



MAILED

APR 13 2016

SEATTLE, WA

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
One Union Square • 600 University Street • Suite 1500 • Seattle, Washington 98101
(206) 389-3400 • (800) 845-8830 • FAX (206) 587-5135 • www.oah.wa.gov

April 13, 2016

Parents



Becky Anderson, Assistant Superintendent of Special Services
 Northshore School District
 3330 Monte Villa Parkway
 Bothell, WA 98021

Angela M. Shapow, Attorney at Law
 Shapow Law PLLC
 1037 NE 65th Street, #235
 Seattle, WA 98115

Carlos Chavez, Attorney at Law
 Tania M. Culbertson, Attorney at Law
 Pacifica Law Group LLP
 1191 Second Avenue, Suite 2000
 Seattle, WA 98101

In re: Northshore School District
 OSPI Cause Nos. 2015-SE-0094, 2016-SE-0001
 OAH Docket Nos. 10-2015-OSPI-00209, 01-2016-OSPI-00232

Dear Parties:

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

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

Sincerely,

MATTHEW D. WACKER
 Administrative Law Judge

RECEIVED

APR 15 2016

SUPERINTENDENT OF PUBLIC INSTRUCTION
 ADMINISTRATIVE RESOURCE SERVICES

cc: Administrative Resource Services, OSPI
 Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

MAILED

APR 13 2016

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

SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NOS. 2015-SE-0094
2016-SE-0001

OAH DOCKET NOS. 10-2015-OSPI-00209
01-2016-OSPI-00232

NORTHSHORE SCHOOL DISTRICT

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

A consolidated due process hearing in the above-entitled matters was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Bothell, Washington, over four days on January 19 – 22, 2016. The Parents of the Student whose education is at issue¹ appeared and were represented by Angela M. Shapow, attorney at law. The Northshore School District (hereafter the District) was represented by Carlos Chavez, attorney at law.² Also present for the District was Shannon Hitch, director of secondary special education. The following is hereby entered:

STATEMENT OF THE CASE

Parents' Complaint

The Parents filed a Due Process Hearing Request (hereafter the Parents' Complaint) with the Office of Superintendent of Public Instruction (OSPI) on October 19, 2015. The Parents' Complaint was assigned Cause No. 2015-SE-0094, and forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. On October 20, 2015, the Parents' Complaint was assigned OAH Docket No. 10-2015-OSPI-00209, and ALJ Michelle C. Mentzer was assigned as the presiding ALJ pursuant to a Scheduling Notice entered the same day. The Parents' Complaint was reassigned to ALJ Matthew D. Wacker pursuant to a Notice of Reassignment of Administrative Law Judge entered October 23, 2015, after the District filed a Motion of Prejudice on October 22, 2015. The District filed its Response to Parents' Hearing Request on October 27, 2015. A prehearing conference was held on November 18, 2015, followed by entry of Prehearing Orders on November 30, 2015, December 10, 2015, and December 18, 2015. A further prehearing conference was set for January 6, 2016.

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

² Tania Culbertson, attorney at law, was also present for the District on January 19, 2016.

District's Complaint

The District filed a Request for Due Process Hearing (hereafter the District's Complaint) with OSPI on January 4, 2016. The District's Complaint was assigned Cause No. 2016-SE-0001, and forwarded to the Office of Administrative Hearings (OAH) for assignment of an ALJ. On January 5, 2016, the District's Complaint was assigned OAH Docket No. 01-2016-OSPI-00232, and ALJ Wacker was assigned as the presiding ALJ pursuant to a Scheduling Notice entered the same day. The Scheduling Notice, in part, set a prehearing conference for January 6, 2016. The Parents subsequently filed their Response to District's Request for a Hearing on January 14, 2016.

Consolidation of Complaints

On January 4, 2016, the Parents filed a Motion for Consolidation and Continuance (the Motion). The Motion sought to consolidate the Parents' and the District's Complaints for one due process hearing, decision, and order. The Motion also sought a continuance of the due process hearing then set to commence on January 19, 2016, in order to have sufficient time to prepare for the consolidated hearing. On January 5, 2016, the District filed its Opposition to Parents' Motion for Continuance of Consolidated Action. The District joined in the Parents' request to consolidate the two Complaints for hearing, but opposed any continuance of the consolidated due process hearing. By agreement of the parties, a prehearing conference was held on the Parents' motion on January 6, 2016.

At the prehearing conference, the parties agreed to consolidate the two Complaints for one due process hearing, decision, and order. After further discussion, the Parents withdrew their motion to continue the consolidated hearing, and the consolidated hearing was set to commence January 19, 2016. A Prehearing Order was entered on January 7, 2016. On January 13, 2016, the District filed its Motion *in Limine* Regarding Irrelevant and Inadmissible Testimony and Documentary Evidence, seeking to exclude evidence the Parents might seek to introduce at the consolidated hearing. The District's Motion *in Limine* was heard and decided at a prehearing conference held on January 15, 2016.

Due Date for Consolidated Decision and Order

The due date for the written decision on the Parents' Complaint was continued to thirty calendar days after the close of the hearing record, pursuant to the District's motion. See First Prehearing Order entered November 30, 2015, under Docket No. 2015-SE-0094. At the conclusion of the consolidated hearing, the District moved to extend the due date for a written decision on the District's Complaint to thirty calendar days after the close of record. The Parents did not object, and the motion was granted.

By agreement of the parties, post-hearing briefs were due and were filed on March 14, 2016. The record closed on that date. Thirty calendar days from March 14, 2016, is April 13, 2016. Therefore, the due date for a decision and order in the above consolidated matters is **APRIL 13, 2016**.

////
////
////

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents Exhibits: P1-P8, P10-P11, P15-P17, P19-P32, P44-P49, P51-P54, P56.

District Exhibits: D1-D7, D9-D16, D18.

Joint Exhibits: J1-J13.

The following witnesses testified under oath. They are listed in order of their appearance:

Jacque Ter-Veen, District School Psychologist,
Colin White, District General Education History Teacher,
Vicki Nelson, Private Occupational Therapist,
Katherine Jewell, Private Reading Specialist,
Janet Prendergast, District Occupational Therapist,
Pamela Sutton, District General Education English Teacher,
Jennifer Miller, District Assistive Technology Team Leader,
Shannon Hitch, District Director of Secondary Special Education,
The Father of the Student,
Jennifer Blair, Neuropsychologist,
The Mother of the Student,
Rachel Keir, Assistant Director for Brooks Academy.

ISSUES and REMEDIES³

The statement of the issues and remedies in this consolidated case is as follows:

- a. Whether the District denied the Student a free appropriate public education (FAPE) by:
 - i. Exiting the Student from special education and related services during May 2015 or,
 - ii. Failing to implement the Student's individualized education program (IEP) from April 15, 2015, to May 18, 2015.

- b. Whether the Student is eligible to receive special education under the IDEA based upon the Student's dysgraphia adversely impacting the Student's educational performance to the extent the Student needs specially designed instruction (SDI) including, but not limited to, SDI in writing, spelling, using written language, and/or occupational therapy (OT) services.

