BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
EMPLOYMENT DEPARTMENT

In the Matter of Tax Hearing For:	)	**FINAL ORDER**
	)	
THE HELLO FOUNDATION, LLC, Appellant	)	Reference No. T71456
	)	

HISTORY OF THE CASE

On October 18, 2010 the Employment Department (Department) issued a Notice of Determination (Determination), finding that The Hello Foundation, LLC (Appellant) was an employer subject to Employment Department law as of January 1, 2010. On November 9, 2010, Appellant filed a request for hearing regarding the Determination. On February 15, 2012, the Department issued a Notice of Assessment (Assessment), finding that Appellant had taxable wages of $2,869,970.82 for the period of the first quarter of 2008 through the third quarter of 2010 (the period in issue), and assessing taxes and interest of $105,385.53. On February 29, 2012, Appellant filed a request for hearing regarding the Assessment. On May 15, 2011, the Department referred this matter to the Office of Administrative Hearings (OAH), and the OAH assigned Administrative Judge Greg Ballinger (the ALJ) to preside at the hearing.

The ALJ convened a prehearing conference on June 14, 2012. Appellant participated in the conference and was represented by Attorney Alexander Trauman. The Department participated in the conference and was represented by Kathleen Saludares. At the conference, the parties agreed to convene a telephone hearing on October 1, 2012. The ALJ established a deadline date of September 17, 2012 for the parties to submit proposed exhibits and witness lists. On August 9, 2012, the ALJ convened a Status Conference to discuss potential stipulations affecting the scope of the hearing and scheduling issues. Appellant participated in the conference and was represented by Mr. Trauman. The Department participated in the conference and was represented by Sarah Wolfe. During the conference, the parties agreed to postpone the hearing until October 4, 2012. On October 4, 2012, the ALJ was unavailable, and the hearing was postponed until October 5, 2012.

The ALJ conducted a telephone hearing in this matter on October 5, 8, 9, 10 and 11, 2012. Appellant participated in hearing and was represented by Mr Trauman. The Employment Department participated in the hearing and was represented by Ms. Wolfe. Sharon Soliday (Soliday), Lucinda Bowman (Bowman), Susan Carter-Anderson (Carter-Anderson), Debbie Welch (Welch), and Ashley Northam (Northam) testified for Appellant. Auditor Sally Gloude (Gloude), Carol Bensen (Bensen) and Claudia Doerr (Doerr) testified for the Department. The ALJ adjourned the hearing on October 11, 2012 and held the record open until October 26, 2012 to permit the parties to submit closing arguments. The parties submitted written closing arguments, and the ALJ closed the hearing record on October 26, 2012.

ISSUES[1]

(1) Whether services for remuneration upon which the Determination or Assessment is based constitute taxable employment under ORS 657.030 through ORS 657.094.

(2) Whether the payments made are wages subject to employment taxation under ORS 657.105 through 657.140. (See also OAR Chapter 471, Division 31.)

(3) Whether the applicant is an "employer" as defined in ORS 657.025. (See also ORS 657.679.)

(4) Whether the Assessment issued under ORS 657.681 is correct.

EVIDENTIARY RULINGS

The Department offered Exhibits A1 through A23, which were admitted into evidence without objection.[2] Appellant offered Exhibits E1 through E22 and Exhibits E25 through E29.[3] The ALJ excluded Exhibit E1 as unduly repetitious of Exhibit A6. The ALJ excluded Exhibit E3 as unduly repetitious of Exhibits A16 through A18. Exhibit E2, Exhibits E4 through E22, and Exhibits E25 through E29 were admitted into evidence without objection.

STIPULATED FINDINGS OF FACT

(1) Appellant filed timely hearing requests regarding the October 18, 2012 Determination and the February 15, 2012 Assessment.

(2) All sworn testimony presented at the hearing by Appellant and the Department is representative testimony. Representative testimony is testimony that would have been given by each of the individuals within the group represented by the witnesses' testimony. The testimony of each representative witness shall apply to all of the individuals within the group represented by the witness.

(3) The testimony of Bowman, Doerr and Northam is representative of testimony that would have been given by the following Speech Language Pathologists (SLPs) identified in the Assessment: Angela Arterberry; Susan Ashbury; Tammi Bailey; Karen Bates; Kelly Bawden; Denise Benville; Carol Blea; Bowman; Tracy Buckendorf; Mark Carlson; Jessica Chace; Karen Clifton; Sasha Correia;

---

[1] The Notice of Hearing mailed to the parties identified a fifth issue: Whether applicant filed a request for a hearing within the 20-day time limit; and, if not, whether there is good cause to extend the appeal period a reasonable time. The parties stipulated that Appellant filed timely hearing requests regarding the Determination and Assessment. Therefore, this Final Order does not address the late appeal issue.

[2] At the hearing, the Department withdrew its original Exhibit A23 and submitted a revised version of Exhibit A23. The revised Exhibit A23 was admitted into evidence without objection.

[3] Appellant also offered Exhibits E23 and E24, which were initially admitted into evidence without objection. During the hearing, Appellant withdrew Exhibits E23 and E24. The ALJ therefore excluded Exhibits E23 and E24 from evidence.

Christina Crouse; Doerr; Sara Ecker; Jill Ehlers; Kathy Fowler; Noela Gerlicher; Jane Gregory; Wendy Gunter; Kristy Hamilton; Dena Hawes; Kay Jellison; Laura Kane; Melissa Lathen; Tracey Levay; Erin McDonnell; Rachel Menne; Tracy (Lee) Moser; David Newton-Tapia; Darci Nielson; Northam; Gina Ossanna; Mary Pearson; Jennifer Peddicord; Heidi Peters; Sally Riley; Veronica Sautter; Margo Schafler; Sharon Scheurer; Cindy Skinner; Megan Snow; Kalie Steele; Emily Tretter; Brook Unwin; Gretchen Walker; Carrie Anne Weaver; and Kira Wright.

