

WASHINGTON STATE  
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of:

Battle Ground School District

Docket No. 08-2022-OSPI-01663

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

Agency: Office of Superintendent of  
Public Instruction

Program: Special Education

Cause No. 2022-SE-0097

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**English**

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A due process hearing was held before Administrative Law Judge (ALJ) Jacqueline Becker on April 25, 26, 27 and 28, and May 8, 2023, via zoom videoconference. The Parents of the Student whose education is at issue<sup>1</sup> (Parents) represented themselves. The Battle Ground School District (District) was represented by Erin Sullivan-Byorick and Nathan Schmutz, attorneys at law. Also present for the District was Ellen Wiessner, District Executive Director of Special Services.

**PROCEDURAL HISTORY OF THE CASE**

The Due Process Hearing Request (Complaint) in this matter was filed by the Parents with the Office of Administrative Hearings (OAH) on August 5, 2022. The Complaint was given Cause No. 2022-SE-0097 and assigned to ALJ Becker.

<sup>1</sup> To ensure confidentiality, names of parents and students are not used.

A related case with identical parties was previously filed by the District on May 25, 2022, and was given cause number 2022-SE-0071. The District's case sought to establish the appropriateness of the reevaluation of the Student dated May 11, 2022. A due process hearing in that matter was held before ALJ Becker in September 2022. A final order was issued on December 1, 2022, which determined that the Student's reevaluation was appropriate and the Parents were not entitled to an independent educational evaluation (IEE) of the Student at public expense.

A motion for summary judgment was filed in this matter by the District in December 2022, seeking summary judgment as to all issues raised in the Complaint. An order granting in part and denying in part the District's motion for summary judgment was issued on February 17, 2023. The Parents filed a proposed amended complaint on December 20, 2022. The Parents were granted leave to amend the Complaint on March 15, 2023, and the due process hearing was set for April 25 through 28, 2023.

Multiple prehearing conference were held to address various issues. A [REDACTED] interpreter was provided for the Mother at all prehearing conferences and at the due process hearing.

#### **EVIDENCE RELIED UPON**

##### Exhibits Admitted

Parents' Exhibits: P1, P2, P4, P5, P7, P9, P10, P15, P16, P22, P27, P28, P32, P35-38, P40, P42, P44, P48.

District's Exhibits: D1-3, D5-10, D12-15, D17-19, D21-32, D34-36, D38-40, D42-44, D46-50, D53, D54, D56-58, D61-82.

##### Witnesses Heard

Margo Faron, District Occupational Therapist  
Alex Bennet, Assistant Principal at Daybreak Middle School  
Justin Pierce, Principal at Daybreak Middle School  
Jaynie Mintz, District general education teacher  
Teresa Edmiston, District general education teacher  
Kim Hamilton, District school psychologist  
Jordan Osborne, District general education teacher  
Lesli Collum, Assistant Principal at Daybreak Middle School  
Ellen Wiessner, District Executive Director of Special Services  
Sarah Pitoyo, District speech-language pathologist  
The Student's Mother  
The Student's Father

## Post-Hearing Briefs

The due date for post-hearing briefs was July 6, 2023. The parties' post-hearing briefs were timely filed.

### **DUE DATE FOR WRITTEN DECISION**

The due date for a written decision in this case was continued to thirty (30) calendar days after the close of the record by order dated September 12, 2022. The record closed with the receipt of the post-hearing briefs on July 6, 2023, and the due date for the written decision is August 5, 2023.

### **ISSUES**

The issues heard at 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) by:
  - i. Failing to adequately protect the Student from harassment, intimidation, and bullying (HIB) and failing to add goals to the Student's Individualized Education Program (IEP) pertaining to HIB;
  - ii. Denying the Parents meaningful participation in the IEP process by inappropriately cutting short the IEP meetings held on February 16 and May 11, 2022;
  - iii. Denying the Parents meaningful participation in the resolution process by refusing to allow the Parents to record the resolution meeting held on August 29, 2022;
  - iv. Denying the Parents meaningful participation in the IEP process by providing the Parents with an inaccurate [REDACTED] translation of the Student's discipline reports which list the wrong referrer;
  - v. Denying the Parents meaningful participation in the IEP process by treating the Student's mother with bias, including unfair treatment, providing erroneous translations, sending incomplete records, and providing unreasonable explanations pertaining to the resolution meeting;

- vi. Withholding speech services for the Student on several occasions in April 2022 without informing the Parents or Student, and failing to provide make up sessions for the missed services;
  - vii. Failing to address the Student's expressive language and self-advocacy difficulties, as well as his health issues, since March 2021;
  - viii. Failing to implement the Student's IEP when he transferred to the District in February 2021; and
  - ix. Providing an inappropriate IEP in March 2021 that failed to include adequate minutes of specially designed instruction (SDI) and failed to include necessary accommodations and modifications pertaining to communication, expressive language, and self-advocacy.
- b. And, whether the Parents are entitled to their requested remedies:
- i. Continued monitoring of the Student's health and safety during school hours, especially at recess;
  - ii. Make up sessions for the speech services missed in April 2022;
  - iii. Special education programming with accommodations and modifications to address the Student's current needs;
  - iv. Continuation of a program to help improve the Student's self-advocacy skills, and a 504 plan;<sup>2</sup> and
  - v. Such other equitable remedies as are shown to be appropriate.

## FINDINGS OF FACT

In making these findings of fact, the logical consistency, persuasiveness, and plausibility of the evidence has been considered and weighed. To the extent a finding of fact adopts one version of a matter on which the evidence conflicts, the evidence adopted has been determined to be more credible than the conflicting evidence. A

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<sup>2</sup> A "504 plan" refers to section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq., a federal statute that protects qualified individuals who have disabilities from discrimination based on their disabilities.

more detailed analysis of credibility and weight of the evidence is set forth below as necessary.

### Background

1. The Student is currently [REDACTED] years old and recently completed seventh grade in the District. P16.<sup>3</sup> His primary language is English. P38 p.6.

2. The Student's Mother (Mother) is [REDACTED] P38 p.6. She has an Associate in Arts degree in early childhood studies which she obtained in 1999. P48. She also has an Associate in Arts degree in consumer and family sciences with an emphasis on nutrition, which she obtained in 2000. *Id.* The Mother earned these degrees in California in programs conducted in English, without use of an interpreter. Tr. 531.

3. The Student's Father (Father) has a Bachelor of Science degree in engineering and a PhD in biophysics. Tr. 550. His native language is English and he describes his ability to speak [REDACTED] as "poor." He and the Mother communicate with each other in English. *Id.*

4. Prior to moving to the District, the family lived in California where the Student was initially determined to be eligible for special education services under the disability category of autism. P38 p.6.

5. The Student was determined to be ineligible for continued special education services in California pursuant to an evaluation conducted in May 2019. P27. However, the Parents disagreed with that decision and believed the Student continued to need support in social communication, so the California IEP team continued his eligibility. P16 p.3. The Student's IEP dated May 22, 2020, from the Moreland School District was in effect at the time the Student moved to the District. P28. It provided for 60 minutes of speech and language services per month. *Id.* at 10. The IEP contained one goal which pertained to "respectful communication skills," specifically friendly tone of voice, positive comments to others, and allowing others equal time to talk. *Id.* at 6.