³ See Fourth Prehearing Order entered January 7, 2016.

- c. If the Student is eligible to receive special education, are OT services and/or assistive technology (AT) services required as a related service to assist the Student in benefiting from special education.
- d. Whether the Parents are entitled to their requested remedies:
- i. A declaration that the Student was denied FAPE and remains eligible for special education and related services;
 - ii. An order requiring the District to convene an IEP meeting for the purpose of designing an IEP for the Student in conformity with the IDEA and implementing State regulations;
 - iii. Reimbursement for private services provided by the Parents, or in the alternative compensatory education, from September 23, 2015, until the ALJ enters a decision and order after the due process hearing;
 - iv. Compensatory education from April 15, 2015, to May 18, 2015 during when the District failed to implement the Student's IEP;
 - v. Compensatory education from May 18, 2015, until the ALJ enters a decision and order after the due process hearing;
 - vi. Or other equitable remedies, as appropriate.
- e. Whether the District's May 2015 reevaluation of the Student was appropriate and if not, whether the Parents are entitled to an IEE at District expense.

FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence.

General Background

1. The Student has attended school in the District beginning with first grade. He was initially evaluated and determined eligible to receive special education and related services during fourth grade as a student with a specific learning disability in the area of written expression. In 2010, the Parents requested and received an independent educational evaluation of the Student at the District's expense. The Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). The Student's eligibility category was subsequently changed from specific learning disability to other health impairment to reflect the new diagnosis. A triennial reevaluation of the Student was carried out in November 2013, at which time the Student's eligibility category was changed back to specific learning disability. The Student continued to receive specially designed instruction in written expression. Exhibit J9p6.

2. In October 2014, the Parents requested another independent educational evaluation at the District's expense. The District offered an early triennial reevaluation, which the Parents accepted. The Parents subsequently withdrew their consent for an early reevaluation and renewed their request for an independent educational evaluation. The District agreed to provide the evaluation at District expense in November 2014. Exhibit J9p6.

3. The Student attended ninth grade at a District middle school during the 2014-2015 school year. Exhibit J9p5.

The Parents' Independent Educational Evaluation of the Student

4. After the District agreed to the Parents' request that it fund an independent educational evaluation (IEE) of the Student, the Parents selected Jennifer R. Blair, PhD., to conduct the IEE. Exhibit D5; Hitch-491.⁴

5. Dr. Blair holds a PhD. in neuropsychology and has over twenty years' of academic and clinical experience providing assessment, diagnostic, and direct services to children and young adults.⁵ Neither the Parents nor the District have raised any issues regarding Dr. Blair's education, training, or experience to perform the IEE, or offer her expert opinion regarding the Student based on the results of the IEE.

6. Dr. Blair conducted the IEE over three days in January 2015. Dr. Blair's report of the IEE was received by the District sometime before February 27, 2015. Exhibit J1; Hitch-493.

7. The significant and relevant findings of Dr. Blair's IEE report are summarized below. Dr. Blair selected multiple standardized tools to assess the Student's intellectual functioning, academic achievement, fine and visual motor skills, attention, and socio-emotional functioning. See Exhibit J1, generally.

8. Dr. Blair selected the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) to assess the Student's intellectual functioning. Exhibit J1p4. The Student's Full Scale IQ was 98. Exhibit J1p5. But based upon the variability in his subtest scores, instructions from the test-provider, and her education, training, and experience, Dr. Blair concluded that the Student's General Ability Index (GAI) score of 105 more accurately reflects the Student's intellectual functioning. Blair-538. This GAI score reflects intellectual performance in the average range for a child of the Student's age at the time of the IEE. J1p5. Based upon her assessment of the Student's intellectual functioning during the IEE, Dr. Blair does not believe any further cognitive assessment of the Student is necessary. Blair-566.

9. Dr. Blair used selected subtests of the Woodcock-Johnson III Normative Update Tests of Achievement (WJ-III) to assess the Student's academic achievement. Exhibit J1pp3, 6. The Student received a standard score of 82 for the Basic Writing Skills cluster, and a standard

⁴ References to the Record of the Proceedings, as necessary, are identified by the witness name (Hitch) and page number (491).

⁵ Dr. Blair's *curriculum vitae* appears in the record at Exhibit P47.

score of 92 for the Written Expression cluster. Exhibit J1p6. The Student earned a standard score of 86 for the Math Calculation Skills cluster. Exhibit J1p8.

10. Dr. Blair also used selected subtests of the Test of Written Language – Third Edition (TOWL-3) to assess the Student's written language. Exhibit J1p7; Blair-560. The Student's scaled score was 6 on the subtest for Contextual Conventions (spelling, punctuation, capitalization), 8 on the subtest for Contextual Language (grammar, sentence structure, vocabulary), and 12 on the subtest for Story Construction (theme, plot, sequencing). Exhibit J1p7.

11. Dr. Blair selected the Wide Range Assessment of Visual Motor Abilities (WRAVMA) (Drawing) to determine whether the Student's fine and visual motor skills are contributing to the Student's troubles with handwriting. The Student scored in the average range, and Dr. Blair concluded that the Student's troubles with handwriting and copying are likely not related to a primary motor dysfunction. Exhibit J1p8; Blair-548. Dr. Blair believes that the Student's difficulties with handwriting are likely related to processing and working memory issues. Blair-562. Processing speed likely to be the most significant factor contributing to the Student's difficulties with handwriting. Blair-567. Based on her assessment during the IEE, Dr. Blair does not believe any further assessment of the Student's fine or visual motor skills is needed. Blair-561.

12. Dr. Blair selected the Conners' Continuous Performance Test-Second Edition (CCPT-2) and the ADHD Rating Scale-IV: Home and School Versions to assess the Student's attention. The Student scored in the average to high average range on these assessments. Exhibit J1pp8-9. Dr. Blair determined these scores revealed mild, but not significant, difficulties with the Student's attention processes, but that his symptoms, even as reported by the Parents, did not currently meet severity or cross-setting criterion for an attention disorder diagnosis, i.e., ADHD. Exhibit J1p10; Blair-552.

13. Based upon the Student's GAI score of 105, the standard scores from the WJ-III, and utilizing the State of Washington Severe Discrepancy Table (Exhibit P8p14), Dr. Blair concluded that the Student has a severe discrepancy between his intellectual functioning and his academic achievement in Math Calculation (GAI Score 105; Standard Score 84). Dr. Blair concluded the Student meets the criterion for a specific learning disability (SLD) in the area of Math Calculation pursuant to the Washington Administrative Code (WAC). Exhibit J1p9

14. Dr. Blair also concluded that the Student has a severe discrepancy (GAI Score 105; Standard Score 82) in the area of "Basic Writing." Dr. Blair concluded that the Student meets the WAC guidelines for an SLD in the area of "Basic Writing." Exhibit J1p10; Blair-552.

15. It is Dr. Blair's opinion that the Student has an SLD in "Basic Writing" even though Basic Writing is not identified in the WAC administrative rules as an area for identification of SLDs. See WAC 392-172A-03055(1). In Dr. Blair's opinion, basic writing would be included under the area of Written Expression. Blair-571.