(4) The testimony of Carter-Anderson and Bensen is representative of testimony that would have been given by the following School Psychologists (SPs) identified in the Assessment: Bensen; Carter-Anderson; Amy Hansen; and Mary Jo Lee.

(5) Welch testified as the sole Occupational Therapist (OT) identified in the Assessment.

FINDINGS OF FACT

(1) On September 20, 2010, the Department's Tax Section received a blocked claims report from the Benefits Section, regarding a claim for unemployment insurance benefits filed by Benson. Benson reported earning wages from Appellant during her base year period. The Benefits Section found no record of wages reported by Appellant for Benson. The Benefits Section asked the Tax Section to investigate Benson's employment status. The Tax Section determined that Benson performed services in subject employment for Appellant during her base year period. During the Tax Section investigation, Benson reported that other individuals performed similar services for Appellant. As a result, the Tax Section selected Appellant for an audit of its payroll records. (Test. of Gloude; Ex. A3.)

(2) On October 18, 2010, the Department issued a Determination which found Appellant was an employer subject to Employment Department law as of January 1, 2010. On November 9, 2010, Appellant filed a request for hearing regarding the Determination. (Exs. A2 and A6.)

(3) On February 15, 2012, the Department issued an Assessment which found Appellant had taxable wages of $2,869,970.82 during the period in issue,[4] and assessed taxes and interest of $105,385.53. (Ex. A8.)

(4) Based on information provided by Appellant, the Department determined that some of the payments included in the Assessment as taxable wages were excludable from taxation as reimbursements. On October 5, 2012, the Department determined that Appellant had taxable wages of $2,855,009.32 during the period in issue.[5] The Department did not issue an Amended Assessment. (Test. of Gloude; Ex. A23.)

---

[4] $338,937.41 first quarter 2008 + $332,145.30 second quarter 2008 + $125,121.12 third quarter 2008 + $223,363.40 fourth quarter 2008 + $428,779.34 first quarter 2009 + $403,516.39 second quarter 2009 + $51,965.05 third quarter 2009 + $88,608.30 fourth quarter 2009 + $495,086.12 first quarter 2010 + $330,640.76 second quarter 2010 + $51,807.63 third quarter 2010.

[5] $324,049.91 first quarter 2008 + $331,072.80 second quarter 2008 + $123,213.62 third quarter 2008 + $214,875.90 fourth quarter 2008 + $416,779.34 first quarter 2009 + $403,516.30 second quarter 2009 + $44,973.55 third quarter 2009 + $91,993.30 fourth quarter 2009 + $521,836.12 first quarter 2010 + $330,890.76 second quarter 2010 + $51,807.63 third quarter 2010.

(5) Appellant is an Oregon limited liability company. Soliday is Appellant's sole owner and managing member. Soliday has 19 years experience as a speech language specialist. During the course of her professional career, Soliday worked as a private contractor and provided speech language services for individuals, state-run facilities and public school districts (districts). Districts are required by federal law to provide Individual Education Plans (IEPs) for students diagnosed with learning disabilities and cognitive deficiencies. Districts employ the services of SLPs, SPs and OTs to diagnose student disabilities, to design student-specific IEPs, and to provide appropriate treatment and curriculum for qualified students. (Test. of Soliday.)

(6) Based on her experience working with Oregon districts, Soliday observed that the districts did not always know where to find specialists to meet specific student needs, and that qualified practitioners often had difficulty finding work. As a result, districts were often unable to meet all of their students' needs. Soliday founded Appellant in 2004 as a way to meet student needs by connecting qualified professionals and school districts. (Test. of Soliday.)

(7) Soliday established a public website for Appellant, which she used to market placement services for speech language professionals and to provide current educational materials of interest to peers and families affected by speech language disabilities. Soliday also established a private password-protected job board, where she listed current job opportunities for speech language professionals. (Test. of Soliday; Exs. A10 – A12.)

(8) During the period in issue, Appellant entered into Engagement Agreements (EAs) with Oregon school districts to provide speech language services, and entered into separate Independent Contractor Agreements (ICAs) with SLPs, SPs and OTs (the contractors) to help provide the contracted services. (Test. of Soliday; Exs. A16 and A19.)

(9) If an SLP, SP or OT expressed interest in Appellant's placement services, Soliday met with the individual to determine whether the individual had appropriate training, experience and licensing required to perform speech language or school psychologist services in Oregon. Soliday and the individual discussed the professional's job preferences, travel restrictions, and desired work schedule. During this meeting, Soliday outlined Appellant's business model, and gave the individual a copy of its ICA. When the individual signed an ICA, the individual became a contactor. Soliday gave the contractor a password, which granted the contractor access to Appellant's job board. (Test. of Soliday.)

