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

IN THE MATTER OF:	SPECIAL EDUCATION CAUSE NO. 2013-SE-0032
ELLENSBURG SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Ellensburg, Washington, on May 14, 15, 16, 17, 2013 and June 4, 5, 6, and 7, 2013. The Adult Student (Student) whose education is at issue[1] appeared on the first day of hearing and was represented by his Parents, who were assisted by Thelma Simon of Partnership for Action Voices for Empowerment (PAVE). The Ellensburg School District (District) was represented by Joni Kerr, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parents filed a due process hearing request (complaint) on March 29, 2013. Orders were entered in the case on April 17, April 25, May 7, and May 21, 2013.

The due date for the written decision was continued to 30 days after the close of the hearing record, based on a motion by the District that was not opposed by the Student. *See* First Prehearing Order of April 25, 2013. The record of the hearing closed with the postmarking of closing briefs on July 22, 2013. The due date for the written decision is therefore August 21, 2013.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits:
J-1 through J-4;
J-5 (except for pages 21, 22, 23 and 97); and
J6 through J-12;

Student Exhibits:
S-1 through S-48;
S-49 (for a limited purpose)[2];

[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] Exhibit S-49 was admitted for a limited purpose. It was one of the documents relied upon by Dr. Peter Stewart in formulating his opinions in this case. Exhibit S-49 was admitted, along with other documents, to show the bases for Dr. Stewart's opinions.

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S-51 through S-86;
S-90 through S-194;
S-195 (except for pages 5 and 6);
S-196 through S-216;
S-219;
S-221 (for a limited purpose)[3];
S-222 through S-229;
S-231 (except for pages 6A through 8);
S-234 (except for pages 6 through 8B);
S-236 through S-237;
S-239;
S-241;
S-250 through S-251 (except for page 3);
S-252 through S-255;
S-256 (except for pages 11 through 12);
S-257 through S-259;
S-260 (except for pages 34 through 41 and pages 43 through 44);
S-261 (except for page 18); and
S-262 through S-263.

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

Thelma Simon, volunteer with PAVE;
Marchel Allenbaugh, District special education teacher;
Sundara Cook, District assistive technology specialist;
Teri Giesy, District special education teacher;
Benaya Allison, District school psychologist;
Celeste Torset, administrative assistant to District superintendent;
Faye Fuchs, director of special education, Educational Service District 105;
Mother of the Adult Student;
Kerri Fahey, District general education teacher;
Jeff Ellersick, District principal;
Paul Farris, PhD, District superintendent;
Dana Hamilton, District school counselor;
Gayle Burchfield, District general education teacher;
John Graf, District principal;[4]
Molly Andaya, District general education teacher;
Jerry Connolly, director, Special Education Technology Center;
Father of the Adult Student;
Patricia Moroney, director, Northwest Language and Learning Services;
Peter Stewart, PhD, clinical psychologist;

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[3] Exhibit S-221 was admitted for the limited purpose of identifying one of the private schools at which the Student seeks placement, namely Dartmoor School.

[4] John Graf was formerly a District assistant principal. He was assistant principal at Ellensburg High School at the times relevant to this case.

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Del Enders, District general education teacher;
Debby White, District school psychologist; and
William Meehan, District director of special services.

ISSUES

1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Adult Student (Student) a free appropriate public education (FAPE) by failing to provide:

   a. Training for the Student's teachers in the following areas: understanding the Student's disability; consistently providing the supports and accommodations listed in his individualized education programs (IEPs); and training regarding the Student's assistive technology;
   b. Training and/or consultation for the Student's special education case manager and other appropriate District staff by Patricia Moroney, M.A., CCCP-SLP, on methods for effectively educating the Student;
   c. Counseling for the Student as a related service;
   d. An appropriate grading system for the Student;
   e. Course credit for compensatory education provided by Ms. Moroney;[5]
   f. Homebound education services from on or about May 4, 2012 through the end of the 2011-2012 school year, during which time the Student was unable to attend school;
   g. Extended school year (ESY) services at Dartmoor School in the summer of 2012;

2. Whether the District violated the IDEA and denied the Student a FAPE by failing to properly implement the provisions of his IEPs in the following ways:

   a. Failing to load books onto his computer until December 2012;
   b. Failing to provide tutoring in math from a qualified tutor;
   c. Failing to inform some of the Student's teachers of his disability prior to the start of classes;
   d. Failing to modify the Student's homework in a consistent format;

3. Whether the District violated the IDEA and failed to properly evaluate the Student by:

   a. Failing to timely consider the psychological evaluation conducted by Peter Stewart, Ph.D., and failing to timely amend its own evaluation in light of Dr. Stewart's evaluation;
   b. Failing to timely complete an assistive technology evaluation;

4. Whether the Student is entitled to the following requested remedies, or other equitable relief as appropriate:

   a. Reimbursement for counseling services privately purchased;

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[5] The original statement of Issues and Remedies also included: "Course credit for summer classes at Morningside Academy". *See* First Prehearing Order of April 25, 2013. The Student withdrew this issue on the fourth day of hearing because that course credit has been provided.

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b. Training for the Student's teachers about his disability;
c. Provision of properly functioning assistive technology;
d. Access to all of the Student's educational records;
e. Provision of a facilitator for all future IEP and evaluation review meetings, and provision of a recording or thorough notes of those meetings; and
f. Residential placement, including tuition, housing, and transportation costs at: (1) Landmark School in Beverly, Massachusetts or New York, New York; or (2) Dartmoor School in Issaquah, Washington.

See First Prehearing Order of April 25, 2013, ¶¶ 15 – 18.

FINDINGS OF FACT

Background

1. The Student attended 11th grade at Ellensburg High School in the 2012-2013 school year. He has attended school in the District at all relevant times. During periods when he has been on an IEP, his eligibility category has been Specific Learning Disability in reading and written language.

2. On January 29, 2010, when the Student was in 8th grade, ALJ Janice E. Shave issued a due process decision involving the same parties as the present case. J-11. The Findings of Fact in Judge Shave's decision concern events prior to the statute of limitations period here. Those findings are adopted and incorporated herein to provide background information to understand the subsequent events.

3. Judge Shave found a denial of FAPE and ordered that 350 hours compensatory education tutoring be delivered on a strict timetable. The Order stated: "It is critical that the services be provided as quickly as possible." J-11:34.[6] To that end, Judge Shave ordered that by the end of the summer break in 2010, no less than 150 hours of that tutoring must be delivered. She ordered that the remaining 200 hours must be delivered no later than December 31, 2010, the middle of the Student's 9th grade year.

4. Judge Shave found the Student had school-related anxiety and ordered, for this and a number of other reasons, an independent neuropsychological evaluation by Dr. Jennifer Blair. Dr. Blair's evaluation report was delivered to the District in May 2010. Among Dr. Blair's findings was that the Student exhibited a great deal of anxiety regarding school and test-taking, and did not exhibit such anxiety elsewhere. Among her diagnoses were Adjustment Disorder with Anxiety and/or Specific Phobia. She concluded that if school-related anxiety continues after a course of recommended instruction, then counseling would be appropriate. J-7.

5. At the beginning of the Student's 9th grade year, 2010-2011, the Parents revoked consent for special education. The Parents did not believe the District could effectively deliver special education to the Student and did not believe the District appreciated the severity of his disability.

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[6] Citations in the format "J-11:34" refer to exhibit J-11, page 34.

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A Section 504[7] plan was adopted instead. It provided accommodations in the general education setting, but no special education. J-3:170-171; J-4. The District's Section 504 evaluation noted that the Student's anxiety was one of the things that impaired his ability to function in the general education environment. J-4:4

6. The period at issue in this case (pursuant to the statute of limitations) begins March 30, 2011, during the Student's 9th grade year. However, the Student was on a 504 plan, not an IEP, during much of the limitations period. As explained in the Conclusions of Law, below, this tribunal does not have jurisdiction over Section 504.

Use of Patricia Moroney's Services

7. Pursuant to Judge Shave's order, the District began providing compensatory education in March 2010, during the Student's 8th grade year. However, in June 2010, the Parents requested and obtained agreement to exchange the 350 hours of tutoring ordered by Judge Shave for 100 hours of service from a speech-language pathologist, Patricia Moroney. Ms. Moroney is located in Seattle. Her office is 110 miles, or one hour and 50 minutes driving time, from the Student's home.[8] It is also separated from Ellensburg by a mountain pass that has difficult driving conditions in the winter. Pursuant to the parties' written agreement, the Student was to complete all 100 hours with Ms. Moroney by August 15, 2011, prior to the start of his 10th grade year. S-66. This was already half a year later than ordered by Judge Shave for the completion of compensatory education.