16. In her IEE report, Dr. Blair remarked that "[d]isorders of written expression are sometimes referred to as 'dysgraphia,' a general term that includes difficulties with fine motor control and handwriting, spelling and conventions, grammar, and various disorders of written

expression...[The Student's] writing disability appears limited to the underlying basics of handwriting and conventions." Exhibit J1p10.

17. At hearing, Dr. Blair confirmed that she did not "diagnose" the Student with dysgraphia based on her IEE, as that is no longer a diagnosis pursuant to the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-V). As the IEE was a "school-based" evaluation, Dr. Blair looked to the WAC guidelines, and gave the Student a "Washington Administrative Code diagnosis." Blair-574-575.

18. Dr. Blair also concluded that the Student had "difficulty on measures of working memory (i.e., holding information "in mind" for further processing) and graphomotor (copying) speed." Exhibit J1p9. This will result in the Student having trouble taking notes in class, copying assignments, and finishing assigned tasks on time. The Student will have difficulty writing in school. Blair-538-539.

19. Dr. Blair made the following recommendations for the Student:

- 1) Continued *direct instruction*⁶ in handwriting, spelling, capitalization, punctuation, and editing are recommended. Direct instruction could take place either through [the Student's] school or through a private provider...
- 2) Training in alternatives to writing (e.g. keyboarding, voice recognition software) are additionally recommended...Assessment through the District's assistive technology expert or through a private provider is recommended. At a minimum, provision of a computer/keyboard system with keyboarding and spelling/grammar checks is recommended.
- 3) Accommodations for [the Student's] troubles with writing and math fact recall are additionally recommended. Accommodations might include, but not necessarily be limited to, the following:
 - Allow [the Student] extra time and a private, relatively distraction-free setting to complete all in-class and standardized tests and assignments.
 - Provide [the Student] the use of a keyboard for all school-related work.
 - Allow [the Student] the use of other technologies to assist in the writing process (e.g. spell-check pens, grammar checks, electronic dictionaries).
 - Allow [the Student] the use of a calculator on all in-class and standardized tests and assignments.
 - Assess [the Student's] knowledge through oral, multiple choice, or short answer, rather than essay, formats whenever possible.
 - Reduce copying demands by providing copies of class notes, math worksheets, and assignments.
 - Do not count spelling mistakes as substantive errors, unless spelling itself is being assessed in itself (sic).
- 4) Although [the Student] technically meets criterion for a specific learning disability in the area of math calculation, *specially designed instruction* is not necessarily recommended in this regard. Rather, informal practice on online math fact

⁶ Dr. Blair appears to use the term "direct instruction" and "specially designed instruction" interchangeably in the recommendations section of her IEE report, although this is not entirely clear from the record.

sites...and the use of a calculator during all math assignments and tests will likely be sufficient to address [the Student's] troubles with automatic fact recall.

Exhibit J1pp10-11, emphasis added.

20. At hearing, Dr. Blair opined it was not "appropriate"⁷ to offer only accommodations to address the Student's area of need related to basic writing. In Dr. Blair's opinion, accommodations are more of a "Band-Aid." While accommodations will help the Student with his basic writing, they are not "curative or remedial." Blair-553.

The District's May 2015 Reevaluation of the Student

21. After receiving Dr. Blair's IEE report, the District undertook a reevaluation of the Student. The reevaluation report was prepared by Jacque Ter-Veen, District school psychologist and the reevaluation case manager for the Student. Exhibit J9pp5-18. Ms. Ter-Veen holds a Master's degree in School Psychology and has at least 12 years' experience as a school psychologist. She has experience in conducting initial evaluations and reevaluations, classroom-based observations, and writing reports. Ter-Veen-23-25.

22. The District provided the Parents with written prior notice that described the evaluation procedures the District proposed to use. The Parents signed the Reevaluation Consent form on March 16, 2015. Exhibit J4pp6-7.

23. The same form noted that the reevaluation was requested by the IEP team because of concerns with motors skills and assistive technology, and to review Dr. Blair's IEE. Exhibit J4p6.

24. The Parents provided consent for a reevaluation, the scope of which included "assessment" in the following areas: a review of existing data, general education teacher report, age appropriate transition assessment, medical-physical, and motor. The Reevaluation Notice and Consent form when to describe more specifically the information, areas, and tests that would be used. It identified Dr. Blair's IEE report, fine motor skills, and data and information from the Student's current classroom teacher. It identified that the occupational therapist (OT) would administer the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Edition, the BOT-2, and Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI).⁸ A keyboarding observation and handwriting observation would also be conducted by the OT. Exhibit J4p6.

⁷ Upon further questioning at hearing, Dr. Blair confirmed that her use of the word "appropriate" in this context is the common, everyday use of that word. Dr. Blair was not using the word "appropriate" as that word is used in relation to matters involving the IDEA, or as a legal term of art. Blair-579.

⁸ The Parents subsequently revoked consent for use of the VMI to assess the Student, as the Parents had arranged for a private OT, Vicki Nelson, to assess the Student, and Ms. Nelson was going to use, or had already used, the VMI. J6p1. Ms. Ter-Veen requested a copy of the private OT assessment, but the Parents did not provide a copy of the private OT assessment until the day of the reevaluation meeting on May 8, 2015, despite having a copy as of April 24, 2015. Mother-687-688.

25. The Reevaluation Notification and Consent form included the following statement: "When the assessments are completed, an *eligibility*/IEP meeting will be held. You will be notified of this meeting in a timely manner so that you may attend." Exhibit J4p6, emphasis added.

26. No one, including the Parents, identified any need for new or additional cognitive or academic achievement assessments given Dr. Blair's IEE report from January. Mother-610; Ter-Veen-90; Hitch-494-495.

27. District OT Janet Prendergast holds a Bachelor of Science degree in occupational therapy and a Master's degree in Education. She has over thirty years' experience as an OT. Prendergast-343. Ms. Prendergast conducted the motor evaluation of the Student for his reevaluation.

28. Ms. Prendergast administered the BOT-2 and considered the results of the private OT evaluation provided by the Parents. She reviewed samples of the Student's work, and consulted with his English teacher. Ms. Prendergast also had the Student produce writing samples for her by copying text. She also obtained a keyboarding sample from the Student. J9p15.

29. Ms. Prendergast did not assess the Student's finger strength as part of her evaluation because it is not typically done in the school setting. It was not relevant to the purpose of her evaluation, which was to determine if the Student could produce legible handwriting and whether he could keyboard. Prendergast-328-329.

30. Ms. Prendergast's assessment summary and significant findings also discussed the assistive technology (AT) consultation conducted by Jennifer Miller, District special education teacher, and District OT Barb Chessler, both of whom are members of the District's AT Team. It also identified and summarized an OT evaluation from Vicki Nelson. Exhibit J9p15.

31. Ms. Chessler and Ms. Miller met with the Student on April 28, 2015.⁹ Exhibit J7. During the consultation, the Student was able to type a paragraph at a speed of 26 words per minute, and independently used spellcheck in WORD. The Student was able to independently correct his grammar by reading out loud the passage he typed. He also used CoWriter software to easily fix his spelling mistakes. The Student did an excellent job dictating a paragraph using dictation software that is part of Mac OS X. The Student reported that dictation software will be an excellent way for him to work on longer written assignments at home. Ms. Chessler and Ms. Miller reported that the Student already has a functional typing speed for his written work. J7p2.