(10) Under the ICAs, the parties agreed that the contractors provided services for Appellant's clients as independent contractors. Appellant agreed to pay the contractors at the rate of $60 to $70 per hour, depending on each contractor's level of experience. The contractors agreed to keep and maintain appropriate and legible records regarding their services, and to prepare and respond to all reports, claims and correspondence, as requested by Appellant and Appellant's clients, in a timely manner. Under the ICAs, Appellant agreed to pay the contractors after receiving invoices for the contractors. The contractors agreed to submit invoices according to Appellant's standards and according to Appellant's payment timelines. Appellant required the contractors to maintain a weekly record of their hours worked, and to submit their time records once per month following the last work day of the month. Appellant provided a form for the contractors to use for keeping and submitting time records. Appellant did not require the contractors to use its timekeeping form. Appellant billed the districts monthly for the services provided by the contractors. School districts typically paid their bills once per month, usually within 30 days after receiving Appellant's invoice. Appellant paid the contractors only after the Districts paid Appellant. Payments to the contractors would be delayed if a District did not pay

Appellant within 30 days. (Test. of Soliday, Bowman, Bensen, Carter-Anderson, Doerr, Northam and Welch; Ex. E4 at 1 and 2.)

(11) Under the ICAs, all services were at-will and were subject to termination by either party at any time and for any reason by either party. Appellant also retained the right to terminate the ICAs in the event of fraud, dishonesty, or other misconduct, failure to perform, insolvency, or for failure to maintain all necessary licensed and certifications require to perform the contracted services. (Ex. E4 at 2 and 3.)

(12) The contractors agreed to be responsible for all income and payroll taxes and levies imposed by federal, state or local government entities relating to amounts paid to the contractors by Appellant. The contractors agreed to carry workers compensation insurance if required by law, and to provide proof of such insurance to Appellant. The contractors agreed to obtain and maintain general liability insurance and errors and omissions insurance to cover their work, and to indemnify and hold Appellant harmless from all claims, demands, damages, actions suits, liabilities and losses of any kind arising out of or connected with the contractors' failure to pay taxes or carry insurance. (Ex. E4 at 3.)

(13) Under the ICAs, contractors were not entitled to any benefits which might be available to Appellant's employees. The contractors had no authority to enter into any contracts or other obligations on behalf of Appellant. The contractors had the authority to hire and fire their own employees to provide or to assist in providing contracted services. (Ex. E4 at 4.)

(14) If a contractor found a job listing of interest, Soliday contacted the district to set up a meeting between the district and the contractor. At this meeting, the district and the contractor discussed the district's specific needs, and, based upon its evaluation of the contractor's experience, training and availability, the district determined whether the contractor was a suitable match. If the district was interested in using the contractor's services, the district and the contractor informally agreed on the scope of work to be performed, the number of hours the contractor would work each week, the location where services were to be performed, and, in some cases, a schedule of specific days the contractor would be on-site to perform services. The contractors were free to accept or decline any work opportunities. (Test. of Soliday, Bowman, Carter-Anderson, Northam and Welch.)

(15) After the contractor and the district agreed to the scope of work to be performed by the contractor, Appellant negotiated an EA with the district. The EA incorporated the scope of work agreement between the district and the contractor. Under the EA, Appellant agreed to provide speech language or school psychology services to the district, including evaluation of students, program planning, IEP writing, and other services. The EA specified the number of hours to be worked each week, the place of performance, duration of the agreement, and rate of pay. For contracts covering less than a full school year, the districts agreed to pay Appellant $90 per hour. For contracts covering an entire school year, the districts agreed to pay Appellant $80 per hour. (Test. of Soliday; Ex. A16 at 1.)

(16) Under the EA, Appellant and the district agreed that Appellant provided services to the district as an independent contractor, that the contractors employed by Appellant worked under Appellant's exclusive control, and that the contractors provided services as Appellant's independent contractors. (Ex. A16 at 2.)

(17) Appellant provided no training to the contractors and did not supervise their work. The Districts required the contractors to provide periodic reports evaluating each student's progress.

Appellant and the districts did not impose deadlines on the contractors for completing the assigned work. Each district had its own report formats and selected the performance measures used to evaluate student progress. The districts designed their report formats and performance measures to comply with federal and state requirements regarding IEPs. The contractors were required to use district report formats and performance measures. The contractors were expected to use independent professional judgment in preparing reports and evaluating student progress. (Test. of Soliday, Bowman, Bensen, Carter-Anderson, Doerr, Welch and Northam.)

(18) The contractors were expected to fix any problems with their work, and did not expect to be paid for their time fixing problems. A contractor could not work more hours per month than provided for under Appellant's EA with the district for that work assignment, unless the contractor obtained prior approval from the district for extra hours. (Test. of Soliday, Bowman, Bensen, Carter-Anderson, Doerr, Welch and Northam.)

(19) During the period in issue, 49 contractors provided services for Appellant as SLPs. To qualify as an SLP, the contractors needed to have a Masters Degree in Speech Language Pathology or Communication Disorders, and to be licensed by the State Board of Examiners for Speech Language Pathology and Audiology (Board). SLP licenses must be renewed every two years, and SLPs are required to complete 30 hours of continuing education courses as a condition of license renewal. Board licenses cost $200 to $285, and the continuing education requirements cost $1,500 to $2,000 every two years. The SLPs were responsible for obtaining and maintaining the required licenses. The SLPs paid for their own licenses and continuing education courses. Under the contract, the SLPs were required to obtain and maintain professional liability insurance. The SLPs all had professional liability insurance covering their work during the period in issue. The SLPs paid $105 to $200 per year for their insurance. (Test. of Carter-Anderson and Bensen; Ex. E4 at 3 - 4.)

(20) The SLPs used a variety of assessment and treatment tools, including: speech articulation measures; audiometers; language assessment tests; oral and visual tests; worksheets; and exercise books. Appellant provided none of the tools used by the SLPs. The Districts provided most of the tools used by the SLPs. The SLPs provided some of the assessment and treatment tools they used in providing services. Bowman used a laptop computer, which she purchased for $2,000, and a variety of IPad applications, which she purchased for $600. The SLPs were free to select which tools to use in evaluating and treating students. Appellant and the Districts did not have the authority to tell the SLPs which tools to use or how to use them. (Test. of Soliday, Bowman, Carter-Anderson and Doerr.)