8. The Parents did not comply with this agreement. They used fewer services from Ms. Moroney as time went on. By the time of the hearing in this case -- nearly two years after all 100 hours were to have been completed -- the Student had only completed 81.75 hours. The remaining hours with Ms. Moroney remain unused.

9. The Mother asserts that Ms. Moroney is providing the Student's special education services in high school because the District is incapable of providing an appropriate education. However, the Student received no services from Ms. Moroney at all during 11th grade, the 2012-2013 school year. From the date the Student went back on an IEP on April 18, 2012, to the time of the hearing more than a year later, the Student received services from Ms. Moroney only four times: on May 9, June 6, August 15, and August 27, 2012. Likewise during 10th grade, he received services from her only four times. Testimony of Moroney, Mother.

10. The Student needs intensive instruction, preferably daily. Testimony of Moroney. The Student received no special education from the District during either 10th or 11th grade because he refused all services.

11. The Parents testified that snowy driving conditions prevented visits to Ms. Moroney in the wintertime, and they eventually came to the conclusion that it was not good for the Student to

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[7] "Section 504" refers to section 504 of the Rehabilitation Act of 1973, 29 USC §§ 701 *et seq.*

[8] The driving distance and time from the Student's home to Ms. Moroney's office were obtained from Google Maps. The parties stipulated during the hearing that official notice pursuant to RCW 34.05.452(5) may be taken of driving distances and times from either Google Maps or Mapquest.

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miss school days in order to visit Ms. Moroney. They did not explain why, during the summer before 11th grade, the Student visited Ms. Moroney only twice. Ms. Moroney worked full-time that summer. Testimony of Moroney.

12. Early on, the Parents obtained an agreement from the District that Ms. Moroney's work with the Student would substitute for one semester of course credit in 9th grade English once the Student reached 90 hours of work with Ms. Moroney. He never reached that amount. However, when Ms. Moroney documented in May 2013 that the Student had completed 81.75 hours of work with her, the District nevertheless gave him credit for the 9th grade English course. S-62.

10th Grade, 2011-2012

13. The District referred the Student for a special education evaluation in October 2011, early in his 10th grade year. The Parents eventually agreed to the evaluation, but made it clear in November 2011 that they did not intend to allow the District to provide any special education to the Student. Rather, they agreed to special education status so that the Student could receive services from outside providers such as Ms. Moroney and Jerry Connolly of the Special Education Technology Center (SETC)[9] and could receive electronic versions of textbooks. As discussed above, the Parents assert that the Student receives his special education from Patricia Moroney in Seattle. The Parents signed consent for a special education evaluation in January 2012, three months after the District offered it.[10]

14. In the meantime, the Student was not doing well in school. By February 2012, he became disheartened about school and sporadically stayed home. S-43; S 258:10. The family asked the District to pay for him to attend summer school at a private school in Issaquah, Washington, the Dartmoor School (Dartmoor). The Student was not yet on an IEP when the Parents asked for this in spring 2012.

15. In March 2012, several District staff agreed to visit Dartmoor to consider the Parents' request. They were prevented from visiting due to a snow closure on Snoqualmie Pass as they were driving to Dartmoor. Instead, District staff had a conference call with Dartmoor staff. They learned information that caused them to recommend against the District funding Dartmoor for the summer. First, instruction would be done by non-special education staff, and staff that were not necessarily certificated teachers. At the high school, by contrast, the Student was offered direct teaching by a special education teacher. Second, the supervising special education teacher for Dartmoor was not on site, so that supervision would be less frequent and less close. Third, Dartmoor does not have classes or small groups, but uses one-on-one instruction. S-103:1; Testimony of Fuchs, Graf, White.

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[9] The SETC is funded by the State Office of Superintendent of Public Instruction to provide assistive technology support to special education departments in school districts throughout the State. Testimony of Connolly.

[10] The Parents originally signed a consent for the evaluation in November 2011, but only on the condition that the District perform no assessments, but instead rely only on evaluations conducted by outside providers in spring 2010. J-5:7-8. The District would not agree to this restriction and eventually persuaded the Parents to allow it to also use both prior and current testing. J-5:10.

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16. The Student was found eligible for special education in early March 2012 under the same category as previously: specific learning disabilities in basic reading and written expression. J-5:34, 40-41. His standardized test scores in reading and written expression had been increasing over the years and continued to increase since he was last tested in 8th grade (2010). Nevertheless, the scores were generally in the low and low-average range, with grade equivalents of 4.5 in basic reading, 6.6 in reading comprehension, and 5.9 in written expression. J-5:29-30. Following this evaluation, the parties agreed to develop a short-term IEP to last through the end of the school year, and to develop a longer-term IEP thereafter.

17. The Parents eventually agreed that the Student could receive some special education, but under very limited circumstances, discussed below. They signed consent for an IEP on April 17, 2012. J-5:63. The IEP provided for 50 minutes per week of special education in reading and 50 minutes in written expression. J-5:34-35. The Student's special education case manager, Teri Giesy, would have recommended 275 minutes per week in each subject, but the Parents would only agree to 50 minutes. Testimony of Giesy.

18. The Parents informed the District early in the IEP development process that they would not allow services to be provided to the Student in a special education classroom (known as a Resource Room). Nor would they allow them to be provided during a regular class period. The District therefore searched for ways that special education services could be provided outside of these normal venues. They entered into an extra contract with Ms. Giesy to provide 100 minutes per week of reading and writing special education during three of her lunch periods per week. They arranged for this to be provided in the library, rather than the Resource Room. The Student never utilized these services. Ms. Giesy would wait for him at the library but he never came. She sent emails encouraging him to attend, but he did not.

19. Ms. Giesy planned to use two curricula geared toward learners with the Student's disability, Read 180 and System 44. Both of these curricula met the recommendations of Patricia Moroney. Testimony of Giesy. Read 180 is also strongly endorsed by Dr. Sally Sheywitz. Testimony of Meehan. Dr. Sheywitz is an expert on dyslexia whom the Parents cited with high regard. Ms. Giesy has three years' experience teaching the Read 180 curriculum. Testimony of Meehan.

20. All teachers who testified at the hearing testified they provided the accommodations and modifications required by the Student's IEP. There was no evidence to the contrary. Part of Ms. Giesy's role as case manager was to get to know the Student's needs by working directly with him, and then be better able to troubleshoot any problems with accommodations or modifications that might arise in his general education classes. Testimony of White. However, Ms. Giesy never had the opportunity to work with the Student.

21. Ms. Giesy testified persuasively that assistive technology (AT) alone is not sufficient for the Student to make gains in reading. It only gives him *access* to materials. It does not teach him to read or write.

22. During the IEP development process, the Parents requested and obtained an open 4th period for the Student to regain energy and to work with tutors, work with AT, and complete tests and assignments. J-5:50. The District put this in his IEP, but wrote that it was with the understanding that it would impact the accumulation of credits needed for graduation. *Id.* The Student mostly used the open 4th period to have a double lunch period. Testimony of Ellersick.

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23. At the beginning of each semester, assistant principal John Graf made sure that each of the Student's teachers was aware of his disability, his history of struggles with education, and his IEP accommodations. One of those accommodations was modified grading as needed. Mr. Graf made sure that all of the Student's teachers (except for PE, where the Student did not need modified grading) were aware of this accommodation. It was left to each teachers' discretion how to apply it to their particular curricula. Testimony of Graf.

24. The family continued to press the District to pay for extended school year (ESY) services in the form of summer school at Dartmoor. An IEP meeting was held on May 4, 2012 to consider adding ESY services to the Student's IEP. The District declined to do so on the ground that there was no data on gains made toward the Student's IEP goals, since he never accessed special education. J-5:66. Students can qualify for ESY if the skills they worked on in special education are only just emerging, or if they demonstrate regression on their special education goals after school breaks. Here, the Student declined to receive such instruction, so the District could not make these assessments. Regarding credit retrieval, which is a separate matter from ESY, the District offers several programs for credit retrieval for high school students. Testimony of Graf. The District declined to pay for Dartmoor for purposes of credit retrieval. (Credit retrieval occurs when students earn credit for courses they missed or courses they took but did not receive credit for.)[11]

25. The Student became despondent that he would not be able to attend Dartmoor in the summer. According to the Mother, the Student told her that the assistant principal, Mr. Graf, told him (the Student) that Dartmoor would be approved. Mr. Graf testified he did not say this to the Student, but thinks the Student may have gotten this impression from the fact that several District staff went to visit Dartmoor. Mr. Graf's testimony is adopted because it is logical that he would not have delivered a decision to the Student before the IEP team had even met. It is also adopted because the Student's statement to the contrary is hearsay. It would unduly abridge the District's opportunity to confront witnesses and rebut evidence to base a finding of fact exclusively on hearsay where there was no opportunity to cross-examine the Student. The Student presented a medical provider's statement that he should not testify for medical reasons.