32. Ms. Chessler and Ms. Miller made recommendations for the Student including: assign a district laptop that has speech-to-text software capability; use the laptop for most written work; review the functions of CoWriter with the Student; teach the Student to create his own topic dictionaries in CoWriter for academic vocabulary; use dictation at home or other environments

⁹ At hearing, the parties stipulated that J7 incorrectly identifies the date of the AT consultation as April 14, 2014, when in fact the consultation took place on April 14, 2015.

when speaking out loud will not disturb other students; and encourage the Student to advocate for himself so he has access to the tools he needs to be successful. Exhibit J7p2.

33. Based upon her assessment, the AT consultation, and Ms. Nelson's OT evaluation, Ms. Prendergast concluded no motor services for the Student were indicated at that time. She noted the Student may benefit from a student-dedicated laptop with Co-Writer, and that he should use dictation software when in a private environment. Exhibit J9p15.

The Parents' Private OT Evaluation

34. Vicki Nelson is a self-employed occupational therapist. She holds a Bachelor of Arts in psychology, and a Bachelor of Science in occupational therapy. Ms. Nelson has 18 years of clinical experience in developmental pediatrics, specializing in fine motor development. Exhibit P48.

35. Ms. Nelson conducted a handwriting assessment of the Student on April 3, 2015. Exhibit J8. She selected and administered the VMI, interviewed at least one of the Parents, and conducted clinical observations of the Student. Although Ms. Nelson testified at hearing that the Student was "fatigued" after 10 minutes of writing, that observation is not noted in her report. At hearing, Ms. Nelson further confirmed that she did not make any determination regarding what the Student's educational needs might be. Based upon her assessment or evaluation of the Student, Ms. Nelson's only conclusion was that he would benefit from working with an OT on his handwriting. Nelson-179-180. Ms. Nelson did opine that learning a typing program would be beneficial for the Student, and that if he could not keep up with writing in class the use of assistive technology with keyboarding would be an alternative. Nelson-183.

36. As part of her evaluation or assessment of the Student, Ms. Nelson was not asked to "qualify" the Student for school-based services. Nelson-190. Nor did she make a determination of the Student's educational needs. Nelson-179. Given the pace of the Student's writing that she observed, Ms. Nelson cannot opine as to whether it would adversely affect the Student's grades at school. Nelson-198. Ms. Nelson does not know what the Student's grades were when she assessed him, and did not speak to any of his teachers. Nelson-198-199. Ms. Nelson does not provide formal AT assessments. Nelson-190-191.

37. The reevaluation summary reviewed existing information and data for the Student going back as far as 2010, when the Student was in fourth grade. Exhibit J9p5. It identified Dr. Blair's IEE, set out selected information from her IEE report, and directed the reader to the IEE report for a comprehensive discussion of Dr. Blair's findings. Exhibit J9p6.

38. The reevaluation summary reflected a copy of the IEE report was attached to the reevaluation report, but there is no evidence of record that the Parents ever received a copy of Dr. Blair's IEE report along with a copy of the reevaluation report.

39. The reevaluation report stated that the Student did not meet eligibility criteria, and stated the following as the reason why the Student did not meet those criteria:

[The Student] currently demonstrates average reading decoding, reading comprehension, written expression, math calculation, and applied math skills. While his spelling and editing skills were assessed to fall in the low average range and his math fluency skills

were low, there does not appear to be an adverse educational impact in this general education classes. Based on the private evaluation results provided by Jennifer R. Blair, PhD., file review, observation, interview, consultation, review of previous and current academic performance, and results of statewide standardized testing, *[the Student] does not require specially designed instruction in any academic area at this time.*

Exhibit J9p7, emphasis added.

40. The reevaluation report stated that the following accommodations may be helpful to the Student: additional time for assignments and tests; calculator; change in class setting for test taking; no loss of credit for spelling/grammar errors in writing; use of a classroom computer to produce essays and pieces of written work expected to be over a paragraph long, if requested; provided [sic] hard copy of notes to copy from when class is taking notes from the white board; access to a laptop; use of word-prediction software or voice to text software. Exhibit J9p8.

41. Current medical evidence for the Student's reevaluation was obtained by Dee Allaway, School Nurse, via email from the Mother. When questioned about a prior diagnosis of Attention Deficit/Hyperactivity Disorder (ADHD) for the Student, the Mother reported "That diagnosis is no longer applicable, as we never chose to medicate him... So basically, long story short, you could assume it is considered no longer applicable in the area of ADHD." Exhibit J9p10.

42. Ms. Ter-Veen also interviewed the Student on May 4, 2015, as part of the reevaluation. The Student remarked that he is really good with numbers and he considered math to be a strength for him. He reported English is his most difficult subject. Exhibit J9p11.

43. Parent input for the reevaluation was also provided via a Student Information Record form completed on April 3, 2015, by one of the Parents. Exhibit J9p11.

44. The reevaluation report reviewed the Student's grades going back to seventh grade.¹⁰ It noted that compared with his performance in seventh and eighth grades, the Student was showing improved grades in English (currently a "low A") and science (A-), while his math grades remained in the "C" range. He had a C+ in his Challenge History Class,¹¹ and a "B" in Spanish. Exhibit J9p12.

45. The reevaluation report also reflected the Student's scores on standardized state-wide tests, the Measurement of Student Progress (MSP), going back to sixth grade, with the most recent being from eighth grade. By the end of eighth grade, the Student scored as either proficient or advanced in reading, math, and science. The most recent MSP for writing was from seventh grade, when the Student scored at the basic level. Exhibit J9p12.

46. The reevaluation report included current observations of the Student as reported by his physical science, geometry, band, English, Spanish, and Challenge Pre AP/IB World History teachers. Exhibit J9p14. While the Student had missing assignments in some classes, his

¹⁰ The Student was in ninth grade at the time of his reevaluation in May 2015.

¹¹ Challenge History is a self-selected course, and is a precursor to Advanced Placement or International Baccalaureate classes.

teachers noted this was average or typical for all their students. The Student's English teacher, Pamela Sutton, reported that the Student is allowed to read his work to her that she cannot decipher, but he was needing that accommodation less and less in ninth grade as his handwriting improved and her ability to decode his handwriting improved. Ms. Sutton noted that his written expression and organization of ideas was average and occasionally above average, but that his use of conventions was below average although he showed marked improvement in self-editing and self-correcting convention errors. Also of note were remarks from multiple of the Student's teachers that he would often not utilize his available accommodations, or needed to be encouraged to use them. Exhibit J9p14.

47. Ms. Ter-Veen also observed the Student in his English class for approximately 40 minutes as part of the reevaluation. She observed the teacher ask the Student a question or questions about a written passage presented on the classroom's white board involving identification of the need to italicize certain text in the passage. She observed, from the rear of the classroom so as not to be obtrusive or interfere with her observation, the Student working on a writing assignment on his computer. She could see the Student typing. She concluded that the Student presented as on-task and working diligently and independently during her observation. Exhibit J9p17. Ms. Ter-Veen's observation of the Student was consistent with her professional practice as a school psychologist.