(21) The SLPs performed most of the contracted work at district facilities selected by the Districts. The SLPs performed some recordkeeping and report writing work in their home offices. (Test. of Bowman, Carter-Anderson and Doerr.)

(22) Bowman maintained an office in her home, in a space dedicated to business purposes. (Test. of Bowman.) Northam maintained a dedicated office space in her home and also maintained a separate room used for meetings with her private practice clients. (Test. of Northam.) Doerr did not maintain a separate office and did not maintain a dedicated office space in her home. Doer used office space provided by the districts. (Test. of Doerr.)

(23) Bowman and Doerr did not provide contract services for any other persons within 12 months of the period in issue. (Test. of Bowman and Doerr.) Northam worked as a private practitioner

for 8 years before beginning work with Appellant and provided contract SLP services for a private school for four years. (Test. of Northam.)

(24) Bowman maintained an online profile on the Linked In social networking site and a website to advertise her private practice, which she published on the Google search engine website. (Test. of Bowman). Doerr did not advertise her services to other clients or referral services. Doerr's contact information was published in state and national SLP organization membership directories. (Test. of Doerr.) Northam maintained online profiles on the Linked In and Facebook social networking sites. Northam's contact information was published in directories maintained by state professional organizations and the state licensing board. Northam relied primarily on work of mouth to obtain other work. (Test. of Northam.)

(25) During the period in issue, four contractors provided services for Appellant as SPs. To qualify as an SP, the contractors needed to have a Master's Degree in Educational Psychology or School Psychology, and to have state and national licenses. The state licenses cost $130 to $150 per year and the national licenses cost $250 per year. The SPs were responsible for obtaining and maintaining the required licenses. The SPs paid for their own licenses. Under the contract, the SPs were required to obtain and maintain professional liability insurance. The SPs all had professional liability insurance covering their work during the period in issue. The SPs paid $110 per year for their insurance. (Test. of Bensen and Carter-Anderson; Ex. E19 at 4.)

(26) The SPs used a variety of resources to provide services, including: intelligence (IQ) tests; behavioral tests, assessment kits, reinforcements and prizes; and computers. Appellant provided none of the resources used by the SPs. The districts provided most of the resources used by the SPs. The SPs provided their own computers. The SPs were free to select which tools to use in evaluating and treating students. Appellant and the districts did not have the authority to tell the SPs which tools to use or how to use them. (Test. of Bensen and Carter-Anderson.)

(27) The SPs provided all contract services at district facilities selected by the districts. (Test. of Bensen and Carter-Anderson.)

(28) Bensen had an office in her home in a space she used 50 to 60 percent of the time for business. (Test. of Bensen). Carter-Anderson maintained an office in her home, in a room dedicated primarily to business purposes. (Test. of Carter-Anderson.)

(29) For a six-month period ending in March 2011, Bensen provided contracted services for Mt. Hood Community College. Bensen also provided contracted services as a behavioral consultant for a preschool program. (Test. of Bensen.) Carter-Anderson did not provide contracted services for another person within 12 months of the period in issue. (Test. of Carter-Anderson.)

(30) Bensen had business cards when she began work with Appellant, but otherwise did not advertise or market her services to others. (Test. of Bensen.) Carter-Anderson had business cards and conducted some social networking on Facebook and on a peer-to-peer listserv network, but otherwise relied upon Appellant to find work opportunities. (Test. of Carter-Anderson.)

(31) During the period in issue, Welch provided services for Appellant as an OT. To qualify as an OT, Welch needed a Bachelor's degree in Occupational Therapy, and certifications from the Oregon Occupational Therapists Association (Oregon Association) and the National Board of Occupational

Therapists (National Board). Oregon Association certificates cost $85 every two years, and National Board certificates cost $100 to $150 per year. Welch was responsible for obtaining and maintaining the required certificates. Welch paid for her certificates. Under the contract, Welch was required to obtain and maintain professional liability insurance. Welch had professional liability insurance covering her work during the period in issue. Welch paid $195 per year for her insurance. Welch maintained an office in a room in the basement of her home, which she used primarily for business. Welch did not provide contracted services for another person within 12 months of the period in issue. Welch did not advertise her services as a contract OT. Welch created a Linked In profile and her contact information was listed in the National Board's member directory. (Test. of Welch.)

CONCLUSIONS OF LAW

(1) The services performed by the contractors during the period in issue did not constitute taxable employment under ORS 657.030 through ORS 657.094.

(2) Services for remuneration upon which the February 15, 2012 Assessment was based did not constitute taxable wages under ORS 657.105 through 657.140.

(3) Appellant is not an "employer" as of January 1, 2010, under ORS 657.025 and ORS 657.679.

(4) The Notice of Assessment issued February 15, 2012 is not correct.

OPINION

1. Taxable Employment

Pursuant to ORS 657.030(1), taxable employment means service performed for an employer, for remuneration.[6] The Department concluded that Appellant had taxable wages of $2,855,099.32 during the period in issue.[7] Appellant did not dispute the Department's conclusion that the contractors performed services for Appellant for remuneration during the period in issue, and did not assert or show that the Department's accounting of payments made to the contractors was inaccurate. However, Appellant disputed the Department's conclusion that the services constituted taxable employment.