6. The Student's California IEP also set forth numerous accommodations, including warnings before transitions, seating near the teacher, provision of directions in a variety of ways, visual cues, use of a graphic organizer, reminders

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<sup>3</sup> Exhibits are cited by party ("P" for Parent, "D" for District), exhibit number, and page number. For example, a citation to "P1 p.5" is to the Parent's Exhibit 1 at page 5. The hearing transcript is cited as "Tr." with references to the page of the cited testimony. For example, a citation to "Tr. 80" is to the testimony at page 80 of the transcript.

during breaks/lunch to eat and drink water, and encouragement of self-advocacy skills. P28 p.9.

#### The 2020-21 School Year – Fifth Grade

7. The Student and his Parents moved from California to the District in February 2021. P16. The Student was in fifth grade and attended Daybreak Middle School (Daybreak) during the 2020-21 school year. *Id.* A “transfer review” was conducted when the Student moved to the District, and it was determined that his special education eligibility under the category of autism would be accepted by the District. The transfer review determined that the Student would receive services comparable to those set forth in the California IEP in the area of communication until a new IEP could be developed by the District. *Id.* at 3. The comparable services consisted of 60 minutes per month of speech-language SDI, effective as of February 25, 2021. *Id.* at 7; P28 p.10.

8. Teresa Edmiston<sup>4</sup> was the Student’s history and language arts teacher when he transferred to the District. Tr. 323, 339. At the time, COVID precautions were still being observed. The Student attended school in person on Thursdays and Fridays and attended remotely on the other days. *Id.* at 324. The Student was seated close to the teachers in his classrooms on days when school was in person. D12 p.1; Tr. 331. Ms. Edmiston always provided notice about upcoming transitions to a new activity to her students approximately five minutes before the transition. Tr. 341. She also provided instruction to her class in a variety of ways, including verbal directions, written instructions, and bullet points on the white board. She sometimes asked students to repeat the directions back. She modeled skills she was teaching. *Id.* Ms. Edmiston also provided written graphic organizers or instructed the student how to make their own, depending on the assignment. Moreover, she added additional supports for her students during COVID due to the remote learning setting, in order to be sure instructions were clear. *Id.* at 342.

9. Aside from having trouble focusing on his work on one day, Ms. Edmiston does not recall the Student having any difficulties in her class. Tr. 329.

10. A new IEP was written for the Student on March 1, 2021 (March 2021 IEP). D13. Sarah Pitoyo, District speech-language pathologist (SLP), was the Student’s IEP case manager. *Id.* at 1. Ms. Pitoyo has been employed as an SLP in the District for five years. Tr. 147. She has Bachelor and Master of Science degrees in communications sciences and disorders. D80.

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<sup>4</sup> Ms. Edmiston has been a teacher for 15 years, primarily at the fifth-grade level. Tr. 323.

11. Ms. Pitoyo recommended increasing the communication SDI from the amount that had previously been provided to the Student in California because she did not know him and the District was just coming out of COVID lockdowns. She wanted to learn more about the Student and be sure she could adequately address his goals given that he was at a new school in a new state. Tr. 184.

12. The District offered the Mother a [REDACTED] interpreter for the March 1, 2021 IEP meeting, but she declined. She stated, "I think I will be able to do today, besides my husband will be with me as well." D15 p.1.

13. Team considerations noted in the March 2021 IEP included the Parents' concerns that the Student has difficulty with change and was having trouble making friends in the District. D13 p.8. The March 2021 IEP noted that the Student was not observed by District staff to have any behaviors that impeded his learning. *Id.*

14. The March 2021 IEP contained three goals, all of which pertained to communication. D13 pp. 9-10. One of the goals was, "By 02/28/2022, when given real life situations [Student] will self identify [sic] that he needs assistance and know who is appropriate to ask for help improving social language from 0 in 5 opportunities to 3 in 5 opportunities as measured by SLP data." *Id.* at 10.

15. The other two IEP goals pertained to social language, which was identified as an area of need for the Student. The goals focused on holding a conversation and interpreting nonverbal communication. D13 pp. 9-10.

16. The March 2021 IEP noted that the Student's receptive and expressive language skills are within the average range for his age. D13 p.9.

17. The March 2021 IEP provided for three accommodations, including preferential seating and "repeat/model directions." D13 p.11. It also provided for 120 minutes per month (i.e., 30 minutes per week) of SDI in communication, provided by an SLP in a special education setting. *Id.* at 13. This represented an increase in SDI minutes compared to the California IEP which had provided 60 minutes per month of communication SDI.

18. A [REDACTED] translation of this IEP was provided to the Mother. Tr. 104.

19. On March 10, 2021, in response to the Mother's inquiry, Ms. Edmiston reported to the Parents that the Student was "doing great." He had "A" grades in every core subject and was participating and asking/answering questions in class. D21 p.1. The Student's math and science teacher, Ms. Fry, reported that she had no concerns about the Student. She stated, "I have no concerns regarding [Student's]

progression in my classroom. What I see is active participation, regular focus and at grade level communication. Actually, he is rather advanced in his communication skills compared to peers in his class. He has a healthy level of self confidence and ability to interact with others.” *Id.*; Tr. 339.

20. Ms. Fry and Ms. Edmiston rewarded students when they performed well, including sending them postcards. The teachers also created a “student of the month” award to provide extra support and praise to students who needed it. The Student was a recipient of that award. Tr. 343.

21. The Mother continued to make very frequent inquiries about how the Student was doing that spring. Tr. 338-40. Ms. Edmiston always observed him to be “functioning well.” *Id.* at 346.

22. On April 15, 2021, the Mother asked the District to conduct an occupational therapy (OT) evaluation of the Student because she felt he was experiencing stress and she had observed him chewing on his shirt. D23 p.1. In response to the Parents’ concerns, the District conducted an “assessment revision” which included assessing the areas of existing data, adaptive, and sensory. D28 p.3. When consenting for the assessment revision, the Mother noted that the Student does not wash his hands and needs to be reminded about eating and drinking because he forgets to eat at school when talking to classmates. *Id.* at 5. The Mother also noted that the Student does not tell anyone when he is injured or in pain. *Id.* at 6.

23. The assessment revision was conducted by District school psychologist Kim Hamilton. D28. Ms. Hamilton has a Bachelor of Arts degree in psychology, and a Master of Science degree in school psychology. D74. She has worked as a school psychologist for over 40 years. Tr. 66.

24. On June 4, 2021, a meeting was held to review the assessment revision. D28 p. 6. The Parents participated in the meeting via Zoom videoconference. *Id.* at 11. The assessment revision determined that the Student was in the below average range in general adaptive skills both at home and at school. *Id.* The assessment revision noted that the Student continued to meet special education eligibility criteria due to autism, and that he had difficulties in communication that adversely affected his educational performance. *Id.* at 9.

25. The assessment revision included an OT evaluation by Margo Faron, District occupational therapist. On the sensory processing scale, the Student scored in the “typical” range at school and the “definite dysfunction” range at home. D28 p.9. Observations of the Student at school did not raise any sensory or behavioral concerns. *Id.* No adverse educational impact from the Student’s adaptive or sensory



functioning were noted. *Id.* at 12. Ms. Faron did not observe any shirt-chewing by the Student. Tr. 47. The fact that the Student may have needed to be reminded to eat was not considered abnormal and would not have warranted an assessment if the behavior was not impacting his education. *Id.* at 58.

26. The assessment revision did not establish a need for SDI in any new areas. The Student continued to receive SDI in communication with a focus on pragmatic language, as well as related accommodations. D28 pp.9-10.

27. A [REDACTED] translation of the assessment revision report was provided to the Mother. D28.

28. Progress on the Student's IEP goals was reported on June 14, 2021, and January 19, 2022. By January 19, 2022, the Student was able to identify when he needed assistance and who to ask for help in five out of five opportunities. D14.

#### The 2021-22 School Year – Sixth Grade

29. The Student was in sixth grade and attended Daybreak during the 2021-22 school year. Jaynie Mintz<sup>5</sup> was his sixth-grade homeroom and math teacher. Tr. 287, 294. Ms. Mintz has been a teacher for 11 years and has experience working with students on the autism spectrum. D76; Tr. 287-88, 315. She did not observe the Student to have any difficulties in her class. Tr. 288, 305-09. He interacted well with other students during group work and was able to explain his answers. *Id.* at 296.

30. Jordan Osborne was the Student's history teacher that year, and also had the Student in his leadership class for one semester. Mr. Osborne has been a teacher for eight years and has a bachelor's degree in secondary English education. D77; Tr. 350. Mr. Osborne observed the Student to be kind, friendly, and willing to work with others. Tr. 353. Mr. Osborne noted the Student was "great" in the leadership class in that he interacted well with younger children he worked with at the primary school, had a good sense of humor, and was always willing to lend a hand with activities. *Id.* at 360, 373.

31. On October 1, 2021, the Student was involved in an altercation with another student at recess. P1. According to the District's "Student Discipline Report," the other student attempted to take a drawing away from the Student by wrapping the Student in his arms and kicking him. When he was released, the Student punched

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<sup>5</sup> Ms. Mintz has bachelor's and a master's degrees in education, and a mathematics endorsement. D76.

the other student in the face. The Student received a one-day in-school suspension for this conduct. *Id.*

32. The “referrer” for the playground incident is listed in the discipline report as Alexander Bennett. The “discipline officer” is listed as Justin Pierce. P1. Mr. Pierce is the principal at Daybreak. Mr. Pierce was not at Daybreak on the day of the altercation, and Mr. Bennett, who was an administrative intern at the time, was in charge. Tr. 255. Mr. Bennett entered the playground incident into the District’s Skyward database. *Id.* The other student involved in the altercation was in the same grade as the Student. *Id.* at 456.

33. The Student’s father was notified of the playground incident by Mr. Bennet by telephone at 1:50 p.m. on October 1, 2021. P2; Tr. 457-58. The Father recalls that Mr. Bennet said the other student had “strangled” the Student. *Id.* at 552. Mr. Bennet denies that he used the word “strangled” to describe the actions of the unnamed student toward the Student. *Id.* at 459.

34. A letter was also sent home to the Parents that day with the Student, notifying them of the incident and that the Student received an in-school suspension for 0.6 days of school on October 1, 2021. No referrer is listed in the letter, and the “discipline officer” is listed as Mr. Pierce. The letter contains instructions regarding how to appeal the in-school suspension. P2.

35. An in-school suspension consists of removal of a student from his or her classroom. They spend the day in a cubicle in the office where they are expected to do their schoolwork either on paper or on a Chromebook. Tr. 464.

36. Mr. Bennet did not view the playground incident as particularly concerning. Tr. 461. In his experience, it is very common for middle school students to become frustrated or angry and engage in physical altercations that involve pushing, kicking, and hitting. *Id.* at 461-62. He had no reason to believe the incident between the students was anything more than an isolated squabble. *Id.*

37. The Mother did not request a translation of the letter regarding the playground incident until November 7, 2022, over a year after it was originally sent. Tr. 431, D63 p.2. The [REDACTED] translation of the letter appears to contain an error in that the “discipline officer” seems to be listed as Stephanie Watts, rather than Mr. Pierce. P35 p.1. Ms. Watts is a District employee. There appear to be other discrepancies between the English and [REDACTED] versions of this letter, as well. The translation was performed by Columbia Language Services at the request of the District, but no evidence was presented as to why these translation discrepancies exist. Tr. 388.

38. On October 3, 2021, the Mother emailed Mr. Pierce and Ms. Pitoyo and asked if she could meet with them regarding the in-school suspension and the related letter. Both Mr. Pierce and Ms. Pitoyo responded almost immediately and agreed to meet with the Mother. P4. The Mother met with Mr. Pierce on October 4, 2021. She raised several concerns, and Mr. Pierce believed the Mother understood his position and his responses to her concerns. Mr. Pierce felt the meeting was positive and productive. D34; Tr. 263.

39. The Mother believes the playground altercation had lasting effects on the Student. She noted that he was scared after the incident, and he would cover his ears and say he did not want to talk about it. He would put a blanket over his head and he also had nightmares. Tr. 479-481.

40. On October 17, 2021, the Father took the Student to the emergency department of a local hospital because the Student was complaining of pain and stiffness in his neck and was having trouble moving his neck due to pain and spasms. The previous day, the Student had gone to taekwondo and had played miniature golf. P5. The Student and the Mother had also been in a car accident approximately three weeks earlier. Tr. 496. The hospital treated the Student with an oral muscle relaxant and Tylenol. The Student reported feeling “much improved” after this treatment and was discharged home with a prescription. P5 p.7.

41. The Mother believes this physical problem was related to the playground altercation and the fact that the Student would not sleep and could not relax. Tr. 481

42. The Mother also believes there have been other episodes of physical violence and bullying directed toward the Student. The Student told her that he had been hit, punched, and stabbed with a pencil by the same student with whom he had the recess altercation. Tr. 484- 85. The Mother raised these concerns with the District. She requested extra supervision for the Student at lunch and recess, but the District declined to provide it. *Id.* at 486. There is nothing in the District’s Skyward database system that indicates any staff member heard from the Student that he was stabbed by a pencil, hit, or punched. Such incidents would have been entered in the data base if they had been reported. *Id.* at 243.

43. Mr. Osborne “vaguely recalled” hearing that the Student was being bullied during the 2021-22 school year. He does not recall the details, but he spoke to Ms. Hamilton about it. Tr. 353. He never observed any indication of the Student being bullied. *Id.* at 367.

44. On October 22, 2021, the Student received another discipline write up for “disrespect” during recess. According to the Student Discipline Report, the recess

aide asked students not to stand in front of a particular door, and the Student continued to ask “why” repeatedly. He was told he would get a referral the next time he “talked back.” P1. The referrer for this incident is listed as Stephanie Anderson, and the discipline officer is listed as Mr. Pierce. *Id.* Ms. Anderson is the assistant secretary at Daybreak. She is likely listed as the referrer because she entered the report of the incident into the Skyward database. Tr. 244-45.

45. Ms. Pitoyo opined at the due process hearing that it is not unusual for middle school students to “talk back.” It is a developmental expectation that children this age will “test boundaries” and talking back is one way of doing that. Tr. 179. Talking back can also be a form of self-advocacy. *Id.*

46. A reevaluation of the Student was initiated by Ms. Hamilton in February of 2022 because the Student’s triennial reevaluation was coming due. D53 p.3. Prior to the meeting to discuss the reevaluation, the Mother asked the District for a copy of “the Student’s behavior logs.” D39. The Mother had requested that the District monitor whether the Student was drinking water and washing his hands, and how often he went to the bathroom. Tr. 236, 301. However, middle school teachers do not typically keep behavior logs pertaining to their students and none were kept regarding the Student. According to Ms. Pitoyo, students should be independent at this point and do not have their behavior tracked. *Id.* at 194. This is the only time in her teaching career that Ms. Mintz has ever been asked to keep such data on a middle school student. *Id.* at 302.