The May 8, 2015, Reevaluation Meeting

48. The following individuals were present and participated at the reevaluation meeting on May 8, 2015: The Parents; Shannon Hitch, District director of secondary special education; Sebastian Ziz, District principal; Janet Prendergast, District occupational therapist; Julia Smith, District IEP case manager/special education teacher; Pamela Sutton, District general education English teacher; Dee Allaway, school nurse; and Jacque Ter-Veen, District school psychologist. Exhibits J9p19, J9p9.

49. Although present at the meeting, Ms. Hitch did not sign the reevaluation summary. Exhibit J9p9.

50. The Parents disagreed with the reevaluation summary and did not sign it, but did verbally note their dissenting opinion. Exhibit J9p9.

51. The Parents stated they provided their dissenting opinion to the reevaluation report to the District, but there is no evidence of record it was attached or associated with the reevaluation report.

52. The evidence of record concerning what occurred at the reevaluation meeting on May 8, 2015, comes almost exclusively from the testimony of the District witnesses at hearing, and mention of the meeting in some of the exhibits. Aside from the fact that the Parents did not have an attorney with them at the reevaluation meeting, there is virtually no testimony from the Parents about what was discussed or what happened at the meeting.

53. At the meeting, the team reviewed the results of the District's reevaluation and verbal input from the team members. There was discussion of Dr. Blair's IEE report. The Student's academic history and current performance were discussed. Input from his general education

classes was discussed. See, generally: Ter-Veen-31; Sutton-587-588; Prendergast-355; Hitch-478-481, 497.

54. OSPI publishes a Severe Discrepancy Table along with instructions on how to use the Table. The publication is intended to supplement, but does not substitute for the Rules for the Provision of Special Education found at Washington Administrative Code (WAC) Chapter 392-172A. Exhibit P8, p. 5 In order to establish a severe discrepancy when a student has a Full-Scale IQ score of 105, that same student must have a Criterion Score of 86 or below. See Discrepancy Table at Appendix A, Exhibit P8p14.

Implementation of the Student's IEP: April 15 – May 18, 2015

55. The Student's IEP was amended in February 2015. Exhibit J5. As amended, the Student's IEP called for him to receive a total of 50 minutes per week (10 minutes, 5 times per week) of specially designed instruction (SDI) from his general education English teacher, Pamela Sutton, in his general education classroom. Exhibit J5p12.

56. The Parents' only contention regarding any implementation failure is that the Student's SDI was delivered by Ms. Sutton one-on-one after school rather than in the Student's general education classroom during the school day. Accordingly, the Parents' argue, the Student's SDI was not provided in the Student's least restrictive environment (LRE). See Parents' Closing Statement at pp. 27-28. The evidence of record regarding this contention is undeveloped. The Student did not testify at hearing. The Mother provided some testimony that is hearsay and is based upon what the Student allegedly told her, and even that hearsay testimony was poorly developed on the record in terms of details and applicable time-period, and was not corroborated by other evidence of record. Ms. Sutton provided some testimony possibly relevant to the Parents' contention; but again it was poorly developed on the record.¹² The undersigned ALJ is left with extraordinarily little evidence to consider concerning the failure to implement claim. Based upon the nature, quality, and quantity of this evidence, the undersigned ALJ finds that it is not possible to make any findings of fact on a more probable than not basis regarding the Parents' contention that the District failed to implement the Student's IEP from April 15 to May 18, 2015.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

¹² The District's Post-Hearing Brief makes reference to the Mother's allegation that the Student was having some difficulties in meeting with Ms. Sutton *after school*. See District's Post-Hearing Brief, p. 19. But this was a reference to the Mother's hearsay testimony.

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Parents. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

The Individuals with Disabilities Education Act

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

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

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

4. A "free appropriate public education" 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" as defined by the Act.

Rowley, 458 U.S. at 188-189.

5. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.*, 458 U.S. at 207. "[A] school must provide a student with a 'meaningful benefit' in order to satisfy the substantive [FAPE] requirement." *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9th Cir. 2014) (internal citation and quotation marks omitted).

Procedural Compliance with the IDEA

6. Procedural safeguards are essential under the IDEA:

Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 882 (9th Cir. 2001).

7. Procedural violations of the IDEA amount to a denial of FAPE only if they:

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) caused a deprivation of educational benefits.

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

Substantive Compliance with the IDEA

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

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

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

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

Evaluation and Reevaluation of Students – Specific Learning Disabilities

9. The administrative regulations governing evaluations and reevaluation of students with specific learning disabilities (SLDs) are found at WAC 392-172A-03020 through 392-172A-03080. WAC 392-172A-03020 provides:

Evaluation procedures.

(1) The school district must provide prior written notice to the parents of a student, in accordance with WAC 392-172A-05010 that describes any evaluation procedures the district proposes to conduct.

(2) In conducting the evaluation, the group of qualified professionals selected by the school district must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

(i) Whether the student is eligible for special education as defined in WAC 392-172A-01175; and

(ii) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum, or for a preschool child, to participate in appropriate activities;

(b) Not use any single measure or assessment as the sole criterion for determining whether a student's eligibility for special education and for determining an appropriate educational program for the student; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Each school district must ensure that:

(a) Assessments and other evaluation materials used to assess a student:

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable. If properly validated tests are unavailable, each member of the group shall use professional judgment to determine eligibility based on other evidence of the existence of a disability and need for special education. Use of professional judgment shall be documented in the evaluation report;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(d) If necessary as part of a complete assessment, the school district obtains a medical statement or assessment indicating whether there are any other factors that may be affecting the student's educational performance.

(e) The student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(f) Assessments of students eligible for special education who transfer from one school district to another school district in the same school year are coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(g) In evaluating each student to determine eligibility or continued eligibility for special education service, the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.

(h) Assessment tools and strategies are used that provide relevant information that directly assists persons in determining the educational needs of the student.

See also 34 CFR §300.303.

10. It is concluded that the District provided the Parents with prior written notice that described the reevaluation procedures the District proposed to use. The Parents signed the Reevaluation Consent on March 16, 2015.

11. It is concluded that the District conducted the reevaluation using a group of qualified professionals. The education, training, and experience of the individuals who participated in the Student's reevaluation provided the qualifications necessary to conduct the reevaluation. The District has offered more than sufficient *prima facie* evidence of those qualifications, and the Parents have not raised any challenge to that evidence.

12. It is concluded that the group of qualified professionals who conducted the Student's reevaluation used a variety of assessment tools and strategies to gather relevant information about the Student. This is amply illustrated in consideration of Dr. Blair's IEE report, where she used multiple standardized assessment tools to obtain information about the Student. The District gathered information from the Student and the Parents. It used the BOT-2 for the Student's OT assessment. It considered the results of Ms. Nelson's private OT assessment, where she used the VMI to gather information about the Student. It conducted an assessment of the Student's need for assistive technology. It reviewed existing information about the Student going as far back as 2010. And it included observation of the Student in his general education English class.