---

[6] ORS 657.030(1) provides:

> As used in this chapter, except as provided in ORS 657.035, 657.040 and 657.043 to 657.094, "employment" means service for an employer, including service in interstate commerce, within or outside the United States, performed for remuneration or under any contract of hire, written or oral, express or implied.

[7] In its Assessment, the Department found that Appellant had taxable wages of $2,869,970.82; at the hearing, the Department presented an amended accounting for the period in issue which reduced total taxable wages for the period in issue. *See* Ex. A23.

A. Independent Contractor Exclusion under ORS 657.600(2)

Appellant argued that the services provided by the contractors did not constitute subject employment because the contractors performed services as independent contractors, not as employees. Pursuant to ORS 657.040(1),[8] services performed by an individual for remuneration are deemed taxable employment unless the individual is an independent contractor, as that term is defined in ORS 670.600.

A potential employer must show all the factors set forth in ORS 670.600 apply before payments to an individual can be considered payments to an independent contractor and therefore excluded from taxable employment. *Travel Networks, LLC v. Employment Dept.*, 175 Or App 502 (2001). Pursuant to ORS 657.683(4), the Department's Determination is *prima facie* correct, and the employer must prove that it is incorrect.[9] In the absence of legislation specifying another standard, the standard of proof in an administrative hearing is preponderance of the evidence. *Metcalf v. AFSD*, 65 Or App 761, 765 (1983). Preponderance of the evidence means evidence sufficient to persuade the fact finder that facts asserted are more probably true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

In this case, six contractors testified, including three SLPs, two SPs and one OT. The parties stipulated that the testimony of the contractors who appeared is representative testimony, and that the testimony of each representative witness applies to all of the individuals within the group represented by the witness. Accordingly, Appellant must show that, as to each group, the preponderance of the evidence supports its assertion that the members of each group provided services as independent contractors.

ORS 670.600 provides:

(1) As used in this section:

(a) "Individual" means a natural person.

(b) "Person" has the meaning given that term in ORS 174.100.

(c) "Services" means labor or services.

---

[8] 657.040(1) provides:

> Services performed by an individual for remuneration are deemed to be employment subject to this chapter unless and until it is shown to the satisfaction of the Director of the Employment Department that the individual is an independent contractor, as that term is defined in ORS 670.600.

[9] ORS 657.683(4) provides, in relevant part:

> At any hearing held as provided in ORS * * * 657.679 * * *, the determination * * * of the director or authorized representative shall be prima facie correct and the burden shall be upon the protesting employing unit to prove that it is incorrect.

(2) As used in ORS chapters * * * 657 * * *, "independent contractor" means a person who provides services for remuneration and who, in the provision of the services:

(a) Is free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;

(b) Except as provided in subsection (4) of this section, is customarily engaged in an independently established business;

(c) Is licensed under ORS chapter 671 or 701 if the person provides services for which a license is required under ORS chapter 671 or 701; and

(d) Is responsible for obtaining other licenses or certificates necessary to provide the services.

(3) For purposes of subsection (2)(b) of this section, a person is considered to be customarily engaged in an independently established business if any three of the following requirements are met:

(a) The person maintains a business location:

(A) That is separate from the business or work location of the person for whom the services are provided; or

(B) That is in a portion of the person's residence and that portion is used primarily for the business.

(b) The person bears the risk of loss related to the business or the provision of services as shown by factors such as:

(A) The person enters into fixed-price contracts;

(B) The person is required to correct defective work;

(C) The person warrants the services provided; or

(D) The person negotiates indemnification agreements or purchases liability insurance, performance bonds or errors and omissions insurance.

(c) The person provides contracted services for two or more different persons within a 12-month period, or the person routinely engages in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.

(d) The person makes a significant investment in the business, through means such as:

(A) Purchasing tools or equipment necessary to provide the services;

(B) Paying for the premises or facilities where the services are provided; or

(C) Paying for licenses, certificates or specialized training required to provide the services.

(e) The person has the authority to hire other persons to provide or to assist in providing the services and has the authority to fire those persons.

(4) Subsection (2)(b) of this section does not apply if the person files a Schedule F as part of an income tax return and the person provides farm labor or farm services that are reportable on Schedule C of an income tax return.

(5) For purposes of determining whether an individual provides services as an independent contractor:

(a) The creation or use of a business entity, such as a corporation or a limited liability company, by an individual for the purpose of providing services does not, by itself, establish that the individual provides services as an independent contractor.

(b) When the individual provides services through a business entity, such as a corporation or a limited liability company, the provisions in subsection (2), (3) or (4) of this section may be satisfied by the individual or the business entity.

Under ORS 670.600(2), in order to prevail, Appellant must establish that the contractors were free from its direction and control in providing services, that the contractors were customarily engaged in independently established businesses, and that the contractors were responsible for obtaining any licenses or certificates necessary to provide the services. ORS 670.600(2)(a), (b) and (d). Because the services in issue were not subject to the licensing requirements of ORS Chapters 671 or 701, ORS 670.600(2)(c) does not apply.

During the period in issue, the contractors were responsible for obtaining and maintaining all licenses required to perform services in their profession, thus satisfying the requirement of ORS 670.600(2)(d). The next issue is whether the contractors were free from Appellant's direction and control in performing contracted services.

i. Direction and Control

The first element of the independent contractor test, set forth at ORS 670.600(2)(a), the requirement that the provider be free from the employer's direction and control, is further defined by administrative rule.