26. The Student's attendance dropped off during the 4th quarter of 10th grade, and he largely did not attend school. The non-attendance began in late-April, before the decision against Dartmoor was made. J-1:13-14. The Mother reported the Student was deeply depressed and unable to attend school. She asked for "home hospital," which is a program for students who are medically unable to attend school, so they receive teaching at home. The District superintendent, Dr. Paul Farris, wrote to the Mother that she would need to submit a diagnosis and a request from a qualified practitioner in order to receive home hospital services. S-72:1. The Parents never submitted this documentation, so home hospital services were not provided. The Mother acknowledged at the hearing that it would not have been a good time for the Student to receive instruction at home.

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[11] The District's prior written notice declining to add ESY to the Student's IEP also stated that the IEP team did not have the authority to approve a private school J-5:66. This referred to approving a private school for credit retrieval purposes, as distinct from ESY. J-95:1; Testimony of White.

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27. Due to his lack of attendance in the 4th quarter, the Student was unable to earn credit for second semester of 10th grade. However, the principal arranged for him to receive credit for just the 3rd quarter. For that quarter, he received a "pass" instead of letter grades in English, Geometry, and Photography, a D+ in Agricultural Biology, and a B in PE. J-2.

28. The Student was not supposed to take Geometry in 10th grade, but rather he was to re-take Algebra I, which he did not pass in 9th grade. Testimony of Andaya. Math teacher Ms. Andaya believes the Student did not have the foundations to understand either Geometry in 10th grade or Algebra-Trigonometry in 11th grade. *Id.*

29. In June 2012, the Student's English teacher, Del Enders, with whom the Student had a very good relationship, offered to supervise a credit-retrieval project for the Student over the summer after 10th grade. The project was to produce a video about the Student and his desire to attend Dartmoor, write grant proposals, and pursue fundraising for Dartmoor tuition using the video. Mr. Enders is knowledgeable about potential funding sources. S-8; Testimony of Enders. The Student did not pursue the project. *Id.*

30. At an IEP team meeting on June 13, 2012, the Student's anxiety was discussed. Notes of the meeting were taken by the Parents' advocate, Thelma Simon. S-219:8-14. The notes state that school psychologist Debby White said: "We have never addressed his anxiety – don't know if has anxiety disorder." The notes later state that Superintendent Dr. Farris said: "We need to evaluate and provide counseling." S-219:11, 13. The District did not offer evidence to contradict what is stated in these notes.

31. In July 2012, the District authorized payment for Ms. Giesy, the Student's special education case manager, to go to Seattle twice during the summer and spend a total of 13 hours working with Ms. Moroney, the SLP who had delivered compensatory education to the Student and whom the family trusted. The contract for these services was not required by the Student's IEP and was entered into outside the IEP process. Its purpose was to establish a relationship between Ms. Giesy and Ms. Moroney, so that the Student would begin to trust Ms. Giesy. The hope was that he would access his IEP services with Ms. Giesy the following school year. S-38:1-2; S-25 through S-28; Testimony of Farris, Giesy.

32. Ms. Giesy and Ms. Moroney scheduled two sessions in August 2012 for Ms. Giesy to come to Seattle. Ms. Giesy had to cancel the first session due to fires in Central Washington that affected her family. Ms. Moroney canceled the second session in order to move her daughter to college. Testimony of Moroney. When Ms. Giesy's school duties resumed in the fall, she was no longer available to travel to Seattle to work with Ms. Moroney. Testimony of Giesy. The parties also discussed Ms. Moroney traveling to Ellensburg to consult with District teachers, but this did not occur. S-23.

11th Grade, 2012-2013

33. In 11th grade, the Student was again enrolled in a math class for which he had not passed the prerequisite courses. The Mother was adamant that the Student take Algebra-Trigonometry, which was the 11th grade course in the normal sequence of math courses. However, he had not passed Algebra I in 9th grade or the second semester of Geometry in 10th grade. Testimony of Fahey. His math teacher, special education case manager, and school counselor all stated he was not prepared for Algebra-Trigometry and should instead take

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Practical Geometry. Testimony of Giesy, Fahey, Hamilton. However, the Parents prevailed and he was enrolled in Algebra-Trigonometry.[12]

34. In Algebra-Trigonometry, Ms. Fahey provided the Student with his IEP accommodations, including modified assignments, extra time for assignments, and modified grading. He also had the help of an in-class tutor to read materials aloud, scribe for him, and take notes for him. Nevertheless, the Student struggled because he lacked the foundations for the class and he did not pass it. Testimony of Fahey.

35. In Cinema class during first semester of 11th grade, the Student did quite well at first, but later in the semester began to skip assignments and skip classes. S-173; Testimony of Enders. The teacher, Mr. Enders, provided all of the Student's accommodations and modifications, and repeatedly re-packaged assignments in an effort to encourage the Student to do them. But the Student did not do them and received an F in the class.

36. Prior to the start of the school year, Ms. Giesy had sent all of the Student's teachers information about his accommodations, modifications and AT. S-10:1; S-156; Testimony of Giesy. Two days into the school year she emailed the Parents asking how the Student was doing and whether they had any concerns. She offered to meet the Student outside of school to talk if he wished. *Id.* The Student's teachers who were witnesses at the hearing testified they provided the accommodations and modifications required by the Student's IEP. There was no evidence to the contrary, except regarding the in-class math tutor in the first few weeks of school, as discussed below.

37. Regarding his open 4th period, the Student had been informed that he could access a math teacher (Molly Andaya) and/or an English teacher (Devin Jones) during that open period. As of late October 2012, the Student that not accessed Mr. Jones at all, and had accessed Ms. Andaya only two or three times. S-19.

38. At the beginning of second semester, the Student did not come to his Study Hall class for the first two days of the semester because his schedule was still in flux; it had not yet been determined whether he would be enrolled in that class. When the Student came to Study Hall on the third day of the semester, the teacher, Gayle Burchfield, marked him down for not coming prepared for the class. The Student contacted the principal, Mr. Ellersick, to say this should not have occurred under the circumstances. Mr. Ellersick agreed, and immediately spoke with Ms. Burchfield about the matter. Prior to the Student's first day in Ms. Burchfield's class, Mr. Ellersick had not informed her about the Student's IEP. He did so prior to the Student's second day in her class. S-4; S-5; Testimony of Ellersick, Burchfield.

39. The Student continued refusing to access his special education services throughout 11th grade.

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[12] Math was not a special education subject for the Student. However, these findings are included for two reasons: The Parents claim the District failed to provide accommodations to the Student and training to his teachers, and this led to his lack of success in general educations classes generally. Also, there are claims regarding the Student's school-related anxiety. Failing to pass his math classes contributed to that school anxiety. Whether he had the prerequisites necessary to pass his math classes is relevant to these matters.

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40. The Student's grades in the first semester of 11th grade were poor. He failed Career-College Readiness Advisory, History, and Cinema. He received no credit for Algebra-Trigonometry. He received a C- in Junior Literature, a C in Physical Education (PE), and a Pass in an Arranged-Study Geometry course (arranged to make up for his not completing Geometry in 10th grade). J-2. There is no transcript in the record for the second semester of 11th grade. The hearing began while that semester was in progress.

Facts regarding math tutor

41. Early in the Student's 11th grade year, the District began looking for an in-class math tutor, as provided for in the Student's IEP. S-10:1; S-14:1. However, the District did not locate one immediately. A tutor was not provided in the Student's math class until October 12, 2012 a little more than five weeks into the school year. S-152; S-168:1.

42. The Student had several in-class math tutors during the remainder of 11th grade: two college students from Central Washington University and a District paraeducator. The complaint contends that none of these tutors were qualified. The Parents offered no evidence as to what qualifications they believe the tutors should have possessed.