13. It is concluded that the District did not use any single measure as the sole criterion to determine the Student's eligibility. The reevaluation team looked at and considered a wide spectrum of information. To the extent the Parents would assert the team relied upon the intellectual ability and educational achievement scores from Dr. Blair's IEE to determine whether the Student has an SLD, that procedure is required under the WAC 392-172A-03055.

14. It is concluded that the District used technically sound instruments or measures for the Student's reevaluation that were valid and reliable. There is simply no evidence of record to conclude otherwise, while at the same time the District presented more than sufficient *prima facie* evidence in form of testimony from the District members of the reevaluation team, Dr. Blair, and Ms. Nelson.

15. It is concluded that the assessments and other evaluation materials were administered by trained and knowledgeable personnel in accordance with instructions provided by the producer(s) of those assessments and evaluation materials. As concluded above, there was more than sufficient evidence in the form of testimony from District members of the reevaluation team to establish their training and experience in the use of those assessment tools, and the manner in which they were administered.

16. A student must be assessed in all areas related to the suspected disability. WAC 392-172A-03200(3)(e), above. The Parents have raised several arguments all connected to this requirement. Each will be discussed in turn. Before turning to that discussion, however, it is critical to consider the nature of the Parents' arguments raised in their closing statement or brief. Many of the arguments raised in the Parents' brief are not supported by evidence of record in the form of testimony from a witness qualified by education, training, or experience to provide an opinion regarding the manner, method, or means by which the reevaluation was conducted, or the scope of the reevaluation. For example, while Dr. Blair provided valuable testimony concerning her IEE of the Student, there was little testimony from her about the team's reevaluation of the Student. The outstanding exception to this was Dr. Blair's disagreement and opinion that the Student has an SLD in written expression, which will be discussed at greater length later. Another example is Dr. Blair's opinion that it would not be appropriate to offer the Student only accommodations instead of SDI and accommodations. That will also be discussed later with respect to all three of the elements required to determine a student is eligible for special education. But nowhere did Dr. Blair, for example, express any opinion that the team's reevaluation did not assess the Student in all areas related to a suspected disability. Ultimately, many of the arguments raised in the Parents' closing brief represent their belief or opinion of what the reevaluation team should have or did not do. Compounding this situation is the lack of legal authority, in the form of case law, supporting many of the Parents' interpretations of relevant regulations in the Washington Administrative Code.

17. The Parents first argue that the reevaluation failed to fully consider existing data because it considered only the results of the WJ-III Written Expression Cluster based on a very circumscribed interpretation of the meaning of "written expression," and did not consider the results of the WJ-III Basic Reading Skills Cluster or the results of the TOWL-3. Parents' Closing Statement, p. 7. Discussion of this argument is more applicable in the context of the requirements to determine an SLD pursuant to WAC 392-172A-03055. But it is worthwhile to note that the corollary to this argument, that by failing to disclose to the Parents its decision not to consider the Basic Reading Skills Cluster or the TOWL-3 the District denied the Parents information necessary for them to request additional academic testing, is not compelling. Indeed, it is Dr. Blair, with whom the Parents have no disagreement, who opined there was no need for further assessment or testing in this area.

18. The Parents argue that the District had information available to it that should have led it to suspect limited strength and vitality on the part of the Student, along with mild attention problems and a former diagnosis of ADHD. All this information, the Parents argue, warranted

further evaluation and consideration of whether the Student might be eligible for special education under the other health impairment (OHI) category. Finally, the Parents argue the District should have evaluated the Student's finger strength. These arguments are not compelling. The Parents point to the District being aware the Student had trouble handing school assignments or work in on time, needing extra time on assignments, and his inconsistent handwriting as the information that should have led the District to do further assessments of the Student. All these pieces of information are equally attributable to the Student's known and already assessed symptoms or impairments relating to his difficulty with basic writing skills. With respect to any assessment of his finger strength, Dr. Blair had already concluded that the Student's troubles with handwriting and copying were likely not due to a motor dysfunction. And Neither Ms. Prendergast or Ms. Nelson assessed the Student's finger strength as part of their OT evaluations. With respect to the Student's former diagnosis of ADHD, it is clear even the Parents did not believe this was any longer a significant factor for the Student. And Dr. Blair's IEE did not raise any red flags that would have alerted the District of any need for further assessment of the Student's mild attention problems. Furthermore, having trouble handing in school work on time is hardly a characteristic associated only with a disability. The Student's teachers confirmed as much with their comparisons of how many missing assignments the Student had in their general education classes when compared to his typically developing peers. It is concluded that at the time of the Student's reevaluation, the District was not in possession of information or knowledge that would have led a reasonable reevaluation team to suspect any other disabilities which should have been assessed or evaluated.

19. The Parents next argue that the District's AT evaluation of the Student was not "sufficiently comprehensive" because it did not assess the Student in a general education classroom, did not assess the Student using longer examples of written work, and it was not conducted in the Student's customary environment. There are no administrative regulations which identify required elements for an AT assessment or evaluation. It is clear that the elements of an appropriate or suitable AT assessment must fall to the professional judgment of the qualified professional who conducts the assessment. The District's AT assessment by Ms. Miller and Ms. Chessier was not contradicted by any other witness qualified by education, training, and experience to offer an opinion about the comprehensiveness of the District's AT assessment. Ms. Nelson confirmed she does not do standardized or formal AT assessments as part of her work, and she was not questioned at hearing to critique the District's AT assessment of the Student. Ms. Nelson confirmed that her assessment of the Student did not make any determination of his educational needs. It is concluded that the District has presented sufficient *prima facie* evidence to establish its AT assessment of the Student was appropriate, and the Parents have failed to present sufficient evidence to rebut that presumption.

20. The Parents next argue that the District's motor and handwriting evaluation was not comprehensive and designed to provide relevant information because it did not assess "spontaneous" writing but rather assessed copying, did not assess the Student's motor skills in the classroom and did not take into consideration attention, focus, or fatigue as factors. Because of this, the Parents assert, the evaluation was not "sufficiently comprehensive" to determine the Student's need(s) for related services. Here again, while Ms. Nelson and Dr. Blair testified at hearing about their assessments of the Student, they were not directly questioned about, and did not provide any opinion concerning, the District's motor and handwriting evaluation. The confounding result of this is that both the Parents and the undersigned ALJ must attempt to draw *inferences* from their testimony. At hearing the Parents could have presented the District's motor and handwriting evaluation to either Ms. Nelson or Dr.

Blair and elicited their professional opinions vis-à-vis whether the evaluation complied with professional standards for such evaluations, contained some fatal flaw, or was otherwise suspect. That did not occur. What is left is a record that begs for interpretation by laypersons rather than experts. Neither the Parents nor the undersigned ALJ are experts in motor or handwriting evaluation. Under the facts in this case, it must be concluded that the District's evaluation is more likely than not reliable and correct, and the Parents have not offered sufficiently compelling argument or evidence to the contrary.