OAR 471-031-0181 provides, in part:

(3) Direction and Control Test. (a) ORS 670.600 states that an "independent contractor" must be "free from direction and control over the means and manner" of providing

services to others. The agencies that have adopted this rule will use the following definitions in their interpretation and application of the "direction and control" test:

(A) "Means" are resources used or needed in performing services. To be free from direction and control over the means of providing services an independent contractor must determine which resources to use in order to perform the work, and how to use those resources. Depending upon the nature of the business, examples of the "means" used in performing services include such things as tools or equipment, labor, devices, plans, materials, licenses, property, work location, and assets, among other things.

(B) "Manner" is the method by which services are performed. To be free from direction and control over the manner of providing services an independent contractor must determine how to perform the work. Depending upon the nature of the business, examples of the "manner" by which services are performed include such things as work schedules, and work processes and procedures, among other things.

(C) "Free from direction and control" means that the independent contractor is free from the right of another person to control the means or manner by which the independent contractor provides services. If the person for whom services are provided has the right to control the means or manner of providing the services, it does not matter whether that person actually exercises the right of control.

(b) Right to specify results to be achieved. Specifying the final desired results of the contractor's services does not constitute direction and control over the means or manner of providing those services.

(4) Application of "direction and control" test in construction and landscape industries:

(a) The provisions of this section apply to:
* * * * *
(E) Construction contractors licensed under ORS Chapter 701.

(b) A licensee described in (6)(a), that is paying for the services of a subcontractor in connection with a construction or landscape project, will not be considered to be exercising direction or control over the means or manner by which the subcontractor is performing work when the following circumstances apply:

(A) The licensee specifies the desired results of the subcontractor's services by providing plans, drawings, or specifications that are necessary for the project to be completed.

(B) The licensee specifies the desired results of the subcontractor's services by specifying the materials, appliances or plants by type, size, color, quality, manufacturer, grower, or price, which materials, appliances or plants are necessary for the project to be completed.

(C) When specified by the licensee's customer or in a general contract, plans, or drawings and in order to specify the desired results of the subcontractor's services, the licensee provides materials, appliances, or plants, including, but not limited to, roofing materials,

framing materials, finishing materials, stoves, ovens, refrigerators, dishwashers, air conditioning units, heating units, sod and seed for lawns, shrubs, vines, trees, or nursery stock, which are to be installed by subcontractors in the performance of their work, and which are necessary for the project to be completed.

(D) The licensee provides, but does not require the use of, equipment (such as scaffolding or fork lifts) at the job site, which equipment is available for use on that job site only, by all or a significant number of subcontractors requiring such equipment.

(E) The licensee has the right to determine, or does determine, in what sequence subcontractors will perform work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

(F) The licensee reserves the right to change, or does change, in what sequence subcontractors will perform work on a project, the total amount of time available for performing the work, or the start or end dates for subcontractors working on a project.

ORS 670.600 was enacted by the legislature, and OAR 471-031-0181 was adopted by the Department, after a cooperative effort among several state agencies, to create a unified definition of the term "independent contractor." The legislature intended with ORS 670.600 to codify the "right to control" case law developed in workers' compensation cases. *S-W Floor Cover Shop v. Nat'l Council on Comp. Ins.,* 318 Or 614 at 630 (1994). In *S-W Floor,* the Oregon Supreme Court further found that, in the worker's compensation arena, the test for determining "control" is based not on the actual exercise of control * * * but on the right to control. *Id.* The Court listed several factors considered by the courts to determine whether a "right to control" established an employment relationship, including: whether the employer retains the right to control the details of the method of performance; the employer's control over work schedules; whether the employer has power to discharge the person without liability for breach of contract; payment of wages; and, whether the employee was actually under the control of another person during the process of the work. *Id.* at 622.

In *Avanti Press v. Employment Dept.,* 248 Or App 450 (2012), the Oregon Court of Appeals also addressed the direction and control element. After reviewing the factors set out in *S-W Floor*, the Court of Appeals observed that the "[R]ight to control is a matter of degree * * * [and], [e]ven in the purest of independent contractor situations * * * the client could give some instructions about where the services were to be performed." *Avanti,* 248 Or App at 461, citing *Pam's Carpet Service v. Employment Div.,* 46 Or App 675, 681 (1980). In other words, the right to control test has never required that an independent contractor be free from *all* direction and control; rather the question is whether the party contracting for services maintains control over the "means and manner" of performance or, instead, gives more generalized instructions concomitant to the "right of the person* * * to specify the desired results." *Avanti,* at 461, citing ORS 670.600(2)(a). The Court of Appeals in *Avanti* balanced five factors to determine whether the employer retained a right of control: (1) direct evidence of the right to or the exercise of control; (2) the method of payment; (3) the furnishing of equipment; (4) the right to fire, and; (5) the intent of the parties to create an independent contractor relationship.[10] *Avanti,* at 462 – 463. *S-W*

[10] *But see, Woody v. Waibel,* 276 Or App 189 (1976), where the Court of Appeals held that the fact that the parties may have believed and operated on the premise that their relationship was that of an independent contractor does not control the outcome of the required analysis under the applicable laws.

Floor and *Avanti,* read together, suggest that analysis of direction and control may involve several relevant factors, and that the factors used depends largely on the nature of the services provided. Both cases focused on elements of control affecting the details of performance, including decisions about work schedules, which tools were used, how the tools were used, and how the work was to be performed.