43. The Parents contend the tutor was supposed to provide substantive teaching of math concepts to the Student, but did not do so. The District contends the tutor was for access to materials, i.e. a person who could read assignments and test materials aloud to the Student, scribe his answers as needed, and take notes in class for him. Testimony of Giesy, Fahey.

44. The District's argument is more persuasive for several reasons. First, the IEP states the tutor is to be "In-Class". J-5:67. A substantive tutor would not have been scheduled *during* class time. Substantive tutoring while the teacher is teaching would be an interruption. Rather, if substantive tutoring was intended, it would have been scheduled outside of class time, such as before or after school. Second, the Student was not eligible for special education in math – only in reading and written language, so this could only be an accommodation, not specially designed instruction. Third, the IEP lists the tutor under "Supplementary Aids and Services", not under "Special Education." *Id.* (Tutors may deliver special education as long as they are supervised by a certificated special education teacher. Testimony of Fuchs.) Fourth, the IEP's list of "Accommodations, Modification, and Assistive Technology" includes services such as those an in-class tutor would provide: "Utilize oral responses to assignments/tests" and "Allow dictation to scribe". J-5:73. It is found that the in-class tutor was to provide access to materials as an accommodation, not to provide substantive teaching of math.

Facts regarding assistive technology

45. At the beginning of the 2012-2013 school year, Sundara Cook, the high school's AT specialist, notified the Student's teachers to give her all written materials in advance, so she could scan them and make them available to the Student in a text-to-speech format. S-16:2. Mathematical text was more difficult to access in text-to-speech format than normal narrative text, but it could be done using certain software programs the Student had.

46. On September 20, 2012, Ms. Giesy wrote to the Parents that Ms. Cook was working to make sure all texts were converted as described above. She then wrote: "If there are problems

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with the documents, computer, etc., please let myself and Sundara [Cook] know immediately so that we can help with this." S-10:3-4.

47. The Student was not using any of the materials at school that Ms. Cook converted for him, but she nevertheless continued to provide them. S-15. In fact, the Student did not bring his computer to school at all. The Parents explained that he did not want to bring it to school ever since the monitor screen got broken at school in 9th grade.

48. The record establishes that District staff were proactive in making sure that written materials were provided to Ms. Cook so she could convert them for the Student in advance of their use in class or in homework assignments. The record also shows that District staff and SETC reviewed the Student's computer periodically to make sure it had the software he needed, offered to address any questions that arose, and offered training and skills assessment to the Student. *See* Testimony of Connolly, Giesy, Cook; S-185; S-256:7; S-123:1; S-121; S-120; S-209:1-2; S-16; S-10:1; S-16:1; S-10:3-4; S-15; S-10:4; S-156; S-13; S-258:6; S-117; S-256:5; S-116; S-116:3; S-115; S-207; S-176; S-256:2;[13]

49. The Parents testified that there were many problems with access to AT. However, most of the testimony and exhibits they presented were from a period prior to the statute of limitations in this case. To the extent there were problems with technology, Ms. Cook and Mr. Connolly stood ready to address them. The Student chose not to use the AT available to him at school, and in fact not to bring his computer to school. Ms. Cook has not seen his computer since September 2010. With most of the students she assists, Ms. Cook has hands-on time with their computers several times a month. Testimony of Cook. The teacher who taught him both 10th and 11th grade math never saw the Student's computer either year. Testimony of Fahey.

50. Regarding loading textbooks onto the Student's computer, one of the reasons the Parents agreed to an IEP in 2012 was that, by federal law, students must be on an IEP in order to receive free electronic versions of textbooks. Until the Parents signed acceptance of the Student's IEP in April 2012, Ms. Cook was scanning individual assignments from his textbooks in order to convert them for use with text-to-speech software. He was still getting the textbook assignments, but it was more cumbersome for Ms. Cook prior to the IEP going into effect. Also, when portions of textbooks are scanned and converted, electronic searches do not include parts of the books that have not yet been scanned, such as an index at the end of the book. Testimony of Cook.

51. The Parents note that full versions of the Student's textbooks were not loaded onto his computer until December 2012. The Mother acknowledged that she did not complain to anyone prior to that time about lack of access to textbooks, which were being converted in pieces by Ms. Cook, as described above. Once the full electronic versions of the textbooks arrived, the Mother insisted that Mr. Connolly load them onto the Student's computer even though Ms. Cook had them on disks and was capable of loading them. Because of the Mother's wishes, Ms. Cook gave those disks to Mr. Connolly, who loaded them onto the Student's computer in December 2012.

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[13] These citations to the exhibits regarding AT start with earlier ones and proceed chronologically to later ones.

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52. Regarding the AT evaluation by Mr. Connolly of SETC, Mr. Connolly began working with the Student during middle school and conducted a formal evaluation of him at that time. When the Student was in 10th grade, Mr. Connolly suggested that he reassess the Student's skills to see if he needed any more training. The District agreed, and Mr. Connolly met with the Student during 10th grade. However, Mr. Connolly became ill and could not complete the updated assessment that year. Mr. Connolly did participate in the special education evaluation team meeting in March 2012 during 10th grade, and gave a report about the Student's AT accommodations. At that meeting he stated he would meet with the Student again to update his assessment. J-5:31.

53. In July 2012, following 10th grade, the District proposed to the Parents that several evaluations be undertaken, including completion of the AT evaluation. S-38:1-2. The Parents did not provide signed consent to complete the AT evaluation until the fall of 11th grade, on October 10, 2012. J-5:93.

54. Mr. Connolly was unaware of any plan for him to conduct another *formal* assessment of the Student. He explained that a formal AT assessment, which includes a full evaluation team meeting, is typically done only once for a student. Mr. Connolly did such a formal assessment of the Student in middle school. During high school, Mr. Connolly worked regularly with the Student and believes it was unnecessary for him to have another formal assessment. The informal meetings about the Student's needs and skills were just as valuable, and a formal meeting of the evaluation team was unnecessary. Testimony of Connolly.

Facts regarding psychological evaluation and counseling

55. In July 2012, after the end of the Student's 10th grade year, District superintendent Dr. Farris offered to fund an evaluation by a private psychologist to assess the Student's depression. S-38:1-2. A month after the letter with this offer was sent, the District had been contacted by the Parents' chosen psychologist, but had not received the Parents' written consent for the evaluation. The Superintendent therefore wrote to the Parents again requesting written consent. S-24. The evaluation took place in October 2012. Dr. Peter Stewart of Sageview Youth Psychology in Richland, Washington performed the evaluation. On December 11, 2012, he provided a copy of his report to the District. J-9.

56. Dr. Stewart conducted a comprehensive evaluation and diagnosed Adjustment Disorder with Mixed Anxiety and Depressive Mood. The Student's adjustment disorder, anxiety, and depression were related to school performance. J-9:6-7. Among Dr. Stewart's recommendations was individual/family counseling based on cognitive behavioral therapy. Dr. Stewart listed this recommendation under "Family" rather than "School" recommendations. J-9:7. However, Dr. Stewart and District school psychologist Debby White both testified that counseling was educationally necessary for the Student.

57. From Dr. Stewart's report, Superintendent Farris was satisfied that the Student was not at risk of suicide (the main reason he had requested the evaluation), and that the District was already providing the recommendations Dr. Stewart listed for the "School" setting. Dr. Farris did not understand that the District needed to have a meeting with the Parent to review Dr. Stewart's report. Testimony of Farris.

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58. On January 14, 2013, approximately a month after Dr. Stewart's evaluation report was issued, the Parents wrote to Dr. Farris. They stated they had been waiting to hear from the District about Dr. Stewart's evaluation and they wanted to make needed changes to the Student's program before the start of the new semester. S-200:1. On January 22nd, Dr. Farris replied, concurring that the parties should meet about Dr. Stewart's evaluation. S-200:4-5. Also on January 22nd, the Mother wrote to him and other District staff that they should meet to plan changes to the Student's classes for the second semester. S-6.

59. The meeting occurred on January 24, 2013. Notes of the meeting were taken by the Parents' advocate, Ms. Simon. The notes indicate that Ms. White and Ms. Hamilton (the school psychologist and school counselor, respectively) stated that counseling was educationally necessary for the Student. S-219:3; *see also* S-33:2-3. The District did not present evidence to contradict the meeting notes. However, second semester was about to start and the meeting focused on developing a schedule for the Student. Further discussion of Dr. Stewart's report and recommendations was deferred.