47. The reevaluation was completed in February 2022, and a draft report was sent to the Parents on February 14, 2022. D44 pp. 3-4. A meeting was schedule to discuss the reevaluation, and The Mother emailed Ms. Pitoyo with questions about the report prior to the meeting. *Id.* On February 16, 2022, the reevaluation and the Student’s IEP were reviewed at an IEP meeting. The Mother was not provided with a [REDACTED] interpreter. There is no evidence that she requested one or that she had changed her previous position that she did not need an interpreter.

48. The attendees at this meeting were Ms. Hamilton, Mr. Osborne, general education teacher Jaime Jeffries, Ms. Mintz, Ms. Pitoyo, and the Parents. D42 p.1.

49. The “present levels of educational performance” portion of the IEP review noted that the Student’s communication goals had all been met. D42 p.8. The Student’s IEP progress report noted that the Student was able to comment, ask appropriate questions, and respond to questions or comments from a peer with at least 15 conversational turns during lunch and recess. D43.

50. At the IEP meeting, the District recommended that communication SDI be discontinued, and the Student be found no longer eligible for special education services. D53 p.2, 5; Tr. 162. However, the IEP team could not reach a consensus regarding the Student's continued eligibility because the Parents did not agree that services should be discontinued, and they still had concerns about the Student's self-advocacy and problem-solving skills. D42 p.15. Due to input from the Parents, the decision was made not to finalize the reevaluation and to gather more data while continuing to provide services to the Student. *Id.*; Tr. 543-44. The Parents were noted by Ms. Pitoyo to be "happy" with this decision to extend the reevaluation and continue services in the interim. D53 p.2.

51. The February 16, 2022 meeting began at 3:00 p.m. D42 p.4. Ms. Mintz recalls that most of the teachers left before the meeting was concluded due to their contractual hour limitations. Tr. 309-10. Ms. Mintz discussed her observations of the Student before she left the meeting. *Id.* She felt the Parents had "ample time" to talk to the teachers about the Student. *Id.* at 311.

52. The Mother acknowledged at the due process hearing that the District took her input into consideration at this meeting. She was asked, "And they [the District] did take your concerns into consideration and changed how they did things because of what you said, isn't that correct?" The Mother responded "yes" to this question. Tr. 544.

53. A new IEP goal was developed for the Student at the February 16, 2022 meeting. It reads, "When given a shared activity [Student] will comment, ask questions appropriate to the activity, and respond to questions or comments provided by the peer for at least five conversational turns improving social language from 70% success during lunch/recess to 80% success during lunch/recess as measured by SLP data." D42 p.9. The IEP continued to provide the accommodations of extra time for transitions, preferential seating, and repeat/model directions. *Id.* at 10. The IEP provided for 15 minutes weekly of communication services in the general education setting, and 15 minutes weekly of communication services in the special education setting, all provided by an SLP. *Id.* at 12.

54. A [REDACTED] translation of the February 2022 IEP was provided to the Mother. D42.

55. After the meeting on February 16th, the Mother sent an email to Ms. Pitoyo and Ms. Hamilton in which she apologized for "taking a longer time than planned" at the meeting due to the Parents' disagreement with the District's decision to find the

Student ineligible for special education services. P38 p.25. The Mother also asked to have a [REDACTED] interpreter at the next IEP meeting. D44 pp.1-2.

56. The Student's 15 minutes of communication services in the general education setting consisted of Ms. Pitoyo observing him interact with peers at lunch or recess to determine what further instruction he might need and whether he was using the skills he had learned. She observed the Student from a distance. Tr. 162-164. The Student had a group of friends he ate with at lunch. *Id.* She never observed the Student be bullied. *Id.*

57. Ms. Pitoyo also observed that the Student typically played football at recess but he was able to find other friend groups engaging in other activities when he did not want to play football. Tr. 167. She observed the Student to be "bright" and able to express his needs well. She described him as "an includer" who "loves to bring more friends into his group." She observed him to comfortably interact with multiple friend groups. *Id.* at 177. The Student expressed to Ms. Pitoyo that one of his personal goals was to add more friends to his friend group. *Id.*

58. In April 2022, Ms. Pitoyo missed approximately three 15-minute sessions with the Student due to illness. Those sessions were not made up. Tr. 152-156. Ms. Pitoyo opined that missing these sessions did not negatively impact the Student. *Id.* at 158-59.

59. The reevaluation was finalized in May of 2022. It reflects that the Student was earning A's in all of his classes and that his academic skills were at grade level. He was noted to be engaged during class and transitions, both in his learning and with his peers. D53 p.6. The general education assessment portion of the reevaluation indicates that the Student has excellent work habits, cooperates and works well with others, and has no behaviors that interfere with his learning. He was noted to engage in conversation with peers and to socialize in and out of class. *Id.* at 9.

60. The observation portion of the reevaluation was conducted by Ms. Hamilton and Ms. Pitoyo. D53 p.13. The Student was observed to talk with his friends at lunch about what they wanted to do at recess, as well as things they found interesting such as sports and games. The Student exhibited appropriate conversational skills including active listening, taking turns, and knowing when to stop talking. At recess, the Student exhibited appropriate conversation skills, and, on one occasion, he explained the rules of the football game to a new student who joined to play. *Id.*

61. Based on her testing and observations of the Student, Ms. Pitoyo determined that he did not require SDI in communication. D53 p.10.

62. On May 11, 2022, an evaluation team meeting was held to review the Student's reevaluation and determine his eligibility for special education services. D53 p.1. An invoice from Columbia Language Services indicates that a [REDACTED] interpreter traveled to the meeting and interpreted for 1.5 hours, from 2:45 p.m. to 4:15 p.m. D50. The interpreter, Ms. Truong, signed the meeting attendance sheet. D53 p.27.

63. The evaluation team included the Parents, Ms. Hamilton, Ms. Mintz, Ms. Jeffries, Ms. Pitoyo, District representative Lesli Collum,<sup>6</sup> and Mr. Osborne. D53 p.8. Mr. Osborne did not attend the meeting because he had jury duty. He thinks he signed the evaluation report after being briefed about the meeting by Ms. Hamilton. He agreed with the team's conclusion that the Student no longer needed special education. Tr. 356-57.

64. The Parents had received a draft of the reevaluation report prior to the meeting and questioned the reevaluation findings through email communications prior to the meeting. Tr. 91-91, 119. The District representatives on the team recommended that special education services be discontinued since the Student no longer met eligibility requirements. They relied on the reevaluation's determination that the Student's skills were within normal limits in the school setting in the areas of social skills, social language, and adaptive skills. Moreover, they concluded that the Student's communication/social language skills no longer adversely affected his educational performance and he no longer required SDI. D53 p. 20. The prior written notice (PWN) issued following the meeting notes that the Parents continued to have concerns about the Student's communication, social, and adaptive skills, but those concerns "do not present" in the school setting. The Parents were not in agreement with the reevaluation's findings or the evaluation team's decision to exit the Student from special education. *Id.*

65. Ms. Hamilton recalls that issues were thoroughly discussed at the May 11<sup>th</sup> meeting. She felt the team had come to a resolution, although they did not all agree on the outcome. The meeting "concluded naturally." Tr. 86-88. No one was cut off

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<sup>6</sup> Ms. Collum has a Bachelor of Science degree in elementary education and special education, and a master's degree in educational leadership. She is certificated in elementary education for K-8 and special education for K-12. D71. Ms. Collum has been a teacher for 19 years and has experience working with students on the autism spectrum. Tr. 221. She has been an assistant principal for two years. *Id.*

from speaking or expressed that they needed more time. *Id.* Both Parents provided input. *Id.* at 94. The Father left the meeting before it was concluded. *Id.* at 120.

66. Ms. Pitoyo felt that all topics addressed in the reevaluation were discussed. Tr. 203-04. The Parents shared their concerns about the Student's behavior at home and asked "a lot" of questions about whether those concerns were noted at school. *Id.* at 231

67. Ms. Hamilton and Ellen Wiessner<sup>7</sup> discussed referring the Student for a 504 plan but did not do so because there were no accommodations that the Student needed, i.e., no basis for a referral. Tr. 378. The Parents have never requested a 504 plan for the Student. *Id.* at 423.

68. The Parents requested an IEE after the May 11, 2022 meeting. D54. The District denied the request and filed a due process complaint on May 25, 2022. A final order was issued in that matter (2022-SE-0071) on December 1, 2022, which determined that the Student's reevaluation was appropriate, and the Parents were not entitled to an IEE of the Student at public expense.<sup>8</sup>

69. "Stay put" was implemented when the District filed its complaint in May of 2022, meaning that the February 2022 IEP remained in place and the Student continued to receive communication services as set forth in that IEP. D57 p.3.

70. Before matter 2022-SE-0071 was concluded, the Parents filed their Complaint in this action and stay put continued. Consequently, the Student never stopped receiving communication services from the District. He continued to receive 15 minutes of communication SDI per week in the special education setting, as well as 15 or more minutes of observation at lunch/recess per week throughout the entire 2022-23 school year. Tr. 198, 213. Ms. Pitoyo estimates that the Student received 945 minutes of communication services due to stay put after he was determined ineligible for special education in May of 2022. *Id.* at 199-201.

71. The Student received grades of all A 's and B 's during the 2021-22 school year. D2.

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<sup>7</sup> Ms. Wiessner is the District Executive Director of Special Services. She was a school physiologist before becoming an administrator. Tr. 376. Ms. Wiessner has bachelor's and master's degrees in psychology and a graduate certificate in educational leadership. D81.

<sup>8</sup> A copy of this decision can be obtained on the OSPI website and/or by contacting OSPI.



### Additional Findings

72. On August 5, 2022, the Parents filed the Complaint in this matter.

73. A resolution meeting was held on August 31, 2022, as required by WAC 392-172A-05090. Both Parents attended the meeting, and an interpreter was provided for the Mother. D61; Tr. 384. The Mother did not feel the interpretation was well done in that the interpreter kept asking, “What do you mean by that?” Tr. 545. The resolution meeting lasted approximately 90 minutes. *Id.* at 427. The Mother had requested to make a recording of the resolution meeting, but Ms. Wiessner denied the request. *Id.* at 384. Ms. Wiessner understood what the Parents were asking for in terms of a resolution, and feels the parties communicated effectively but did not agree on a resolution. *Id.* The Parents wanted the Student to continue to receive special education services. *Id.* at 425. The Mother raised the same concerns she had raised before, such as the Student not washing his hands and not advocating for himself. *Id.* at 426. Ms. Wiessner answered the Parents’ question at the meeting and when the Father had to leave, the Mother went with him. *Id.* at 385, 427.

74. The questions asked of Ms. Wiessner by the Mother at the due process hearing indicate that the Mother wanted to make a recording in order to memorialize the discussion at the resolution meeting. For instance, she asked, “[T]here’s no notes and no recording [of the meeting]. How would we prove what we’ve talked about?” Tr. 395. She also asked, “Do you think, then, it is useful to have a recording in the meeting? Because right now what I’m saying is that you don’t remember. How do we talk about the problem if you don’t remember?” *Id.* at 395-96.

75. On October 20, 2022, Ms. Wiessner emailed the Mother and explained that there was a difference in the Student’s reevaluation report initially presented in the due process hearing in matter 2022-SE-0071 and the report that had been provided to the Parents originally. P42. Ms. Wiessner explained that on May 19, 2022, she printed a copy of the reevaluation report and provided it to the District’s attorney. She thought it was a final copy but it was still in draft form. Later that afternoon Ms. Hamilton accessed the report and made a few changes, including changes to the PWN. The report was then finalized and “locked” in the District’s computer system. It was emailed to the Mother on May 24, 2022. The draft version provided to the District’s attorney was used initially during the due process hearing in matter 2022-SE-0071 until the error was discovered. The draft report was then replaced with the final report. *Id.*

76. It is found that the Parents were provided with the final version of the reevaluation report at the relevant time, i.e., in May 2022.

77. In November 2022, the Mother requested [REDACTED] translations of numerous documents, including discipline reports, data sheets and a PWN. The District provided the requested translations. D63; D64.

78. On December 5, 2022, the Parents made a special education referral for the Student and asked the District to assess him in the areas of cognitive and medical/physical. They also requested a functional behavioral assessment. D67. The evaluation team declined to initiate an evaluation. The PWN informing the Parents of the decision states that the areas identified by the Parents were addressed in the previous evaluation and the Student's teachers reported no concerns in any area. The Student was performing at grade level in all areas and did not exhibit any behaviors at school that impede his learning or that of others. *Id.*; Tr. 125.

79. There are typically four to seven adults supervising the Daybreak playground at recess. Tr. 225. Ms. Hamilton opined at the due process hearing that the Student does not require adult supervision at school or during recess beyond that which is typically provided to all students. She cautioned that undue attention from adults can lead to unwanted attention on a student from peers. *Id.* at 120-21.

80. Self-advocacy skills, as well as how to identify, prevent, and report bullying are taught in the District in the "SecondStep" social-emotional learning general education curriculum. Tr. 123, 445.

81. The Parents repeatedly expressed concern to District staff that the Student does not drink enough water, sometimes does not eat his lunch, and does not wash his hands. Although she was not required to do so, Ms. Pitoyo frequently reminded the Student to drink the water his Mother sent with him as a courtesy to the Parents. Tr. 173-75. The Student never seemed hungry or thirsty when he was working with Ms. Pitoyo. *Id.* at 175. He ate and drank at lunch. Ms. Pitoyo did not feel the Student needed to be reminded of things that he could do independently. *Id.*

82. Ms. Pitoyo has worked with the Student weekly for over two years. She has never observed him to appear anxious or tired at school. The Student never exhibited any symptoms of an emotional crisis of any kind. Tr. 204-206. He never appeared to be angry or depressed. *Id.* at 207. She has never observed him to be the subject of HIB at any time during school and he has never told her that he has been the subject of HIB. *Id.*

83. During much of the time Ms. Pitoyo worked with the Student, the Mother asked for updates about him more frequently than do most parents. She often asked for weekly updates. Tr. 209.

84. Ms. Pitoyo does not think the Student needs to be monitored at school more than other students are monitored. Additional monitoring would be “very disruptive” to the Student because his peers would know he is being watched by the adults and that would adversely impact him. Tr. 209-10. It could also create inappropriate dependence on adults. *Id.*

85. The Student expressed to Ms. Pitoyo that he has mastered his communication goals and his work with her is “too easy.” Tr. 210-11. The Student becomes less engaged when his work is too easy. Ms. Pitoyo feels it is harmful to the Student to be removed from the general education setting even for a short time because it removes him from participation with his peers. *Id.* She recommended that he be returned 100% to general education. *Id.* at 212.

86. Ms. Collum has interacted with the student in her role as assistant principal at Daybreak. She described him as quiet but willing talk to her if she greets him. She has noticed that the Student engages with his peers at recess, lunch, and in the classroom. She described him as “a very typical seventh grade student.” Tr. 223-24. He does not have conflicts with other students and Ms. Collum thinks his social skills are above average. The Student has no concerning behaviors and he follows school rules. *Id.* She does not find the playground incidents in October 2021 to be concerning because the Student does not have a pattern of getting into conflicts with others. *Id.* at 249.