21. The Parents next argue that the District failed to ensure the observation of the Student included documentation of his academic performance and behavior in the areas of difficulty. Parents' Closing Statement, p.11. With respect to observations of students suspected of having an SLD, WAC 392-172A-03075 is relevant and provides that:

(1) School districts must ensure that a student who is suspected of having a specific learning disability is observed in the student's learning environment, including the general education classroom setting, to document the student's academic performance and behavior in the areas of difficulty.

(2) The evaluation group must:

(a) Use information from an observation in routine classroom instruction and monitoring of the student's performance that was done before the student was referred for an evaluation; or

(b) Have at least one member of the evaluation group conduct an observation of the student's academic performance in the general education classroom after the student has been referred for an evaluation and parental consent is obtained.

(3) In the case of a student of less than school age or out of school, a group member must observe the student in a learning environment appropriate for that student.

22. The Parents interpret the above regulation to require the District, or in this case Ms. Ter-Veen, to have observed the Student not only in his general education English class, but also in his general education math class. That interpretation is not supported by the plain language of the regulation, or other source of legal authority. Interpreting the phrase "the student's learning environment" to require observations in more than one general education classroom leads to the slippery slope where a school district would be required to observe a student in every one of his or her general education classes. That result finds no support in the plain language of the regulation. Ms. Ter-Veen selected the Student's general education English to observe the Student for approximately 40 minutes because handwriting and basic writing skills appear to be the most significant aspect of the Student's difficulties in school. It is, on its face, a well-reasoned decision by Ms. Ter-Veen. It is concluded that the regulations did not require Ms. Ter-Veen to also observe the Student in this general education math class. The Parents also seek to interpret the phrase "academic performance...in the areas of difficulty" to require an observation which encompasses both direct observation and, apparently, evaluation of the resulting work product. While the Parents argument here is not beyond the pale of reason, Ms. Ter-Veen credibly testified, based on her education, training, and experience, that she conducted this observation consistent with her established professional practice. There is simply no evidence of record from an equally credible and qualified source to refute or question Ms. Ter-Veen's opinion. It is concluded that the observation of the Student complied with the

requirements of the plain language of the regulation.

23. After careful consideration of the Parents' arguments and the evidence of record, it is concluded that the District's reevaluation of the Student meets the procedural requirements under WAC 392-172A-03020.

24. The Parents next argue that the District failed to ensure a variety of information was documented and carefully considered. Parents' Closing Statement, p. 12. The Parents' Closing Statement does not cite to or identify any specific regulation to support this argument, but it appears to be WAC 392-172A-03040(4) regarding determination of eligibility. That regulation requires a school district to ensure that information obtained from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, is documented and carefully considered as part of the eligibility determination process.

25. Within the more general argument that information was not documented and carefully considered, the Parents raise a number of points. First, the Parents argue that the District failed to account for or document the variance between Dr. Blair's "ultimate conclusion" and the District's conclusion concerning eligibility. Parents' Closing Statement, p. 13. The information from Dr. Blair was documented. A summary of that information appears in the Reevaluation Summary. Finding of Fact 37. And Dr. Blair's IEE report was to be attached to the Reevaluation Summary. With respect to the information from Dr. Blair's IEE report being carefully considered, the record supports a conclusion that it was indeed carefully considered. The record reflects discussion of Dr. Blair's report at the reevaluation meeting. The Parents seem to interpret the requirement to document and carefully consider information as a requirement that there be a written statement in the reevaluation report setting out at length the details of the discussion during which the information was carefully considered. That is one interpretation of the regulation, but it is not the only or most plausible interpretation. Reference to WAC 392-172A-03035(1)(B) is instructive. That regulation requires the evaluation, or in this case the reevaluation, report to include a discussion of the assessments and review of the data that supports the conclusion regarding eligibility. That discussion of the eligibility determination appears in the reevaluation report. Finding of Fact 39. While brief, it cannot be concluded that it is legally insufficient.

26. The Parents want to interpret language in Finding of Fact 39 from the reevaluation report to conclude that the reevaluation report is misleading; that it appears from the language that Dr. Blair supported the team's determination that the Student was not eligible for special education. Again, while this language in the reevaluation report could have been more extensive or perhaps better phrased, it is not necessarily misleading.

27. The Parents argue that the District failed to carefully consider the results of the TOWL-3 and the WJ-III Basic Writing Skills cluster, asserting that District staff at the hearing testified those measures were not considered. This appears a matter of semantics more than substance. It is clear from the record that the team first *considered* those measures, but then determined it would be inappropriate to *use* those measures to determine the Student's eligibility. The reasons and rationale why it was inappropriate to use those measures are more properly part of the discussion regarding the District's ultimate determination whether the Student has an SLD under WAC 392-172A-03055, which will be discussed later.

28. The Parents argue that Ms. Nelson's OT evaluation of the Student was not fully documented and carefully considered. This argument must fail. The reevaluation report included Ms. Prendergast's motor and handwriting evaluation summary, in which Ms. Prendergast identifies and summarizes Ms. Nelson's OT evaluation. Finding of Fact 30.

29. The Parents argue that the District failed to provide them with a reevaluation report that contained all of the required elements. Parents' Closing Statement, p. 15. First, the Parents argue that there is no statement regarding whether the Student achieves adequately for his age or meets state grade level standards in written expression. The regulation actually states that for a student suspected of having an SLD, the documentation of the eligibility determination must contain a statement of whether the student does not achieve adequately for the student's age or meet state grade level standards in one or more of the areas identified in WAC 392-172A-03055(1). WAC 392-172A-03080(1)(e). On this point, the Parents are correct; the reevaluation report does not appear to contain such a statement. It is concluded the failure to include such a statement is a procedural violation of the IDEA. But not all procedural violations constitute a denial of FAPE. As set out above, a procedural violation only constitutes a denial of FAPE when it: 1) impedes the child's right to a free appropriate public education; 2) significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parent's child; or 3) causes a deprivation of educational benefits. 20 USC §1415(f)(3)(E)(ii); WAC 392-172A-05105(2).

30. It is concluded that the record does not establish this procedural violation meets any of the three conditions to constitute a denial of FAPE for the Student. First, as will be discussed later, the Student is not eligible to receive special education and related services under any disability category, and therefore this violation cannot deny him FAPE. Second, the record is bereft of evidence to support a conclusion this procedural violation significantly denied the Parents their opportunity to participate in the decision-making process. The record is clear that the Parents are highly involved and informed regarding the Student's reevaluation, Dr. Blair's IEE, and how the eligibility determination was reached. Finally, as the Student is not eligible for special education, this procedural violation cannot deprive him of an educational benefit.

31. The Parents' argue that professional judgment was "considered" but not documented, but do not elaborate in any meaningful way when or in what manner this was so. Parents' Closing Statement, p. 16. Absent citation to the evidence of record or even more explanation, it is concluded the Parents have not raised any violation of the IDEA.