60. On March 5, 2013, the Mother wrote to Dr. Farris that the family had selected a counselor to deliver the services recommended in Dr. Stewart's report. The counselor was Dr. Charles Schwarzbeck of Seattle, who was recommended by Ms. Moroney. The Mother asked whether Dr. Schwarzbeck should bill the District, or whether the District would enter into a contract with him. S-33:1. Dr. Farris responded on March 8th that they would first need to amend the Student's evaluation to reflect a need for counseling as a related service, then identify a provider and enter into a contract before services could be implemented. S-33:1-2. The Mother replied on March 13, 2013 that the District had received Dr. Stewart's evaluation in December, and the matter of counseling should have been addressed at the parties' meeting on January 24th. S-33:2-3.

61. On March 25, 2013, the District invited the Parents and the Student to a meeting to be held April 2, 2013. The notice stated the meeting was to review Dr. Stewart's report, consider amending the District's evaluation and IEP in light of it, and determine whether the related service of cognitive behavior therapy was needed. J-5:95-96. Evidence at hearing established that the District was prepared to offer counseling at the April 2nd meeting. Ms. White, the school psychologist, had compiled a list of local providers from whom the Student could choose, and she would have recommended 15 sessions of counseling initially, with a review at that point to determine if additional sessions were needed.[14]

62. On March 29, 2013, the Parent filed the due process hearing request in this case. On April 1st – the day before the meeting to review Dr. Stewart's report and consider adding counseling to the Student's IEP – the Mother cancelled the April 2nd meeting. She wrote that because the District's notice about the meeting was incomplete[15] and because a due process

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[14] While Ms. White recommended 15 sessions, Ms. Hamilton, the school counselor, testified that a typical course of cognitive behavior therapy is 8 to 10 sessions. Ms. Hamilton's testimony was about cognitive behavior therapy in general, not about the Student's needs in particular. It is therefore given less weight than Ms. White's testimony on this matter.

[15] The Parents offered no evidence concerning what they believe was incomplete about the District's notice. The prior written notice and invitation of March 25, 2013 stated that a meeting would be held on

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hearing was pending, she would wait until authorized by the ALJ to make any changes to the Student's IEP or evaluation. S-193.

63. The Student turned 18 years old shortly before the April 2nd meeting was to be held. (His exact birthday is omitted to avoid including personally identifying information in this decision). On his birthday, the Student appointed his Mother to be his educational representative. The Student appeared briefly on the first day of the hearing at the ALJ's request, but did not testify and played no part in the hearing thereafter. Because the complaint was filed by the Parents before the Student turned 18 years old, and because the Student appointed his Mother as his educational representative on the day he turned 18, the Parents are referred to herein as the complaining party.

64. Later in April 2013, the Student met twice with Dr. Schwarzbeck in Seattle. He was the psychologist recommended by Ms. Moroney and chosen by the family. Dr. Schwarzbeck charged $250 per visit, for a total of $500. S-263. The Student has not seen Dr. Schwarzbeck, or any other mental health provider, from that time through the due process hearing in June 2013. Dr. Schwarzbeck did not testify and there is no evidence regarding the nature of the therapy he provided.

CONCLUSIONS OF LAW

The IDEA

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 USC §1401 *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) § 300 *et.seq.*, and Chapter 392-172A Washington Administrative Code (WAC).

2. OAH does not have jurisdiction under Section 504 of the Rehabilitation Act of 1973, 29 USC §§ 701 *et seq.* For this reason, no claims are adjudicated for the period during which the Student was on a Section 504 plan, from September 16, 2010 through April 17, 2012.

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 *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

> First, had 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

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April 2, 2013 to consider Dr. Stewart's evaluation and consider amending the District's evaluation and IEP to add cognitive behavior therapy as a related service. J-5:95-96.

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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 207;102 S. Ct. at 3051.

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 education instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. 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 of 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; 102 S. Ct. at 3041-3042.

5. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but instead a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Rowley,* 458 U.S. at 200 - 201; 102 S. Ct. at 3048. "District must provide Student a FAPE that is 'appropriately designed and implemented so as to convey' Student with a 'meaningful' benefit". *J.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 432 - 433, (9th Cir. 2010); *see also J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1038, n. 10, (9th Cir. 2009).

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

Procedural Matter

7. The District responded belatedly to part of the Parents' request for the Student's educational records. Specifically, a portion of the emails contained in his records were produced after the hearing began and more than 45 days after the Parents' April 1, 2013 request for all records. The 45th day after that request was the second day of the hearing (May 15, 2013), and they were not produced by that date.

8. WAC 392-172A-05190(1) provides, in pertinent part, regarding parental requests for records access:

> The School District shall comply with a request promptly and before any meeting regarding an individualized education program or hearing or resolution session . . . The

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school district shall respond, in no case, more than forty-five calendar days after the request has been made.

9. The Parents did not seek to amend their complaint to add a claim for violating the regulation quoted above.

10. At the hearing, the ALJ took several steps to remedy the unfairness to the Parents of receiving some records after the hearing had begun. First, the Parents were permitted to introduce any of the late-disclosed records in evidence notwithstanding their being offered less than five business days before the hearing began. There was a period of several weeks between the hearing dates in May and those in June 2013, during which time the Parents reviewed the late-disclosed records and prepared the new exhibits they wished to submit. The Parents submitted exhibits S-250 through S-263 when the hearing resumed in June 2013. Second, the District was required to present its witnesses first, instead of the normal order of presentation in cases where the Parents have the burden of proof. This was to give the Parents the advantage of hearing the District's witnesses first before the Parents had to present their case. Third, the Parents were given the opportunity to re-call as witnesses in June any District witnesses to whom the Parents wished to pose additional questions in light of the late-disclosed records.

11. In preparing this decision, the ALJ considered whether an additional appropriate remedy for the procedural disadvantage experienced by the Parents would be a reversal of the burden of proof. In cases where records are destroyed by one party (rather than simply being disclosed late), a reversal of the burden of proof is sometimes imposed as a remedy. *See Henderson v. Tyrrell*, 80 Wn. App. 592, 605, 910 P.2d 522 (1996); *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381-382, 972 P.2d 475 (1999). However, this case does not involve the destruction of records. Also, the Supreme Court has held that the parents have the burden of proof in cases where the parents filed the due process hearing request. *Schaffer v. Weast, supra,* 546 U.S. 49. Nevertheless, the ALJ has examined whether the outcome would have been different on any of the issues in this case if the burden of proof had been reversed. It is concluded that the outcome would have been the same on all issues in this case. There were no issues close enough that the burden of proof played any role. Although the phrases "the Parents have carried their burden of proof" and "the Parents have not carried their burden of proof" are used below, this is in deference to the standard set forth in *Schaffer.* As noted above, the outcome would have been the same had the burden of proof been reversed. It is also concluded that the three remedies provided to the Parents were sufficient to counteract any procedural disadvantage the Parents may have experienced from the late disclosure of some records.

Parents' Claims

Failure to provide training for Student's teachers

12. The Parents allege the District violated the IDEA by failing to provide training to the Student's teachers in three areas: (1) understanding the Student's disability; (2) consistently providing the supports and accommodations listed in his IEPs; and (3) assistive technology.

13. The Parent has cited no statute, regulation, or case law under the IDEA to support these claims. School districts are required to inform general education teachers of the accommodations and modifications provided in a Student's IEP, and ensure that they are

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provided. The Parents have not established any failure to perform these duties. One teacher, Ms. Burchfield, was not informed of the Student's accommodations and modifications prior to his first day in her class. That is because the Student's schedule was in flux and it was not known sufficiently in advance that the Student would be assigned to her Study Hall. The problem was brought to the principal's attention and he rectified the situation immediately.

14. Aside from informing teachers of the accommodations and modifications in a student's IEP, there is no other requirement for "training" in any of the three areas cited by the Parents. Nevertheless, it will be observed that Mr. Graf in 10th grade and Ms. Giesy in 11th grade did inform teachers in advance of his arrival in their classes about the Student's disability and needs, and offered their services to help address any issues that might arise concerning the Student's accommodations and modifications. It is also found that Ms. Cook offered assistance to the Student's teachers with regard to his AT, and both she and Mr. Connolly of SETC stood ready to assist with any AT problems that might arise.

15. The Parents have not carried their burden of proof that the District violated the IDEA by failing to provide training to the Student's teachers.