87. Ms. Mintz recalls hearing a rumor during the 2021-2022 school year that a student named [REDACTED] had bullied the Student. Tr. 312-14. The Parents are concerned that “[REDACTED] has bullied the Student and may continue to do so. No one at the due process hearing was able to identify a classmate of the Student named [REDACTED] and no one in the Student’s grade is named [REDACTED]. *Id.* at 308, 313. The other student involved in the recess altercation over the drawing in October 2021 is not named [REDACTED]. *Id.* at 457.

88. The Father remains concerned that the Student might be “strangled” again. The Father is concerned that the Student could suffer permanent harm because he does not react “normally” to some circumstances and may not defend himself if he were to be strangled. Tr. 552. The Father thinks the Student needs additional supervision at school for another year. *Id.* at 553.

89. The Mother never complained to the District that she did not understand the [REDACTED] translations of the IEPs, PWNs, or other documents. Rather, she was consistently quite specific with her questions and disagreements about the contents of those documents. Tr. 463.

## CONCLUSIONS OF LAW

### Jurisdiction and Burden of Proof

1. The Office of Administrative Hearings has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 et seq., the 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 pursuant to these statutes, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

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

### The IDEA

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

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

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

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

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

*Id.* at 188-189.

5. The Supreme Court clarified the substantive portion of the *Rowley* test quoted above in 2017:

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

*Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 137 S.Ct. 988, 999-1000 (2017).

6. Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

(I) impeded the child’s right to a free appropriate public education;

(II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or

(III) caused a deprivation of educational benefit.

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

7. The IDEA does not require a school district to provide a “potential-maximizing education” in order to provide FAPE, but only a “basic floor of opportunity” that provides “some educational benefit” to the student. *Rowley*, 458 U.S. at 200-01.

Whether the District denied the Student FAPE by failing to adequately protect him from HIB and failing to add goals pertaining to HIB to his IEP

8. The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry that must focus on the unique needs of the student at issue. As the U.S. Supreme Court has made clear, “A focus on the particular child is at the core of the IDEA,” and an IEP must meet a child’s “*unique needs*.” *Endrew F.*, 137 S.Ct. at 999 (emphasis in original). “An IEP is not a form document” and the “essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.* “Above all, an IEP team is charged with developing a ‘comprehensive plan’ that is ‘tailored to the unique needs of a particular child.’” *L.C. on behalf of A.S. v. Issaquah Sch. Dist.*, 2019 U.S. Dist. LEXIS 77834 \*21, 119 LRP 18751 (W.D. Wash. 2019), *aff’d sub nom. Crofts v. Issaquah Sch. Dist. No. 411*, 22 F.4<sup>th</sup> 1048 (9th Cir. 2022) (*quoting Endrew F.*, 137 S.Ct. at 994).

9. The Office of Special Education Programs (OSEP), which is part of the Office of Special Education and Rehabilitative Services (OSERS), has described bullying as follows:

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors.

Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013).

10. In *M.L v. Federal Way Sch. Dist.*, 394 F.3d 634 (9<sup>th</sup> Cir. 2015), the U.S. Court of Appeals for the Ninth Circuit determined that the student at issue in the appeal was not denied FAPE when his classroom teacher failed to stop classmates from

teasing him. The court determined there was no evidence that the teasing affected the student's education and concluded the teasing did not result in the loss of educational benefit. The court rejected the parents' argument that unaddressed teasing was "potentially dangerous" because it could escalate to physical abuse that the student's limited verbal skills would prevent him from reporting. *Id.* at 651. In discussing the issue, the court cited with approval authority holding that HIB must be so severe that it effectively bars the victim's access to an educational opportunity before it amounts to a denial of FAPE. *Id.* at 650-51.

11. In the present case, there is no evidence in the record that the Student was ever subjected to bullying or any other form of HIB. The playground incident in October of 2021 was an isolated skirmish over a drawing and in no way represented a pattern of HIB. The evidence does not support a conclusion that HIB affected the Student's education or resulted in him losing educational benefit. The evidence likewise does not support a conclusion that the District failed to protect the Student from HIB, or that he needed IEP goals pertaining to HIB.

12. As set forth above, FAPE consists of SDI supported by such services as are necessary to permit a child to benefit from the instruction. There is no evidence that the Student was denied FAPE in any way at any time. He met his IEP goals, performed well in school, and was determined to no longer need special education services as of May 2022.

13. For these reasons, the Parents have not met their burden to prove this claim by a preponderance of the evidence.

Whether the District denied the Student FAPE by failing to address his expressive language and self-advocacy difficulties, as well as his health issues, since March 2021<sup>9</sup>

14. There is no evidence in the record that the Student had "health issues." The fact that he may not have consumed as much water at school as his Mother wanted him to, and did not always eat his lunch, does not amount to a health issue that the District needed to address. There is no evidence that the Student had health issues of any kind that impacted his learning.

15. The Student received communication SDI as soon as he transferred to the District. The IEP developed in March 2021 doubled the Student's minutes of communication services. It contained a goal specifically related to self-advocacy, and

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<sup>9</sup> For clarity, the issues are analyzed in a different order than they are presented in the statement of issues.

two other goals related to communication. The Student met his self-advocacy goal and the other communication goals as of February of 2022.

16. The March 2021 IEP noted that the Student's expressive language skills were within the average range for his age. No difficulties with expressive language were noted and none have been established by the Parents. The assessment revision conducted in May 2021 did not establish a need for SDI in any new areas.

17. There is no evidence that the Student was denied FAPE due to the District failing to provide SDI for expressive language or failing to address health issues. Likewise, there is no evidence that the Student was denied FAPE due to a failure by the District to address his self-advocacy skills.

18. For these reasons, the Parents have not met their burden to prove this claim by a preponderance of the evidence.

Whether the District denied the Student FAPE by failing to implement his IEP when he transferred to the District in February 2021

19. Washington law is clear regarding how a school district must handle the transfer of a student eligible for special education from a different state:

If a student eligible for special education transfers from a school district located in another state to a school district within Washington state and had an IEP that was in effect in the previous school district, the new school district, in consultation with the parents, must provide FAPE to the student including services comparable to those described in the student's IEP, until the new school district:

(a) Conducts an evaluation to determine whether the student is eligible for special education services in Washington state, if the school district determines an evaluation is necessary to establish eligibility requirements under Washington state standards; and

(b) Develops and implements a new IEP, if appropriate, that meets the applicable requirements in WAC 392-172A-03090 through 392-172A-03110.

WAC 392-172A-03105(5).

20. The meaning of "comparable" in this context has been addressed by OSEP and the courts. In *Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2018), the court held that the services provided to the child at issue by the new



school district were similar and equivalent to the services that had been provided in the previous district even though they were delivered in a different setting (at a local elementary school rather than in the home). Thus, a new school district is not required to provide the exact same services set out in the student's previous IEP; it is required to provide comparable services, i.e., services that that are "similar" or "equivalent."

21. The Student at issue here was provided with services comparable to those he had been receiving in California, i.e., 60 minutes per month of speech-language SDI, as soon as he moved to the District. Because the Student was attending school in the District remotely for three days per week in February 2021, some of the California IEP's accommodations were unnecessary and were not implemented each day, such as preferential classroom seating.