Appellant entered into contractual relationships with the contractors before separately contracting with the client school districts to provide services. Most of the specific requirements affecting the details of performance resulted from the informal agreements reached between the contractors and the districts, which were later incorporated into the EAs between Appellant and the client. The contractors and clients agreed on such things as the number of hours the contractors would devote to each client's needs, the place of performance, and the days of the week the contractors would be on-site to provide services. In most cases these factors would represent limitations on the contractor's discretion in performing services. However, because these specific elements were in fact negotiated between the contractors and the client, the controls were imposed by the client, not by Appellant, and were therefore outside the scope of the agreements between Appellant and the contractors. In that respect, these factors cannot be fairly interpreted as control reserved or exercised by Appellant.

Appellant provided no training to or supervision of any of the contractors. Before contracting with Appellant, each of the contractors obtained the education and licenses required to perform the contracted services. Subject to some decisions dictated by the districts, the contractors were free to decide what evaluation, testing and treatment protocols to use, and were expected to use independent judgment in evaluating a student's eligibility for IEP services and in selecting appropriate curriculum for each eligible student. While Appellant required the contractors to submit their time records on a monthly basis, and provided a form for the contractors to use for reporting their time, the contractors were not required to use Appellant's form. Generally, I am persuaded that the monthly timekeeping requirement was within Appellant's right to specify a desired result, and in this case more directly related to the districts' billing practices. I am therefore persuaded that the contractors were free from Appellant's control over the details of performance.

To provide contracted services, the contractors needed various tools and equipment, all of which either the contractors or the clients provided. Even where a district required a contractor to use a specific testing tool, I am persuaded that such decisions were dictated by the nature of the work and by requirements of state and federal law, not by the nature of the relationship between the parties. I therefore conclude that the provision of tools suggests an independent contractor relationship between Appellant and the contractors.

In *Avanti*, where the outside salesperson was paid on a commission rate, and where the employer had no expectation regarding the number of hours the salesperson would devote to the contracted work, the Court of Appeals found that the method of payment was largely "neutral." *Avanti*, at 465, citing *1C Larson, Workmen's Compensation Law* §44.33(b). In this case, Appellant paid the contractors an hourly rate, based in part on the nature of the specific services provided and in part on the contractor's years of experience in the field. Payments to the contractors were therefore based on the amount of time the contractor spent on a particular job, and arguably related to Appellant's interest in how each of the contractors spent their time. However, Appellant's witnesses consistently testified that in their field, unless engaged as a salaried employee, they billed contracted speech language services to their private

clients on an hourly basis. Therefore, while the method of payment here is distinguishable from the method of payment in *Avanti*, I am persuaded that the method of payment is also neutral, suggesting neither employment nor independence.

All of Appellant's witnesses testified persuasively that the parties intended to create independent contractor relationships between Appellant and the subcontractors. Pursuant to *Avanti*, this intention is evidence suggesting and independent contractor relationship.

In Avanti, the employer's right to terminate the contract without liability for breach of contract suggested control rather than independence. *Avanti*, at 465. Under the ICAs, all services were at-will and were subject to termination by either party at any time and for any reason by either party. Appellant also retained the right to terminate the ICAs in the event of fraud, dishonesty, or other misconduct, failure to perform, insolvency, or for failure to maintain all necessary licensed and certifications require to perform the contracted services. At the hearing, Soliday testified that the unconditional right to terminate applied only to short term contracts covering less than a full school year, and that the conditional right to terminate applied only to long term contracts covering a full school year. However, nothing in the written contract supports this interpretation. Appellant's unrestricted right to terminate the contracts at will suggests an employment relationship rather than independence.

Although Appellant's unrestricted right to terminate the contracts suggests an employment relationship, Appellant's lack of control over the details of providing services, together with the intent of the parties to create independent contractor relationships, all suggest an independent contractor relationship, particularly where, as here, much of the "control" was the result of negotiations between the contractors and Appellant's clients. Appellant therefore satisfied the first element of the independent contractor test set forth in ORS 670.600(2)(a).

ii. Customarily Engaged in an Independently Established Business

The next issue, set forth at ORS 670.600(2)(b), is whether the contractors were customarily engaged in independently established businesses. To satisfy this element of the test, Appellant must establish that each of the contractors met at least three of the five requirements set forth in ORS 670.600(3)(a) through (e).

Three SLPs testified at the hearing, representing the group of 49 SLPs who provided services during the period in issue. Two of the three representative witnesses, Bowman and Northam, testified that they maintained offices in their homes dedicated primarily to business use. The third, Doerr, testified that she did not maintain any kind of separate office space. Because two thirds of the SLPs met the requirement of ORS 670.600(3)(a), Appellant established that, more likely than not, all of the members of the SLP group met this requirement.

Two SPs testified at the hearing, representing the group of four SPs who provided services during the period in issue. Carter-Anderson testified that she maintained a dedicated office space in her home. On the other hand, Bensen testified that she used a room in her home 50 to 60 percent of the time for business. The issue here is whether "50 to 60 percent" constitutes "primarily" under in the statute. Unfortunately, "primarily" is not defined in the statute. Pursuant to *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), when interpreting undefined statutory language, words of common usage typically should be given their plain, natural, and ordinary meaning. *PGE,* 317 Or at 611. "Primarily"

is defined as "first of all: fundamentally, principally." *Webster's Third New Int'l Dictionary* 1800 (unabridged ed 2002). I am persuaded that a space used on average more than 50 percent of the time is principally or primarily used for business. Accordingly, Bensen and Carter-Anderson both maintained an office in a portion of their residence that was used primarily for their businesses. Appellant thus established that, more likely than not, all of the members of the SP group met the requirement of ORS 670.600(3)(a).

Welch testified that she maintained a dedicated office space in her home, thereby satisfying the requirement of ORS 670.600(3)(a).