Failure to provide training or consultation for District staff with Patricia Moroney

16. The Parents have cited no statute, regulation, or case law under the IDEA -- nor any provision of the Student's IEP -- requiring the District to have Ms. Moroney train or consult with its staff. When the Student refused to meet with Ms. Giesy, his special education teacher, to receive reading and writing services, the District went above and beyond its responsibilities and offered to have Ms. Giesy and Ms. Moroney meet and consult during the summer before his 11th grade year. The purpose was to see whether some of the trust the Student had in Ms. Moroney might be transferred to Ms. Giesy if the Student knew the two of them had consulted. The scheduled summer meetings in Seattle did not occur due to a natural disaster and due to Ms. Moroney having a conflict in her schedule. The meetings could not be rescheduled once the school year resumed because Ms. Giesy was no longer available for full days of out-of-town travel. The parties talked about Ms. Moroney coming to Ellensburg to consult with the Student's teachers during the school year. This did not occur for unknown reasons, but there was no legal requirement that it occur.

17. The Parents have not carried their burden of proof that the District violated the IDEA by failing to provide training or consultation for District staff with Patricia Moroney.

Failure to provide counseling for the Student as a related service

18. Counseling as a related service is discussed in the section below concerning the District's response to Dr. Stewart's December 2012 psychological evaluation. However, the Parents assert that the District knew of the Student's school-related anxiety prior to that time, and should have provided counseling sooner, or evaluated the Student to see whether he needed counseling sooner.

19. WAC 392-172A-03020(3)(e) requires that students be evaluated in all areas related to the suspected disability, including social and emotional status. *See* 34 CFR § 300.304. The District had sufficient information to suspect that the Student might have an emotional problem interfering with his learning, and thus an evaluation in this area should have been offered earlier

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than it was. In January 2010, Judge Shave's decision found the Student had school-related anxiety. In May 2010, the District received Dr. Blair's independent neuropsychological evaluation. Dr. Blair diagnosed the Student with an anxiety-related disorder and stated that if his school-related anxiety continued after a period of recommended instruction, then counseling would be appropriate. The District subsequently recognized the Student's anxiety in September 2010, during his Section 504 evaluation. The District again discussed at an IEP meeting in June 2012 the fact that the Student's anxiety was interfering with his learning. The District offered a psychological evaluation on July 11, 2012.

20. The statute of limitations in this case goes back to March 30, 2011, so the period of the District's violation for failing to evaluate the Student for school-related anxiety cannot go farther back than that. If the District had offered an evaluation on March 30, 2011 and the Parents had provided consent at that time, then the District would have had 35 school days to complete the evaluation, the 35th school day being May 19, 2011. *See* WAC 392-172A-03015(3); 34 CFR § 300.303. The District should not benefit from its violation, and there was evidence that the Student was suffering from significant school-related anxiety. It will therefore be presumed that a need for counseling would have been found had an evaluation been conducted in spring 2011. Counseling should therefore have been provided promptly after May 19, 2011.

21. The District offered a psychological evaluation on July 11, 2012. If the Parents had provided consent at that time, then the evaluation would have been completed by 35 school days later, on October 23, 2012. (The Parents did not provide consent for the evaluation until October 10, 2012, but that delay is not attributable to the District.) October 23, 2012 is therefore the end of the period during which the District was in violation of its obligation to evaluate the Student and provide counseling if needed. The period of violation thus spans May 19, 2011 through October 23, 2012. (A second period of District-caused delay in providing counseling occurred *after* Dr. Stewart's evaluation, but that will be discussed separately, below.)

22. The Parents have carried their burden of proof that the District violated the IDEA by failing to offer counseling to the Student as a related service.

Failure to provide an appropriate grading system for the Student

23. The Parents have cited no statute, regulation, or case law under the IDEA requiring any particular grading system for students. The Student's IEP included the accommodation of modified grading as needed. All of the teachers who testified at the hearing provided the Student with modified grading. There was no evidence to the contrary. The evidence shows that the Student's failure to achieve passing grades in some courses was due to a failure to turn in assignments (even the modified, extended-time assignments that were provided to him), frequent absences, not having the prerequisite skills for some classes, and not receiving any specially designed instruction in reading or writing (either from the District or Ms. Moroney) to support his work in those classes. There is no evidence the Student's poor grades were due to a failure to provide modified grading.

24. The Parents have not carried their burden of proof that the District violated the IDEA by failing to provide an appropriate grading system for the Student.

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Failure to provide course credit for compensatory education provided by Ms. Moroney

25. The District did provide course credit for the compensatory education provided by Ms. Moroney. The Parents acknowledged this at the hearing. They attempted to raise essentially the opposite claim during the hearing: That the District *wrongfully* provided course credit for the compensatory education provided by Ms. Moroney, because the Student completed only 81.75 hours of work with her instead of 90 hours.

26. WAC 392-172A-05100(3) provides:

> The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process hearing request unless the other party agrees otherwise.

See 34 CFR § 300.512. The District did not agree to have this opposite issue raised at the due process hearing. The Parents are therefore barred from raising it.

27. The Parents have not carried their burden of proof that the District violated the IDEA by failing to provide course credit for compensatory education provided by Ms. Moroney.

Failure to provide homebound education services from on or about May 4, 2012 through end of the school year

28. WAC 392-172A-02100 provides that home or hospital instructions shall be provided to certain eligible students. It also provides, in pertinent part:

> As a condition to such services, the parent of a student shall request the services *and provide a written statement to the school district from a qualified medical practitioner* that states the student will not be able to attend school for an estimated period of at least four weeks.

(Italics added). The District informed the Parents that they would need to provide a health care provider statement if they wanted to request home/hospital instruction. The Parents chose not to do so.

29. The Parents have not carried their burden of proof that the District violated the IDEA by failing to provide homebound education services to the Student.

Failure to provide ESY services at Dartmoor School in summer 2012

30. WAC 392-172A-02020 addresses the standards governing ESY services. It provides, in pertinent part:

> (5) The purpose of extended school year services is *the maintenance of the student's learning skills or behavior, not the teaching of new skills or behaviors.*
> (6) School districts must develop criteria for determining the need for extended school year services that include *regression and recoupment time based on documented evidence*, or on the determinations of the IEP team, based upon the professional judgment of the team and consideration of factors including the

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nature and severity of the student's disability, *rate of progress, and emerging skills, with evidence to support the need.*
(7) For the purposes of subsection (6) of this section:
(a) Regression means significant loss of skills or behaviors if educational services are interrupted in any area specified on the IEP;
(b) Recoupment means the recovery of skills or behaviors to a level demonstrated before interruption of services specified on the IEP.

(Italics added).

31. The District correctly determined that the criteria for ESY services were not met here. The Student had failed to access any special education services during the school year. It was therefore impossible to determine whether there was a need for ESY to maintain the skills he had gained. It was also impossible to provide the documentation required to support an ESY determination, as mandated by the regulation quoted above.

32. Credit retrieval is not one of the allowable bases for providing ESY. The District has several credit retrieval programs for high school students and declined to pay for Dartmoor for the purpose of credit retrieval. The IDEA does not address credit retrieval.

33. The Parents have not carried their burden of proof that the District violated the IDEA by failing to provide ESY services at Dartmoor School in summer 2012.

Failure to implement the Student's IEP by not loading books onto his computer until December 2012

34. The Student's IEP contains extensive requirements regarding AT. None of them state that full versions of textbooks must be loaded onto the Student's computer. The closest provision to such a requirement in the Student's IEP states:

> All printed material given/made accessible to students to be in text-to-speech format to be prepared by District staff. This is to include information on websites. All materials need to be prepared and ready for [the Student] at the same time information is given to other students or the assignment is excused.

J-5:74.

35. The District fulfilled this requirement. The Parents offered no evidence of any assignments from the Student's textbooks (or elsewhere) that were not converted to a text-to-speech accessible format prior to their use in class. By December 2012, Ms. Cook, the AT specialist, had received full electronic versions of all of the Student's textbooks, so she no longer had to perform the more cumbersome scanning and conversion process. The full textbooks were loaded onto the Student's computer at that time.

36. The Parents have not carried their burden of proof that the District failed to implement the Student's IEP by not loading books onto his computer until December 2012.

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Failure to implement the Student's IEP by not providing tutoring in math from a qualified tutor

37. For the reasons set forth in the Findings of Fact, the Parents have not established that the Student's in-class math tutor was supposed to teach substantive math concepts to him. The evidence establishes that the tutor was to provide access to the in-class materials by reading, scribing, and taking notes for the Student.

38. Regarding the math tutors' qualifications, the Parents did not state what qualifications they believe the tutors ought to have. They also presented no evidence on what qualifications the tutors did have.

39. However, the Parents did establish that no tutor was provided for more than five weeks at the beginning of the Student's 11th grade year. The Student's IEP provided for an in-class tutor in his math class. However, at the beginning of the school year on September 5, 2012, no tutor was in place. A math tutor did not start until October 12, 2012, more than five weeks later. This constituted a failure to implement the Student's IEP.

40. 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).

41. The absence of an in-class math tutor for more than five weeks was more than a minor discrepancy in the services owed to the Student. He had been having extreme difficulty in his math classes in high school, not passing most of them. Mathematical text was more difficult to convert to a text-to-speech format than normal narrative text, so a reader was of particular value. For these reasons, there was a material failure to implement the pertinent provision of the Student's IEP.

42. The Parents have carried their burden of proof that there was a material failure to implement the Student's IEP, in that no in-class math tutor was provided for more than five weeks at the beginning of 11th grade, the 2012-2013 school year.

Failure to implement the Student's IEP by not informing some of the Student's teachers of his disability prior to the start of classes

43. The only evidence that a teacher was not informed of the Student's disability prior to the start of classes concerned one teacher, Ms. Burchfield. She was not informed of the Student's disability prior to his first day in her Study Hall because the Student's schedule was in flux and it

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was not known sufficiently in advance that he would be in that class. The problem was brought to the principal's attention and he rectified the situation immediately.

44. To the extent that Ms. Burchfield did not implement the Student's accommodations and modifications on one day, this was a minor discrepancy and not a material failure to implement. *See Van Duyn, supra.*

Failure to implement the Student's IEP by not modifying the Student's homework in a consistent format

45. All teachers who testified at the hearing modified the Student's assignments for him. There was no evidence to the contrary. The Student's IEP required "Shortened assignments – as arranged with teacher and written down." J-5:73. The IEP contains no requirement that his homework be modified in a consistent format. With each teacher teaching a different subject, and having their own methodology and teaching style, there is no evidence it would be beneficial to require them all to use a consistent format.

46. The Parents have not carried their burden of proof that the District failed to implement the Student's IEP by not modifying his homework in a consistent format.

Failure to timely consider Dr. Stewart's psychological evaluation and failure to timely amend the District's evaluation in light of Dr. Stewart's report

47. WAC 392-172A-03025 provides that school districts must "review existing evaluation data on the student" and on the basis of that data, and input from the parents, determine whether "any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP . . . " *See* 34 CFR § 300.305.

48. The District undertook a psychological evaluation of the Student, contracting for its performance with Dr. Stewart. Dr. Stewart provided the District with his report on December 11, 2012. Pursuant to the regulation quoted above, the District was required to review his evaluation report, together with input from the Parents, and determine whether any additional services were needed to enable the Student to meet his IEP goals.

49. The regulation does not state how soon after receiving new evaluation data a school district must review it and determine whether to modify the IEP. Another regulation provides that districts must ensure that the IEP team "[r]evises the IEP, as appropriate, to address .'. . [t]he results of any reevaluations." WAC 392-172A-03110(3); *see* 34 CFR § 300.324. Again, this regulation does not specify a time period by which such revision must be accomplished. A rule of reasonableness will therefore be applied, taking into account the school district's calendar, the relative importance of the need in question, and what if any educational progress the student was making in the absence of that need being addressed. Regarding the second criterion, evaluation data that suggests a minor change to an existing program is less important, and need be attended to less quickly, than evaluation data that suggests a significant change in program or a new area of service.

50. In the present case, the District received Dr. Stewart's report on December 11, 2012, shortly before winter break was to begin on December 21, 2012. It would have been difficult to

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coordinate the schedules of all the members of the Student's evaluation team to meet during that interval, which contained only seven school days. It was thus reasonable for the District to delay considering Dr. Stewart's report until after winter break. The need in question was relatively important, as a new area of service was to be considered. The Student was not making educational progress at that time, based on the low grades he was receiving (he did not pass four of his classes that semester) and his refusal to access any special education services. For these reasons, the District should have scheduled a meeting to review Dr. Stewart's evaluation on or about the date that school resumed after winter break, January 2, 2013.

51. The District instead scheduled this meeting for April 2, 2013, three months later. On that date, if the meeting had gone forward, the District would have reviewed Dr. Stewart's report and would have amended the Student's IEP to add counseling as a related service. This should have occurred three months earlier. However, because the Mother cancelled the April 2, 2013 meeting, this date marks the end point of the District's violation for failing to timely consider Dr. Stewart's report. The period of violation is therefore January 2 through April 2, 2013.

52. The Parents have carried their burden of proof that the District violated the IDEA by failing to timely consider Dr. Stewart's psychological evaluation and failing to timely amend the Student's IEP in light of that evaluation.

Failure to timely complete an assistive technology evaluation

53. The evidence established that the District obtained parental consent on October 10, 2012 for Mr. Connolly of SETC to complete an AT evaluation. Pursuant to WAC 392-172A-03015(3), that evaluation was due to be completed 35 school days later. Instead, Mr. Connolly performed an informal evaluation by meeting with the Student and assessing his skills. Mr. Connolly did not understand that the District intended for him to conduct another formal evaluation. He does not believe there would have been any value to another formal evaluation that was any different than the value obtained through the informal evaluation he conducted. Mr. Connolly is found to be a credible witness with significant expertise in the support of special education students with assistive technology. There was no evidence that contradicted Mr. Connolly's testimony on this matter.

54. The Parents have established that the District violated the IDEA by failing to timely complete an AT evaluation after the Parents provided written consent for it. However, for the reasons stated above, the Parents have not established that this resulted in a denial of FAPE.

Remedies

55. The claims on which the Parents prevailed are the District's failure to: (1) provide mental health counseling as a related service; (2) timely consider Dr. Stewart's psychological evaluation; and (3) implement the in-class math tutor provision of the Student's IEP during the first five weeks of the 2012-2013 school year.

Compensatory Education

56. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

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Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra,* 401 F.3d at 523-524.

57. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra,* 401 F.3d at 524. For its part, the District has been cooperative and solicitous toward the Student and the Parents throughout the period at issue here. The District has gone above and beyond what the IDEA required in an effort to correct the violations found in the previous due process hearing and to turn around its prior contentious relationship with the Parents.

58. The Parents, for their part, have rejected most of the services the District offered and have failed to provide for the Student the remedies ordered in the prior case, despite the District making those remedies available. The Parents failed to provide the Student with anywhere near the number of hours of compensatory education mandated by Judge Shave, and did not even use the greatly reduced number of hours with Ms. Moroney that they bargained for. Also, the Parents did not follow Judge Shave's intent that the Student receive compensatory education on a compressed schedule. Finally, the Parents cancelled the April 2, 2013 IEP meeting at which the District was to consider (and was prepared to offer) adding mental health counseling to the Student's IEP. The Parents contend the Student was in great need of such counseling, yet they prevented the District from providing it and have not provided it themselves.

59. The Student's lack of educational success during the two-year period covered by this decision is not attributable to deficiencies in the special education services or accommodations offered by the District, because the Student did not access them. His lack of success during those years is attributable in part to the Parents' decision not to provide him with the intensive compensatory education ordered by Judge Shave and to stop all special education services. Because the Parents largely ceased using Ms. Moroney during those two years, and utilized no special education services, the Student has been totally without the support he needed.

60. There were two periods of time during which the District's conduct – not the Parents' conduct – deprived the Student of counseling that was educationally necessary for him. As discussed above, the first was May 19, 2011 to October 23, 2012, when the District violated the IDEA by failing to evaluate the Student or provide counseling for his school anxiety. The second period was January 2, 2013 to April 2, 2013, when the District failed to consider Dr. Stewart's evaluation and failed to determine whether any changes to the Student's IEP were needed in light of that evaluation. These two periods total 87 weeks.

61. It cannot be presumed that the Student would need or benefit from 87 weeks of mental health counseling, especially in light of the only evidence in the record concerning the recommended course of counseling for the Student being 15 weeks. The purpose of compensatory education is not to penalize school districts one-for-one for each week of an IDEA violation. Rather, its purpose is to compensate students and put them in the position they would have been absent the denial of FAPE.