22. A new IEP was developed on March 1, 2021, almost immediately after the Student moved to the District, which doubled the amount of SDI he received and set forth new accommodations. Upon development of the new IEP, the District was not obligated to provide services comparable to those in the California IEP and the District was certainly not obligated to implement the California IEP to the letter, as the Parents seem to argue in their briefing. Parent's Closing Statement pp. 9-10.

23. There is no evidence that the Student was denied FAPE due to the District failing to implement the California IEP when the Student transferred to the District. Accordingly, the Parents have not met their burden to prove this claim by a preponderance of the evidence.

Whether the District denied the Student FAPE by providing an inappropriate IEP in March 2021 that failed to include adequate minutes of SDI, and failed to include necessary accommodations and modifications pertaining to communication, expressive language, and self-advocacy

24. As set forth above, in order to provide FAPE an IEP must be reasonably calculated to enable a child to make progress appropriate in light of his circumstances. *Endrew F.*, 137 S.Ct. 999-1000.

25. An IEP must include a statement of the special education and related services to be provided to the student to enable him to advance appropriately toward attaining annual goals. WAC 392-172A-03090(d). "Related services" means such services as are required to assist a student eligible for special education to benefit from special education, including psychological services and counseling. WAC 392-172A-01155(1). An IEP must also include a statement of the program modifications and supports that will be provided to enable a student to advance appropriately, to

be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities, and to be educated and participate with other students, including nondisabled students. WAC 392-172A-03090(1)(c)-(d).

26. It is well established that the appropriateness of an IEP must not be judged in hindsight, but rather based on the information that was reasonably available to the parties at the time the IEP was developed. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).

27. As discussed above, there is no evidence that the Student required SDI or accommodations and modifications to address expressive language. He did not have a deficit in his expressive language skills.

28. The March 2021 IEP provided for 120 minutes per month of communication SDI with a focus on social language and self-advocacy. It also provided accommodations and modifications, such as preferential seating and repeating and modeling directions. The assessment revision conducted in May 2021 did not establish a need for SDI in any new areas. The Student achieved all his IEP goals in less than a year. Thus, the evidence is clear that the March 2021 IEP was a comprehensive plan that was “tailored to the unique needs” of the Student, as is required by the IDEA.

29. The Parents argue that the student needed additional support in order to “reach his full potential” and advance in his education with an eye toward employment and independent living. Parents’ Closing Statement p.12. However, this is not what the IDEA calls for and the Parents’ goal that the Student “reach his full potential” seems to be the gravamen of their dispute with the District. A school district is not required to provide a “potential-maximizing education” in order to provide FAPE, but only a “basic floor of opportunity” that provides “some educational benefit” to the student. *Rowley*, 458 U.S. at 200-01.

30. It is concluded that the March 2021 IEP more than met the requirements of the IDEA as articulated in *Rowley*, and the District had no obligation to provide additional services aimed at helping the Student reach his full potential. The March 2021 IEP was appropriate in light of the Student’s circumstance and provided him with FAPE.

31. Accordingly, the Parents have not met their burden to prove this claim by a preponderance of the evidence.

Whether the District denied the Student FAPE by withholding speech services on several occasions in April 2022 without informing the Parents or Student, and failing to provide make up sessions for the missed services

32. At issue here is whether the District failed to implement the Student's IEP when Ms. Pitoyo missed sessions with the Student and did not make up the missed time.

33. *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811 (9<sup>th</sup> Cir. 2007), addresses whether services were provided to a student "in conformity with" the IEP. According to *Van Duyn*, minor discrepancies between the services required by the IEP and those that are provided do not violate the IDEA. *Id.* at 822. The *Van Duyn* court stated:

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

\* \* \*

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

*Id.* at 821 and 822 (italics in original). A child's educational progress, or lack thereof, may be probative of whether there has been more than a minor shortfall in the services provided. *Id.* at 822.

34. In April of 2022, Ms. Pitoyo missed approximately three 15-minute sessions with the Student due to illness. Those sessions were not made up. Ms. Pitoyo opined that missing those sessions did not negatively impact the Student. This opinion is supported by the evidence in that Student had met all his IEP goals as of February 2022, so a new goal was created. The Student was then determined to no longer require special education services on May 11, 2022.

35. Due to stay put being in effect for the Student for more than an entire school year, he received approximately 945 minutes of communication SDI above what was called for by his IEP. There is absolutely no evidence that the denial of 45 minutes of services in April 2022 negatively affected the Student in any way.

36. It is concluded that the 45 missed minutes were not material and were, at most, a very minor implementation failure. Moreover, the services the Student received during stay put more than compensated for any implementation failure.

37. For these reasons, it is concluded that the Student was not denied FAPE due to the missed speech services. Accordingly, the Parents have not met their burden to prove this claim by a preponderance of the evidence.

### Meaningful Participation

38. Four of the Parents' claims allege they were denied meaningful participation in the IEP and resolution process. The IDEA requires that parents be given the opportunity to "participate in meetings with respect to the identification, evaluation, and educational placement of the child." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed. Appx. 342 (9th Cir. 2007); 20 U.S.C. § 1415(b)(1). To comply with this requirement, parents must not only be invited to attend IEP meetings but must also have the opportunity for "meaningful participation in the formulation of IEPs." *H.B. v. Las Virgenes*, 239 Fed. Appx. at \*4.

39. Neither the IDEA nor Washington special education law specifically define "meaningful participation." Determining what is "meaningful" requires balancing of the totality of the circumstances of a particular meeting. *Mercer Island Sch. Dist.*, 121 LRP 1640 (SEA Wash. 2020) (upholding the school district's refusal to provide recordings and transcripts of IEP meetings to the parent). In reviewing and balancing the totality of the circumstance, a tribunal may consider such things as whether the parents received notice of meetings, received draft documents before meetings, engaged in discussion, posed questions, and had opportunities to comment. *Id.*

40. A school district is required to notify parents of meetings and to schedule meetings at a mutually agreeable time and place. WAC 392-172A-03100. School districts are also required to provide interpreters for parents whose native language is not English, and to give parents a copy of their student's IEP at no cost. *Id.*

### Whether the District denied the Student FAPE by denying the Parents meaningful participation in the resolution process when it refused to allow the Parents to record the resolution meeting held on August 29, 2022

41. The IDEA mandates that a school district must convene a meeting with the parent and relevant members of a student's IEP team within 15 days of receiving notice that a parent has filed a due process hearing request. The purpose of what is commonly referred to as "a resolution meeting" is "for the parent of the child to discuss the due process hearing request, and the facts that form the basis of the

request, so that the school district has the opportunity to resolve the dispute that is the basis for the due process hearing request.” WAC 392-172A-05090(1)(a) and (b).

42. OSEP has clarified that a state educational agency has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings. The IDEA does not authorize or prohibit the recording of meetings by a parent or a school official. If the use of recording devices is prohibited or limited, the state educational agency must make exceptions for a parent for whom recording devices are necessary to understand the IEP or the IEP process. Letter to Anonymous, 40 IDELR 70 (OSEP 2003).

43. Washington law prohibits the recording of private conversations without first obtaining the consent of all persons engaged in the conversation. RCW 9.73.030. In the present case, the District did not consent to the Parents’ request to record the resolution meeting.

44. The Parents did not present persuasive evidence at the hearing that recording the resolution meeting was necessary for either of them to understand the process. The Mother was provided with an interpreter, and the Father, who speaks English, was present at the entire meeting. The purpose of the resolution meeting was for the District to have the opportunity to resolve the disputes that were the basis of the due process hearing request. At the meeting, the Mother raised the same concerns that she had raised on many previous occasions. Ms. Wiessner understood what the Parents were asking for and understood the dispute that formed the basis of the request, i.e., the Parents wanted the Student to continue to receive special education services and the District did not agree that continued services were necessary or appropriate. The Parents and the District clearly understood these were the issues to be decided at the due process hearing. There is ample evidence that the issues had been discussed by the Parents and the District on *numerous* occasions.

45. To the extent the Mother argues that she could not understand what transpired at the meeting without listening to a recording of it afterward, the evidence does not support that argument. The Mother’s spouse speaks English and was present. The Mother speaks English well enough to have obtained two associate degrees in English-speaking programs without the use of an interpreter. English is the primary language spoken in the family home. The Mother has repeatedly asked the District specific questions about various documents she received in English. And the Mother was provided with an interpreter at the meeting. Moreover, questions asked by the Mother at the due process hearing indicate that she wanted a recording of the meeting to “prove” what was discussed, not to aid her in understanding what transpired. This is confirmed in the Parents’ post-hearing briefing in which they

contend that they wanted a record of what happened at the resolution session “that everyone could agree on in the future.” Parents’ Closing Statement p.3.

46. The Parents have not met their burden to prove that being denied permission to record the resolution meeting impaired their ability to meaningfully participate in the resolution process. And there is no evidence that the Student was denied FAPE by the District’s refusal to consent to the Parents’ request to record the resolution meeting. Accordingly, the Parents have not met their burden to prove this claim by a preponderance of the evidence.

Whether the District denied the Student FAPE and denied the Parents meaningful participation in the IEP process by inappropriately cutting short the IEP meetings held on February 16 and May 11, 2022

47. Two days prior to the February 16, 2022 meeting, the Parents were provided with a draft of the reevaluation that was to be discussed. The Student’s homeroom/math teacher for the 2021-22 school year opined that the Parents had “ample time” to talk about the Student at the meeting. The evidence supports this opinion in that, *due to input from the Parents* at the meeting, the Student was not exited from special education as the District had initially recommended. Rather, he was provided with a new IEP and the reevaluation was extended to collect more data. The Parents were “happy” with this decision to extend the reevaluation and continue services in the interim.

48. There is no evidence that the meeting was “cut short” or that the Parents were denied an opportunity to provide input and pose questions. After balancing the totality of the circumstances of this meeting, it is concluded that the Parents were not denied meaningful participation in the February 16, 2022 meeting.

49. With respect to the May 11, 2022 meeting, the Parents were provided with a draft of the reevaluation report prior to that meeting, as well, and had questioned the reevaluation findings through email communications prior to the meeting. The meeting lasted approximated 90 minutes and an interpreter was provided for the Mother. Ms. Hamilton and Ms. Pitoyo felt that the issues were thoroughly discussed and the meeting “concluded naturally.” No one was cut off from speaking or expressed that they needed more time to give input. Both Parents provided input, and the Father left before the meeting concluded.

50. The Parents argue that Mr. Osborne’s absence at the meeting deprived them of the opportunity to discuss the Student’s needs regarding self-advocacy, as well social, pragmatic and expressive language skills. Parent’s Closing Statement p.8. This is not persuasive evidence that the Parents were denied the opportunity to

participate meaningfully in the May 11, 2022 meeting. Two other general education teachers attended the meeting. Mr. Osborne had attended and participated in the February 16<sup>th</sup> meeting and there is no evidence that he had changed his opinion or had garnered additional input to offer between February and May. Mr. Osborne agreed with the team's decision to exit the Student from special education reached at the May 11<sup>th</sup> meeting.

51. The evidence overwhelmingly supports the IEP team's conclusion at the meeting that the Student no longer needed special education services. There is no evidence that the meeting was "cut short" or that the Parents were denied an opportunity to provide input and pose questions. The fact that the IEP team did not adopt the Parents' recommendation that special education services be continued does not mean the Parents were deprived of meaningful participation in the decision-making process. After balancing the totality of the circumstances of this meeting, it is concluded that the Parents were not denied meaningful participation in the May 11, 2022 meeting.

52. For these reasons, the Parents have not met their burden to prove this claim by a preponderance of the evidence.

Whether the District denied the Student FAPE by denying the Parents meaningful participation in the IEP process by providing the Parents with an inaccurate [REDACTED] translation of the Student's discipline reports which list the wrong referrer

Whether the District denied the Student FAPE by denying the Parents meaningful participation in the IEP process by treating the Student's mother with bias, including unfair treatment, providing erroneous translations, sending incomplete records, and providing unreasonable explanations pertaining to the resolution meeting

53. These two issues are related and will be addressed together.

54. There is no evidence that the District treated the Mother unfairly or with bias in any way. Rather, the evidence demonstrates that the District staff members were remarkably patient with the Mother's constant inquiries about the Student and were consistently responsive and appropriate in all their dealings with her.

55. There is no evidence that "unreasonable explanations" about the resolution meeting were given to the Parents. It is apparent that the District and the Parents disagreed about whether the Student needed continued special education services, and agreement could not be reached at the meeting.

56. There is no evidence that the Parents were given incomplete records by the District.

57. Regarding erroneous translations of documents, the translation of the letter pertaining to the playground incident in October 2021 contains errors, including listing Ms. Watts as the discipline officer rather than Mr. Pierce.<sup>10</sup> The Mother found and pointed out this error after comparing the documents herself. The [REDACTED] translation was not requested by the Parents until over a year after the letter was originally sent, yet the Parents argue that the inaccurate translation prevented them from getting “further information from this primary source.” Parents’ Closing Statement p.4. However, the evidence is clear that the Parents were given all the necessary information about the incident at the time it occurred, and the Mother met with Mr. Pierce to discuss the altercation just a few days later. It is concluded that the translation errors in this letter are inconsequential and have not impaired the Parents’ ability to meaningfully participate in the Student’s IEP process.

58. As found above in the Findings of Fact, the Parents were provided with the final, correct version of the May 2022 reevaluation report at the relevant time, i.e., in May 2022. The confusion with exhibits at the due process hearing in matter 2022-SE-0071 in September of 2022 is inconsequential and was rectified, and in no way impacted the Parent’s meaningful participation in the Student’s IEP process.

59. For these reasons, the Parents have not met their burden to prove these claims by a preponderance of the evidence.

### Conclusion

60. Based on the record, it is concluded that the Parents have not established by a preponderance of the evidence that the District violated the IDEA or that the Student was denied FAPE in any way. Consequently, the Parents are not entitled to any relief.

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

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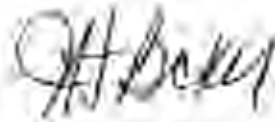
<sup>10</sup> The Parents urge the ALJ to compare exhibits P1 and P35, and they point out the “very different formatting” between the two documents. Parent’s Closing Statement pp. 3-4. However, exhibit P2 is the letter that appears to have been translated to yield exhibit P35. Those are the documents that have been compared herein.



## ORDER

The Parents have not established that the Battle Ground School District violated the IDEA or that the Student was denied FAPE. The Parents are not entitled to any relief and their requests for relief are DENIED.

Served on the date of mailing.



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Jacqueline H. Becker  
Administrative Law Judge  
Office of Administrative Hearings

### Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety (90) 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, Legal Services, PO Box 47200, Olympia, WA 98504-7200. To request the administrative record, contact OSPI at [appeals@k12.wa.us](mailto:appeals@k12.wa.us).

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that true copies of this document were served upon the following as indicated:

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Dated July 27, at Seattle, Washington.

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