancing the totality of the circumstance, a tribunal may consider items including whether the parents received notice of the meeting, received draft documents before the meeting, were represented by an attorney, engaged in discussion, posed questions, and had opportunities to comment. *Id.*

41. In this case, the Parents had ample opportunities to meaningfully participate in the development of the May 2021 IEP. Four IEP meetings were held over a total of approximately eight hours. The Parents and their counsel were invited to, and attended, all of them. The Parents were provided draft documents before each meeting and were invited to provide input both before and at the meetings. The Parents were represented by counsel throughout the IEP meetings, and both Parents and their counsel provided input at the meetings. The Parents, at times, were provided the opportunity to speak uninterrupted. In addition, Parents' counsel spoke a great deal at each meeting, to the point that some participants found that Parents' counsel disrupted the meetings, limited the input that participants could give, and overall hindered the development of the IEP. Even so, the Parents have alleged a number of procedural violations that they argue has resulted in a denial of FAPE to the Student. Each of the issues that the Parents allege is specifically addressed below.

Issue (c)(i): The Parents have not shown that the District denied the Student FAPE by determining what the Student's special education eligibility category would be without meaningful input from the Parents and members of the IEP team.

42. The evidence fails to show that IEP team members lacked meaningful opportunities to discuss the Student's special education eligibility category. The draft evaluation report provided before the January 28 meeting identified the Student's eligibility category as Autism. The team discussed the Student's autism diagnosis and its impact on the Student's education. No member

of the team raised concerns about the Student's eligibility category. Moreover, there was never any dispute that the Student qualified for special education. No evidence shows that the Student qualified for special education in any category other than autism. Finally, as long as the IEP included necessary services, which it did, any error in determining the Student's eligibility category did not result in a denial of FAPE. Through four meetings with ample input by the Parents, District staff, and other service providers, the preponderance of the evidence fails to show any procedural violation of the IDEA that denied the Student FAPE on this ground.

Issue (c)(ii): The Parents have not shown that the District denied the Student FAPE by determining how the Student's disabilities would be documented in the District's special education eligibility reevaluation without meaningful input from the Parents and members of the IEP team.

43. The evidence fails to show that the District determined the impact of the Student's disabilities on his access to education without meaningful input from the IEP team. At the January 28 meeting, the IEP team discussed how the Student's disability affected his access to education, including the impact that it had on his communication, behavior, and daily routines. The team also discussed the Student's need for assistive technology, structure, and opportunities to interact with peers. The preponderance of the evidence fails to show that the District denied meaningful input, and thus denied the Student FAPE, on this issue.

Issue (c)(iii): The Parents have not shown that the District included inaccurate and misleading information in its most recent special education eligibility reevaluation.

44. The preponderance of the evidence fails to establish that the District included inaccurate or misleading information in its evaluation report. The Parents have not met their burden in regard to this issue.

Issue (c)(iv): The Parents have not shown that the District denied the Student FAPE by determining what specially designed instruction, related services, supplementary aids and services, and supports to staff would be recommended to the IEP team in the District's special education eligibility reevaluation without meaningful input from the Parents and members of the IEP team.

45. The District's draft evaluation report was provided to IEP team members before the November 12 and January 28 meetings. (D-7.) It identified the specially designed instruction, related services, supplementary aids and services, and staff supports that would be recommended, and the Parents were invited to provide any feedback before or during the IEP meetings. Team members discussed specially designed instruction, and team members did not raise concerns about them, the related services, or the supplementary aids that the report recommended. Team members thus had the opportunity to discuss or object to the recommendations on multiple occasions for months before the IEP was finalized. The preponderance of the evidence fails to show that the District denied the Student FAPE by making these recommendations without meaningful input from the team.

Issue (c)(v): The Parents have not shown that the District denied the Student FAPE by failing to consider new goals and reusing old ones.

46. The evidence does not show which, if any, goals the District included in the May 2021 IEP that were in previous IEPs. In addition, the evidence shows that the team discussed updating the Student's annual goals in the areas of academic, social-emotional, and behavior at the March 11 meeting. The team also made changes to the goals in the area of communication based on Marilea Brock's and Jo Ristow's recommendations. The preponderance of the evidence fails to show that the District denied the Student FAPE with respect to its consideration of the IEP goals.

Issues (c)(vi) and (c)(vii): The Parents have not shown that the District denied the Student FAPE by declining to consider any educational placement for the Student outside of the District or by declining to consider DBS as the Student's new educational placement.

47. The evidence shows that the IEP team discussed the Student's placement at some length at the May 18 meeting. The team discussed placement other than at Cashmere Middle School, and a number of team members expressed the opinion that the Student should stay at DBS. Despite the fact that the IEP did not propose placement at DBS, the preponderance of the evidence shows that placement at DBS was discussed before the IEP was finalized. The evidence thus does not show that the District denied the Student FAPE on this ground.

Issue (c)(viii): The Parents have not shown that the District denied the Student FAPE by determining that one Educational Service District BCBA has sufficient availability and skill to support the Student in a District building in the same manner that the Student was supported by multiple BCBAs at DBS.

48. The record does not show that the District determined that Ms. Trammell could support the Student in the District just as the Student was supported by multiple BCBAs at DBS. The District simply decided, based on recommendations, that the District would provide BCBA support to staff members, to include two-and-a-half hours of weekly supervision or consultation with a BCBA. The Parents have not shown that Ms. Trammell was unavailable or unqualified to provide this support to the Student. This evidence fails to establish a denial of FAPE.

Issue (c)(ix): The Parents have not shown that the District denied the Student FAPE by determining that District paraeducators have the same level of skill and expertise to support the Student in the same manner that he has been supported by RBTs and/or CBTs at DBS.

49. The record shows a substantial discussion of this topic at the May 18 meeting. The team discussed supplementary aids, particularly whether a paraeducator or a behavior technician should provide the Student with one-to-one services, and the team ultimately determined that paraeducator support would be appropriate for the Student. Opinions differed, but team members had the opportunity to provide substantial input. The preponderance of the evidence fails to show a denial of FAPE on this ground.

Issue (c)(x): The Parents have not shown that the District denied the Student FAPE by determining that the District's special education teacher and paraeducators can support the Student as the Student was supported by BCBAs and behavior technicians.

50. There is no evidence that the District made this determination, nor any legal reason why any such determination would be required to provide FAPE. The Parents have shown no denial of FAPE on this ground.

Issue (c)(xi): The Parents have not shown that the District denied the Student FAPE by declining to consider the recommendations of any of the BCBA's at the meeting regarding the amount of services from a BCBA that the Student needed.

51. The evidence shows that the District did consider recommendations from BCBA's, including Robin Talley and Melissa Trammell. Conversely, no evidence shows that the District refused to consider recommendations from BCBA's about the amount of services the Student needed from BCBA's. The preponderance of the evidence fails to show a denial of FAPE on this ground.

Issue (c)(xii): The Parents have not shown that the District denied the Student FAPE by determining that it would not allow the Student's current BCBA's to speak about the amount of services that they provided to the Student.

52. IEP meetings cannot be expected to continue indefinitely. *Clover Park Sch. Dist.*, 118 LRP 38059 (SEA Wash. 2018) ("At some point, a rule or reason must come into play. It cannot be expected that one IEP meeting can go on indefinitely."); *Seattle Sch. Dist.*, 114 LRP 32867 (SEA Wash. 2014) ("There is no legal requirement that a reevaluation meeting continue indefinitely until the last team member believes every last iota of information is considered to that member's satisfaction. This would result in an unworkable and impracticable model for any meeting.").

53. As noted previously, the District held four IEP meetings totaling approximately eight hours' time. During that time, team members discussed a number of topics, including whether paraeducators or behavior technicians could best serve the Student. The District heard input from numerous team members on these topics. The Parents declined to attend meetings without their counsel. Parents' counsel's interruptions throughout the meetings at times interfered with the time available for the team to hear from all members. Despite all of these factors, the District produced an IEP that, as determined above, was amply discussed and whose provisions were based on the recommendations of team members. The fact that several team members may not have contributed to discussion of particular issues did not result in a denial of FAPE, and the preponderance of the evidence fails to show as much.

Issue (c)(xiii): The Parents have not shown that the District denied the Student FAPE by declining to consider the recommendations of the SLP who conducted the IEE and the SLP who was serving the Student about the amount of direct and indirect services the Student needs from an SLP.

54. The District adopted the amount of direct SLP services that Ms. Brock and Ms. Ristow requested. It also adopted their recommendation to increase the staff support regarding the Student's use of his AAC. The preponderance of the evidence fails to show any denial of FAPE on this ground.

Issue (c)(xiv): The Parents have not shown that the District denied the Student FAPE by declining to consider having the Student served by behavior technicians instead of paraeducators.

55. The evidence shows substantial discussion during the May 18 IEP meeting about whether paraeducators or behavior technicians would serve the Student, and about behavior technicians and BCBA's from DBS working with the Student at Cashmere Middle School. The District ultimately believed that it would be difficult to take staff from the clinical setting and have them

work in a public-school setting. The preponderance of the evidence fails to show that the District declined to consider the services of behavior technicians. The Parents have not shown denial of FAPE on this ground.

Issue (c)(xv): The Parents have not shown that the District denied the Student FAPE by declining to consider having the Student’s interim placement providers continue to serve the Student in the District’s proposed educational placement.

56. The District has sole discretion to assign staff to serve the Student, and it is not obligated to assign the Parents’ preferred providers to serve the Student. *Morton Sch. Dist.*, 106 LRP 18808 (SEA Wash. 2006). The evidence shows that the District considered different placements for the Student and heard substantial input from team members before it finalized the May 2021 IEP. The evidence also shows that the staff who would serve the Student under the May 2021 IEP have the requisite training and qualifications to serve the Student. Moreover, the evidence shows that the IEP team considered having the Student continue to be served by his interim placement providers, and that this option was discussed during all four IEP meetings. The preponderance of the evidence fails to show a denial of FAPE on this ground.

Issue (c)(xvi): The Parents have not shown that the District denied the Student FAPE by determining that the Student does not need a year-round educational program without meaningful input from the Parents, members of the IEP team, and the Student’s service providers at the time.

57. As explained above, team members had ample opportunity over the course of four meetings to provide input about the Student’s placement. The preponderance of the evidence shows that the District discussed and considered the year-round program that the Parents sought. Thus, the Parents have failed to show a denial of FAPE on that ground.

Issue (d): The Parents have not shown that the District denied the Student FAPE since March 1, 2020, by denying the Parents and all relevant members of the Student’s IEP team the opportunity to have access to all of the drafts of the District’s March 3, 2021 reevaluation and all of the drafts of the May 25, 2021 IEP.

58. A school district must permit parents of students eligible for special education to review education records relating to their students when the parents request to do so. WAC 392-172A-05190. This does not establish a right to have access to all drafts of final IEPs and evaluation reports. The IDEA also provides no requirement that all relevant members of the IEP team have access to every draft of a final evaluation report or every draft of a final IEP.

59. In this case, there is no evidence that the Parents requested all drafts of the March 2021 evaluation report and the May 2021 IEP. The Parents requested that the District provide them with any version of the March 2021 evaluation report that had not been shared with them, and the District provided documents responsive to the Parents’ request. (D-39, p. 1; Test. of Avila, Tr. at 2723:19–2723:5.) In addition, the District provided the Parents with the Student’s education records that were responsive to their requests.

60. The evidence fails to show that the Parents did not receive all drafts of the March 2021 evaluation report or the May 2021 IEP before they filed their due process request. Moreover,

even if the District had failed to provide these items, the Parents have presented no evidence that any such failure denied the Student FAPE.

Issue (e)(i): The Parents have not shown that the District denied the Student FAPE by muting the Parents and their counsel.

61. The mute feature was used only at the first IEP meeting on November 12, 2020. The Parents were unmuted at their request. The mute feature was not used at any of the three subsequent IEP meetings. The Parents were allowed to contribute, uninterrupted, at the beginning of one meeting, and their counsel spoke a great deal at all four meetings. Use of the mute feature was limited to a portion of one of the four meetings, and it did deny the Parents the opportunity to provide meaningful input during the IEP process. No denial of FAPE occurred on this ground.

Issue (e)(ii): The Parents have not shown that the District denied the Student FAPE by failing to allow the Parents to speak at IEP team meetings.

62. The evidence fails to establish that the Parents were not recognized or given opportunities to speak at IEP meetings. Even if instances occurred where the Parents raised their hands and were not recognized, for the majority of IEP meeting time, the Parents were not muted, were allowed to contribute freely, and were able to give substantial input during the meetings. In addition, Parents' counsel provided ample input on the Parents' behalf during the IEP meetings. The preponderance of the evidence fails to establish a denial of FAPE.

Issue (e)(iii): The Parents have not shown that the District denied the Student FAPE by failing to allow the non-District members of the IEP team to speak by not recognizing them when they requested to speak.

63. Other than the Parents, the IDEA establishes no legal right of all team members to meaningfully participate in the IEP process. Even so, the evidence establishes that non-District members of the IEP team, including DBS staff, provided input throughout the IEP meetings. Even if they had not, the evidence fails to show that any such deficiency deprived the Student of educational benefits. The preponderance of the evidence fails to show a denial of FAPE on this ground.

Issue (e)(iv): The Parents have not shown that the District denied the Student FAPE by declining to allow the non-District members of the IEP team to speak more than once on a topic or to answer the Parents' questions at meetings.

64. The IDEA does not guarantee any IEP team members besides parents the right to provide input at IEP meetings, let alone to speak more than once. Even so, the evidence shows that non-District team members were able to speak more than once, and that they provided input throughout the series of IEP meetings. (Test. of Moholy, Tr. at 1443:10–13; Test. of Todd, Tr. at 1587:13–17; Test. of Brown, Tr. at 1826:23–1827:1, 1841:18–21; Test. of Bushouse, Tr. at 2255:7–12, 2267:5–9; Test. of Trammell, Tr. at 2518:6–9, 2532:20–23; Test. of Avila, Tr. at 2638:16–18, 2662:5–8.) The evidence fails to show a denial of FAPE on this ground.

Issue (f): The Parents have not shown that the District violated the IDEA and WAC 392-172A-05090 by failing to convene a meeting as required.

65. Under WAC 392-172A-05090, a school district must convene a resolution meeting within 15 days of receiving notice that a parent has served the district with a due process hearing request. The regulation sets out specific requirements for doing so. If a school district fails to hold a resolution meeting as specified in the regulation, or fails to participate in it, the parents may seek intervention from the tribunal to begin the due process hearing timeline right away rather than waiting for the 30-day resolution period to end. WAC 392-172A-05090(2)(e).

66. The only evidence of a resolution session is an email and brief testimony that the parties scheduled a meeting and determined who would be invited. (D-30, Test. of Avila, Tr. at 2724:13-2726:11). The record lacks evidence that the resolution meeting was held or, if so, how the District failed to comply with WAC 392-172A-05090 in convening it. In addition, the remedy for such a failure is to accelerate the due process hearing timeline. The due process hearing has already occurred, and the Parents did not make that request, so the issue is moot.

Issue (g): The Parents have not shown that the District denied the Student FAPE by failing to provide the Parents with educational records promptly and before any meeting on an IEP or resolution session.

67. Under WAC 392-172A-05190, a school district must provide parents with educational records promptly and before any IEP meeting or resolution session. As in issue (f) above, the Parents specifically allege that the District failed to provide records before a scheduled resolution session on June 3, 2021. The preponderance of the evidence fails to show any denial of FAPE on this ground. First, the record lacks evidence that the meeting occurred—only that it was scheduled. Second, the Parents have not produced evidence that shows how any such procedural violation denied the Student FAPE.

Issues (h) and (i): The Parents have not shown that the District denied the Student FAPE by disenrolling the Student from the District after the 2020-2021 school year ended.

68. The “stay put” provision of the IDEA generally provides that “during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public-school program until all such proceedings have been completed.” 20 U.S.C. 1415(j); 34 CFR § 300.518(a). Washington has its own comparable stay put regulation. WAC 392-172A-05125.

69. For purposes of the stay put provision, the current educational placement is typically the placement described in the child’s most recently implemented IEP. *Johnson ex rel. Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002). When a student’s most recently implemented IEP includes multiple stages, the IEP as a whole—including the unimplemented stages—is the current educational placement. *N.E. v. Seattle Sch. Dist.*, 842 F.3d 1093, 1097 (9th Cir. 2016) (“[A] partially implemented, multi-stage IEP, as whole is a student’s then-current educational placement.”).

70. A school district is not obligated to serve a student when parents make clear that they have enrolled the student elsewhere. See WAC 392-172A-03105(1) (“At the beginning of each school year, each school district must have an IEP in effect for each student eligible for special education services that it is serving through *enrollment* in the district.”) (emphasis added); *L.B. v. Kyrene Elementary District No. 28*, 2019 WL 4187515, *6 (D. Ariz. Sept. 4, 2019) (a school district is “required to provide FAPE to students that reside in its district, but it is not required to provide FAPE ‘if the parent makes clear his or her intention to keep the child enrolled’ in an out-of-district private school”).

71. In this case, the preponderance of the evidence fails to show that the District denied the Student FAPE by disenrolling him on June 11, 2021. The May 2021 IEP became the Student’s current educational placement beginning May 25, 2021. The IEP provided for the Student to attend Cashmere Middle School for a portion of his school day, and to spend the rest of his day at DBS through the end of the 2020-2021 school year. The IEP then provided for a transition plan for the Student to attend school in the District full-time beginning in the 2021-2022 school year. However, after May 25, 2021, the Parents declined to have the Student attend school at the District and informed the District that they had enrolled the Student full-time elsewhere. (Test. of Avila, Tr. at 1121:1–3.) The District did not unilaterally disenroll the Student; indeed, it did not do so until after learning that the Parents had enrolled the Student elsewhere. Moreover, the District waited until after the school year ended, at which point the Student would have transitioned to full-time schooling in the District. Finally, the District made clear that it was ready to serve the Student if the Parents returned the Student to the District. The preponderance of the evidence shows that the Parents prevented the District from serving the Student according to the IEP, and that the District was always prepared to serve the Student if the Parents returned the Student to the District. Given these facts, the evidence fails to show that the District denied the Student FAPE on this ground.

ORDER

The Parents have not established that the District violated the IDEA. The Parents are therefore not entitled to any of their requested remedies.

Signed on December 29, 2021.



ERIC J. ROTH
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.

Parents

[REDACTED]
[REDACTED]

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Dated December 29, 2021 at Seattle, Washington.

Jazmyn Johnson

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