62. Neither Dr. Stewart nor any Parent witness testified to the number of weeks of counseling the Student requires in order to receive this compensation and participate more

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successfully in his education. Ms. White, the school psychologist, recommended that he initially receive 15 weeks of counseling, with a review at that point to determine whether additional weeks are needed.

63. The Student has a significant amount of school-related anxiety. There was also an extremely long delay in providing services that were educationally necessary. This delay exacerbated his anxiety as he continued to fail in many of his classes. For these reasons, the Student will be awarded 25 weeks of compensatory education counseling, with a review toward the end of that period. Additional weeks of counseling may be provided thereafter as part his prospective placement, depending on the recommendations of his therapist and the decision of the IEP team (hopefully the Student will attend the IEP meeting and contribute his thoughts on the matter). The 25 weeks of compensatory education counseling should begin as soon as possible and must be completed within one year from the date of this decision.

64. The provider must be a licensed counselor or psychologist at no more than 45-minutes driving distance from the Student's home.[16] The reason for this geographical limitation is that counseling should not interfere with the Student's homework, extracurricular activities, or need for rest and relaxation. In prior years, the Student did not receive the compensatory education that Judge Shave ordered because the Parents chose a provider at too great a distance from home. That mistake should not be repeated.

65. The choice among licensed providers will be made by the Student from a list containing a minimum of 10 qualified providers, which list will be furnished by the District to the Student within 10 days after the District receives this decision. Services are to commence as soon as possible and are to be paid for by the District. If the Student cancels any counseling session without giving the amount of advance notice required by the counselor, so that the District is charged for the session, that session will count against the Student's compensatory education award of 25 sessions. If the Student does not believe the selected counselor is appropriate for him, he may switch to another counselor on the list. He may switch as many times as he believes is appropriate for his needs.

66. The District requests that any award of counseling be limited to cognitive behavior therapy. This request is denied. While witnesses, including Dr. Stewart, recommended cognitive behavior therapy for the Student, it will be left to the professional judgment of the therapist to decide what methodology, or combination of methodologies, to employ. The only restrictions imposed are that the counselor have the training and experience necessary to use cognitive behavior therapy, and that the counseling be aimed at helping the Student to participate more successfully in his education. It is up to the counselor to choose what methodology or methodologies to employ to reach that goal.

67. The award of counseling services herein does not imply that the District caused the Student to be in need of those services. No such finding is made. It is only found that the Student needed those services due to his anxiety about school and his refusal to access the

[16] Driving distance will be determined by a generally respected online mapping service such as Google Maps or Mapquest.

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educational services offered to him. The District has been found responsible for the delay in providing counseling services, but not for causing the need for those services.

68. Reimbursement for the two sessions of counseling provided by Dr. Schwarzbeck would not normally be considered, since there is no evidence as to the services Dr. Schwarzbeck provided or whether they focused on the educational needs of the Student. If those services had been delivered during the period the District unlawfully delayed providing counseling, then reimbursement would have been awarded: Because of the undue delay, and lacking guidance from the IEP team, the Parent would have been justified in making a unilateral selection of provider. However, the visits to Dr. Schwarzbeck occurred later in April 2013, after the Parents cancelled the April 2, 2013 IEP meeting to discuss mental health counseling. The Parents could have attended the meeting and advocated for their chosen provider, but instead they cancelled the meeting and incurred expenses for that provider unilaterally. The request for reimbursement of payments to Dr. Schwarzbeck will therefore be denied.

69. The second type of compensatory education to which the Student is entitled arises from the District's failure to implement the in-class math tutor provision of his IEP from September 5 through October 11, 2012. This is a period of approximately five weeks. The District's failure to implement this IEP provision was unaffected by the Parents' counterproductive actions that would otherwise be considered in making an equitable award. Twenty-five math tutoring sessions of 55 minutes each (the length of a normal class period) will be awarded to the Student. This represents one period per day, five days per week, for five weeks.

70. As discussed above, the purpose of the in-class math tutor was to allow the Student to better access the materials rather than to provide substantive teaching. However, in 12th grade, it may be that substantive teaching would be more helpful to the Student than an in-class access tutor. For compensatory education, the Student may choose which type of tutor he would find most helpful. If the Student chooses substantive tutoring rather than in-class tutoring, it may occur either before or after school, at the Student's choice. The District will select the tutor once the Student identifies which type of tutor he prefers. The Student may choose to receive the 25 sessions consecutively, on a daily basis, during a five-week period. He may alternatively choose to spread the sessions out over time. The only restriction is that the sessions must be completed by the end of the 2013-2014 school year.

Prospective Relief

71. Within three business days after the Student's 23rd compensatory education counseling session, the District will communicate with the counselor and inquire how many sessions of counseling beyond 25, if any, the counselor believes are necessary in order for the Student to receive benefit from his education. (The counselor will not need to disclose any private patient information other than the number of weeks, if any, that he or she recommends for further counseling. If the counselor requires the Student's written consent for this communication, then the Student must provide that written consent or else forgo further counseling beyond the 25 sessions at District expense.) Within two weeks after receiving the counselor's recommendation, the IEP team will meet to consider that recommendation and other relevant data, and amend the Student's IEP, if necessary, to provide additional weeks of counseling as a related service. If the Student cancels any such counseling session without giving the amount of advance notice required by the counselor, so that the District is charged for the session, that session will count against the number of additional counseling sessions provided for in his IEP.

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Other Requested Remedies

72. All other remedies requested by the Parents are denied because they have established no violations of the IDEA that would entitled them to such remedies.[17] The Parents believe they should receive private services as remedies without trying the special education services offered by the District during the period at issue because they claim the District's special education services failed their son in the past. Judge Shave's decision awarded the Parents remedies for a past denial of FAPE. The Parents here attempt to gain additional remedies based on either the denial of FAPE found by Judge Shave or based on events prior to the statute of limitations. Both of those avenues for gaining additional remedies are not permitted. The only remedies to which the Parents are entitled are for violations shown to have occurred during the two-year statute of limitations period at issue in the present case. Those have been awarded.

ORDER

1. The District violated the IDEA and denied the Student a FAPE by:

   a. Failing to provide counseling to the Student as a related service;
   b. Failing to timely consider the psychological evaluation conducted by Dr. Peter Stewart; and
   c. Failing to implement the in-class math tutor provision of the Student's IEP for the first five weeks of the 2012-2013 school year.

2. The District shall provide compensatory education to the Student in the form of 25 sessions of mental health counseling on the terms set forth in the Conclusions of Law, above.

3. Within three business days after the Student's 23rd compensatory education counseling session, the District shall communicate with the counselor and inquire how many sessions of counseling beyond 25, if any, the counselor believes are necessary in order for the Student to receive benefit from his education. Within two weeks after receiving the counselor's recommendation, the IEP team shall meet to consider that recommendation and other relevant data, and amend the Student's IEP, if necessary, to add additional weeks of counseling as a related service.

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[17] One of the remedies the Parents requested is access to all of the Student's educational records. That is already required by law (*see* 20 USC §1415(b)(1)) and so it is unnecessary as a remedy. Also, it addresses no IDEA violation that was alleged in the complaint. Another requested remedy is the provision of a facilitator for future IEP and evaluation review meetings, and the provision of recordings or thorough notes of those meetings. The parties have done these things in connection with past meetings and may choose to do them in the future. However, that is a matter for the IEP team to decide. There has been no IDEA violation that would warrant such a remedy. The District has been cooperative and solicitous with the Parents and the Student throughout the period at issue here, and has done nothing to impede their participation at meetings.

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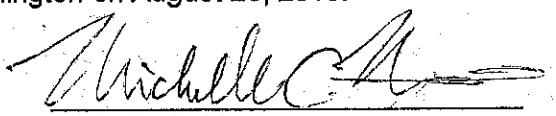
4. The District shall provide 25 sessions of math tutoring to the Student, each session lasting 55 minutes, to be delivered prior to the end of the 2013-2014 school year, on the terms set forth in the Conclusions of Law, above.

Signed at Seattle, Washington on August 20, 2013.



Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

Final Decision

Further Appeal Rights: Information About Your Right To Bring A Petition For Reconsideration And Your Right To Bring A Civil Action

Reconsideration

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

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. If a timely petition for reconsideration is filed, this ninety-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

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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.

Parents
[redacted]

William Meehan, Special Services Director
Ellensburg School District
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Adult Student
[redacted]

Joni Kerr, Attorney at Law
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cc: Administrative Resource Services, OSPI
Matthew D. Wacker, Senior ALJ, OAH/OSPI Caseload Coordinator

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