Under the ICAs, all of the contractors were required to maintain business liability and errors and omissions insurance, and all of the contractors agreed to indemnify Appellant against any losses caused by their work. In addition, if the districts did not pay Appellant, or if the districts paid Appellant's invoices late, all of the contractors bore some risk that they might not be paid for their work, or that payment would be delayed. Accordingly, all of the contractors bore some risk of loss, satisfying the requirement of ORS 670.600(3)(b).

Of the three SLPs who testified, Doerr did not advertise her services; Bowman and Northam made some limited use of online social networking sites, and Northam's contact information was published in various membership directories. I am not persuaded that these activities constituted advertising efforts which were reasonably calculated to obtain new contracts to provide similar services. On that basis, I therefore conclude that the SLPs did not meet the requirements of ORS 670.600(3)(c).

Of the two SPs who testified, neither did any advertising other than the occasional use of social networking sites, and only Benson provided services to at least one other person within 12 months of the period in issue. Appellant therefore failed to show that, more likely than not, the SPs met the requirements of ORS 670.600(3)(c).

Welch testified that she did not advertise her services and did not provide services to any other persons during the period in issue. Welch therefore did not meet the requirements of ORS 670.600(3)(c).

A contractor needed either a bachelor's or master's degree to qualify for work in his or her chosen profession. However, while the investment in their educational requirements was significant, I am persuaded that this expense represented a cost of entering the profession, rather than an investment in a business. On the other hand, while most of the resources used by the contractors were provided by the districts, some of the contractors invested in testing and treatment materials, and all of the contractors paid for required licenses and insurance to cover their work. Given the nature of the work involved, I am persuaded that these expenditures represent significant investments in their businesses, thereby satisfying ORS 670.600(3)(d).

Under the ICAs, the contractors had the authority to hire and fire their own employees to provide or to assist in providing contracted services. As such, Appellant satisfied the requirements of ORS 670.600(3)(e).

Appellant established that all of the represented groups met at least three of the five elements of ORS 670.600(a) through (e). The contractors therefore met the requirements of individuals customarily

engaged in independently established businesses. As discussed above, Appellant also established that the contractors were free from Appellant's direction and control in providing services, under ORS 670.600(2)(a), and that all of the contractors were responsible for obtaining and maintaining licenses required by law, satisfying ORS 670.600(2)(d). Appellant therefore established that the contractors provided services as independent contractors. Pursuant to ORS 657.040(1), the services provided by the contractors did not constitute subject employment.

2. Taxable Wages

Pursuant to ORS 657.105(1), "wages" means all remuneration for employment.[11] However, because the services performed for Appellant by the contractors did not constitute subject employment, the payments made to the contractors were not taxable wages.

3. Taxable Employer

Pursuant to ORS 657.025(1), a subject employer is defined as any employing unit which employs one or more individuals in subject employment, in each of 18 separate weeks during any calendar year, or in which its total payroll during any calendar quarter amounts to $1,000 or more.[12] Pursuant to ORS 657.020(1), an employing unit is a company which had in its employ one or more individuals performing services for it within this state.[13] As discussed above, the Department found that Appellant was an employer subject to Employment Department law as of January 1, 2010. However, because

---

[11] ORS 657.105(1) provides:

> As used in this chapter, unless the context requires otherwise, and subject to ORS 657.115 to 657.140, "wages" means all remuneration for employment, including the cash value, as determined by the Director of the Employment Department under the regulations of the director, of all remuneration paid in any medium other than cash.

[12] ORS 657.025 provides, in part:

> (1) * * * "[e]mployer" means any employing unit which employs one or more individuals in an employment subject to this chapter in each of 18 separate weeks during any calendar year, or in which its total payroll during any calendar quarter amounts to $1,000 or more.
>
> * * * * *

[13] ORS 657.020 provides, in part:

> (1) * * * "[e]mploying unit" means:
>
> (a) Any individual or type of organization, including any partnership, association, limited liability company, limited liability partnership, trust, estate, joint stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or successor thereof, or the legal representative of a deceased person, who has or had in its employ one or more individuals performing services for it within this state.
>
> * * * * *

none of the services or wages included in the Assessment were subject to Employment taxes, Appellant is not an "employer" under ORS 657.025(1). The Department therefore incorrectly concluded that Appellant was subject to employment taxes as of January 1, 2010.

4. The Assessment

In the Assessment, the Department concluded that Appellant had taxable wages of $2,869,970.82 during the period in issue. At the hearing, the Department offered a revised accounting of payments to the contractors, asserting that Appellant had total taxable wages of $2,855,009.32 during the period in issue. *See* Ex. A23 at 1. As discussed above, Appellant showed that the services provided by the contractors were excludable from taxable employment and taxable wages. Therefore, the Assessment is not correct, and is set aside.

ORDER

(1) The Notice of Tax Assessment mailed February 15, 2012 is set aside. The Hello Foundation, LLC, is not liable for unemployment insurance tax for services provided by the contractors, during the period from the first quarter of 2008 through the third quarter of 2010, under ORS 657.030 through ORS 657.094.

(2) The Notice of Determination mailed December 18, 2010 is set aside. The Hello Foundation, LLC is not an "employer" as of January 1, 2010, under ORS 657.025 and ORS 657.679.

Greg Ballinger, Administrative Law Judge
Office of Administrative Hearings

APPEAL RIGHTS

This decision is a final order. An aggrieved party may file a petition for review within 20 days of the date this decision is mailed with the Court of Appeals, State of Oregon, for judicial review under the Administrative Procedure Act. See ORS 657.487 or 657.684, and ORS Chapter 183.310 to 183.500.