32. The Parents argue that although Ms. Hitch participated in the eligibility decision she did not sign the reevaluation report. Assuming for the sake of argument it is true that Ms. Hitch was actually was involved in a meaningful way in reaching the decision that the Student is not eligible for special education, this is at most another procedural violation of the IDEA. As discussed above, not all procedural violations result in a denial of FAPE. How the failure of one member of a reevaluation team to sign a report would deny a student FAPE or significantly impede a parent's opportunity to participate in the decision-making process when that parent was present and participating in the reevaluation meeting is not addressed in the Parents' Closing Statement. It is concluded that this procedural violation of the IDEA did not result in either of those conditions. It is concluded that the record does not establish this procedural violation meets any condition to constitute a denial of FAPE for the Student.

33. The Parents also argue that the District failed to include their statement of dissent with the reevaluation report. Again, as a procedural violation of the IDEA this omission more likely than not does not result in any of the conditions under which a procedural violation constitutes a denial of FAPE for the Student. This was the Parents' statement of dissent, so they would have known exactly what it was – they sent it to the District. It is extremely difficult to conceive how, by not including it in the reevaluation report, the Parents' opportunity to participate in the decision-making process for the Student was substantially impeded, how it denied the Student FAPE, or caused a deprivation of educational benefit. It is concluded this procedural violation did none of those.

34. The Parents argued that the District failed to include the Student's criterion score, failed to explain the use of the Student's GAI score when determining the Student's criterion score, and failed to explain the basis for discounting the WJ-III Basic Writing Skills cluster and the TOWL-3. The criterion score appeared in Dr. Blair's IEE report, which the Parents clearly had. While brief and likely subject to a more clear explanation, the eligibility summary in the reevaluation report is legally sufficient. It is concluded the Parents have not established any further procedural violations on the basis of this argument.

35. In summary, while the reevaluation procedures and the reevaluation report itself could have been better, could have been more carefully explained, could have been more comprehensive, or could have been more detailed, the undersigned ALJ holds that, apart from the procedural violations identified above, none of which denied the Student FAPE, the procedures and the report are legally sufficient under the facts and circumstances of this case to find they are appropriate under the IDEA.

The Decision to Exit the Student from Special Education

36. In order to be eligible for special education and related services under the IDEA, a child must have a disability in a recognized eligibility category, the disability must have an adverse educational impact on the child, and that adverse educational impact must require specially designed instruction. WAC 392-172A-01035(1)(a). In this case, the only disability category potentially applicable for the Student is an SLD.¹³

37. The Parents argue that the Student has an SLD in Written Expression, or in the alternative Basic Writing. Both these arguments must fail. First, although Dr. Blair concluded the Student has an SLD in Written Expression, that conclusion is not supported by her own IEE. The most telling fact is that the assessment tool Dr. Blair used and on which she based her conclusion, the WJ-III, itself differentiates between Written Expression and Basic Writing Skills, having two different clusters and subtests for those areas. Accepting Dr. Blair's use of the Student's GAI score (105) rather than his Full-Scale IQ score (98), the Student would have to earn a standard score of 86 or less in order to establish a severe discrepancy, and consequently establish he has an SLD under the District's severe discrepancy. The Student

¹³ Although the Parents argue the District should have evaluated the Student for eligibility under the OHI category, for reasons already addressed the undersigned concludes there is simply insufficient evidence to support such a disability for the Student, and the District did not violate the IDEA by failing to evaluate the Student for that disability category.

earned a standard score of 92 for the Written Expression cluster. Therefore, by definition, the Student does not have a severe discrepancy or an SLD in Written Expression. The Student earned a standard score of 82 for the Basic Writing Skills cluster on the WJ-III. This would qualify him as having a severe discrepancy and an SLD in Basic Writing Skills but for the fact that the applicable regulations *do not recognize* an SLD in Basic Writing Skills. WAC 392-172A-03055(1). The undersigned ALJ is cognizant and respectful of Dr. Blair's credentials and experience. But her explanation for how she took the Student's standard score in the Basic Writing Skills cluster and concluded he had an SLD in Written Expression is not logically compelling or persuasive. It is concluded that the Student does not have an SLD in Written Expression under the Washington Administrative Code, which this ALJ is bound to follow.

38. Nevertheless, the record does support a conclusion that the Student has an SLD in Mathematics Calculation, an area recognized in WAC 392-172A-03055(1). The Student earned a standard score of 86 on the WJ-III Math Calculation Skills cluster, which is just low enough to establish a severe discrepancy and an SLD. But that is not the end of the eligibility determination process for special education.

39. The next step is to determine if the Student's SLD in Mathematics Calculation results in any adverse educational impact. The evidence on this point was not well developed at the hearing, likely because the parties were much more focused on the issue of whether the Student has an SLD in Written Expression. Giving the benefit of the doubt to the Student, and in light of the history of accommodations the Student has for math, it is concluded that the Student's SLD does have an adverse educational impact on the Student. But that is not the end of the eligibility determination process for special education.

40. The crux of whether the Student was correctly exited from special education lies with the third element of eligibility; whether the adverse educational impact of the Student's SLD requires the use of SDI? The answer to that must be no. The Student has a history of solids grades and state assessment results in math while relying on only the accommodations in his IEPs. Those grades and state assessment results are reflected in the reevaluation report. Given that evidence, it must be concluded that the any adverse educational impact of the Student's SLD does not require the provision of SDI.

41. It is concluded that the reevaluation team's decision to exit the Student from special education on the basis of his reevaluation in May 2015 was legally correct because any adverse impact of his Mathematics Calculation SLD can be addressed without the need of SDI. The evidence of record establishes on a more likely than not basis that the adverse impact of the Student's SLD can be addressed with the use of accommodations. Accordingly, it must be concluded that the Student is not eligible for special education.

Failing to Implement the Student's IEP from April 15 – May 18, 2015

42. The evidence of record was so poorly developed with respect to this issue that no findings of fact could be reached on a more probable than not basis. Accordingly, as the Parents bear the burden of proof on this issue raised in their request for a due process hearing, it must be concluded that they have failed to prove the District did not implement the Student's IEP.

Remaining Issues and the Parents' Requested Remedies

43. Having concluded that the District's decision to exit the Student from special education was correct and that the Parents have not carried their burden of proof to establish any failure to implement the Student's IEP, it is concluded that the remaining issues raised by the Parents are moot. Accordingly, it is concluded that the Parents' requested remedies are denied.

ORDER

The District's May 2015 reevaluation of the Student was appropriate or the defects did not constitute a denial of a free appropriate public education for the Student.

The District's decision to exit the Student from special education based on the May 2015 reevaluation was legally correct.

The Parents have not carried their burden of proof to establish the District failed to implement the Student's IEP from April 15 -- May 18, 2015.

The Parent's remaining issues are dismissed as moot.

The Parents' requested remedies are denied

Signed at Seattle, Washington on April 13, 2016.



MATTHEW D. WACKER
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

////

///

///

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. *me*

Parents

[REDACTED]

Becky Anderson, Assistant Superintendent of Special Services
Northshore School District
3330 Monte Villa Parkway
Bothell, WA 98021

Angela M. Shapow, Attorney at Law
Shapow Law PLLC
1037 NE 65th Street, #235
Seattle, WA 98115

Carlos Chavez, Attorney at Law
Tania M. Culbertson, Attorney at Law
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101

cc: Administrative Resource Services, OSPI

Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator