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STATE OF WASHINGTON
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FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION

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IN THE MATTER OF:

PENINSULA SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2013-SE-0105

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 Gig Harbor, Washington, on February 10, 11, 12 and 13, 2014. The Parent of the Student whose education is at issue¹ appeared and was represented Bridget Bourgette Shaw, attorney at law. The Peninsula School District (District) was represented by Lance Andree, attorney at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parent filed a due process hearing request on November 14, 2013. She subsequently filed a First Amended Complaint, and leave to amend was granted on January 6, 2014. (The First Amended Complaint is referred to herein as the Complaint.) Telephonic conferences in this case were held on December 17, 2013 and February 20 and 21, 2014. Orders were issued in the case on December 10 and 19, 2013, February 18, and March 3, 2014.

The due date for the written decision was continued to 30 days after the close of the hearing record, pursuant to a joint request by the parties. See First Prehearing Order of December 19, 2013. The hearing record closed with the filing of post-hearing briefs on March 5, 2014.² Thirty days thereafter is April 4, 2014. The due date for the written decision is therefore April 4, 2014.

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¹ In the interests of preserving the family's privacy, this decision does not name the parents, students or siblings. They are referred to herein as "Parent," "Student," "Sibling 1," etc. While the Student lives with both of his parents, only the Mother filed the due process hearing request and participated in the hearing. Therefore, all references herein to the "Parent" in the singular are to the Mother.

² Originally, the due date for filing closing briefs was March 3, 2014. See Order Setting Due Date For Closing Briefs of February 18, 2014. The parties subsequently submitted a joint request to extend that deadline by two days, to March 5, 2014. It was so ordered. See Order Extending Due Date for Closing Briefs of March 3, 2014.

EVIDENCE RELIED UPON³

The following exhibits were admitted into evidence:

Joint Exhibits: J-1 through J-48;

Parent Exhibits: P-1; P-3 through P-5; P-7 through P-8; P-11 through P-16; P-18; P-20 through P-25; P-28 through P-38; P-41; P-43 through P-50; and P-52 through P-54;

District Exhibits: D-1; D-3 through D-6; D-8 through D-16; D-18 and D-19.

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

The Parent;

Alexie McElhoe;

Kathleen Mitchell, teacher and director, Arrowsmith Program at Crosspoint Christian School;

Linda Siegel, PhD;

Christine Faulstich, PhD, District school psychologist;

Robin Smith, District special education and general education teacher;

Donna Rippon, District general education teacher; and

Sean Whalen, District director of special education.

ISSUES

1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
 - a. Failing to provide a proper prior written notice (PWN), and failing to conduct the steps required in a PWN, before reducing and revising the Student's IEP services in January 2013;
 - b. Failing to provide the Parent with a Procedural Safeguards Notice in connection with the January 2013 revision of the Student's IEP;
 - c. Finalizing the January 2013 IEP after the Parent had signed it and outside the boundaries of the alterations to that IEP that the Parent had agreed to in email correspondence;
 - d. Failing to timely identify, evaluate and assess the Student's needs;

³ Exhibit P-39 was excluded at the hearing. After the hearing, in a telephone conference with the parties on February 20, 2014 and continued on February 21, 2014, the admissibility of Exhibit P-39 was reconsidered *sua sponte* by the ALJ. After reconsideration, it remained excluded. Also after the hearing, the parties stipulated to add the missing second page of Exhibit J-18. The missing page was attached to a written stipulation, and was admitted to the record as Exhibit J-18, page 2.

- e. Failing to properly implement the Student's June 2012 IEP in the ways set forth in the Parent's First Amended Complaint, at page 10;⁴
 - f. Failing to reevaluate the Student before reducing and revising his IEP services in January 2013;
 - g. Adopting an inappropriate IEP in January 2013 that did not provide FAPE to the Student;
2. Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate:
- a. Reimbursement of tuition and transportation expenses for the Student's attendance at a private school meeting his educational needs for a two-year period, totaling at least \$38,000; and
 - b. Prospective placement of the Student at a private school meeting his educational needs.

See Second Prehearing Order of January 6, 2014, ¶¶ 7 – 9, as amended by stipulation of the parties on the first day of hearing, February 10, 2014.

FINDINGS OF FACT

1. The Student attended school in the Peninsula School District (District) from kindergarten through 6th grade. He is currently in 7th grade and attending a private parochial school in Bremerton, Washington during the 2013-2014 school year. He lives with his Parents and two siblings within the boundaries of the District.
2. The Student is eligible for special education under the category Health Impaired, based on a diagnosis of attention deficit hyperactivity disorder (ADHD). The Student also has a disability in written language. His first IEP was adopted at the end of 5th grade, on his last day of elementary school.⁵

Background

3. In kindergarten, the Student had signs of distractibility that did not resolve through the year, according to his report card. J-13:2.⁶ In 1st grade, the Student was diagnosed with ADHD and began taking medication for it. The medication was very helpful and the Student has continued on medication for ADHD to the present. Testimony of Parent.

⁴ Page 10 of the Parent's First Amended Complaint appears in the record as page 11 of Exhibit J-48.

⁵ The names of the elementary school and middle school that the Student attended are omitted from this decision in order to provide more confidentiality for the family.

⁶ Exhibits are cited herein in the following format. "J-13:2" refers to Joint Exhibit 13, at page 2. Exhibits beginning with a "P" are Parent exhibits. Exhibits beginning with a "D" are District exhibits.

4. The Student's 1st grade teacher wrote that he had creative ideas in writing, but struggled with handwriting, spacing, and punctuation. J-14:3. He continued with the same teacher in 2nd grade, but received lower grades in writing. Seven areas were graded in writing. By the end of 2nd grade, he received the lowest grade in five areas of writing (1 on a scale of 4), and the second lowest in two areas of writing (2 on that scale). By contrast, his grades in reading, math, science, and social studies all met or exceeded standards (3 or 4 on that scale). J-15.

5. In 3rd grade, the Student's writing grades remained 1's and 2's. He also had some difficulty focusing. At the end of the year, the teacher wrote that the quality of the Student's work continued to be an issue and much support was needed for him to produce grade-level work. J-16.

6. The Student had the same teacher for 4th and 5th grades, Stephanie Strader. In 4th grade, the Student's writing grades improved to 2's and 3's. After the first trimester, Ms. Strader's written comments included: The Student really needs to work on organization of his work, materials, and thoughts. Disorganization leads him to rarely complete homework in reading, math and spelling. He has creative thoughts, but his writing is sometimes unclear and ineffective, lacking organization, appropriate detail, and having problems with legibility, writing conventions, and spelling. Things improved in the second trimester. Ms. Strader wrote that the Student had developed into a clearer writer when his writing was legible. His grade in one area of writing (writing clearly and effectively – content, organization and style) improved from 2 to 3 this trimester, though Ms. Strader commented on continuing problems with legibility, writing conventions and editing. Organization was still an issue, but they had developed a few strategies to address it that, for the most part, seemed to be working. The third trimester comments did not discuss these matters further. They focused on end-of-the-year encouraging comments and ways to maintain skills over the summer. The increased grade in writing clearly and effectively remained; it was still a 3. P-8.

7. During 4th grade, Ms. Strader and the Parent referred the Student for a speech-language evaluation because he struggled at times to communicate effectively in speech and written language. They reported he was often hard to follow, had unorganized thoughts, struggled to connect his ideas to the current topic, and used "filler" words. J-4:1-2. However, a speech-language pathologist (SLP) found in a March 2011 evaluation that the Student scored within the average range on standardized assessments of communication skills. J-4:2-3. The SLP's classroom observation noted dysfluencies in the Student's speech (repetitions, interjections, revisions) 13% of the time, whereas 2% is average. She concluded the most likely cause for the Student's communication difficulties was his ADHD diagnosis. J-4:3.

8. In the spring of 4th grade, the statewide assessment (Measurements of Student Progress or MSP) included an assessment in Writing. A passing score was 9 out of a possible 12 points. The Student's score was a 5. This was in the Below Basic range (the lowest). J-10. By contrast, his scores in Reading and Math were in the Proficient range.⁷

⁷ Fourth grade was the only year the Writing MSP was given to the Student. His MSP scores for 3rd grade through 6th grade are set forth together, in a section below.

Fifth Grade, 2011-2012

9. At around the time of the fall parent-teacher conference in October 2011, the Parent told Ms. Strader that she was going to have the Student evaluated for dysgraphia (disorder of written language). Ms. Strader expressed support for this. Testimony of Parent.

10. At the beginning of December 2011, Ms. Strader completed the Vanderbilt Assessment Scale (Vanderbilt) at the request of the Student's pediatrician, who prescribes his ADHD medication. P-35:3-4; Testimony of Parent. The Vanderbilt is a standardized assessment of behavior. The teacher rating scale instructs the teacher to rate the child based on age-appropriate behavior, and to base the ratings on the child's behavior since the beginning of the school year. P-35:1. Ms. Strader rated the Student at the most serious level ("very often") on six of the nine symptoms of inattention/disorganization, and "often" on a seventh symptom. In the area of hyperactivity, she saw only about half that number of symptoms. She saw no externalizing problems (e.g., anger, aggression), and no internalizing problems (e.g., fear, sadness, low self-esteem). In classroom performance, she rated him at the most serious level ("problematic") on assignment completion and organizational skills, and "somewhat of a problem" on following directions and disrupting class. *Id.*

11. Throughout 5th grade, the Student's grades in writing were 1's in legibility, 2's on several other aspects of writing, and 3's only in "Effort". The District grades on a scale of 1 to 4. J-18.⁸ The report card comments regarding writing and organizational skills became worse over time. The first trimester report card stated the Student has amazing ideas, but they are often difficult to follow due to his penmanship and lack of conventions. She needed to work with him on these areas, as well as revision strategies for elaboration. J-18:2.

12. The second trimester comments on writing and organization showed more concern. Ms. Strader wrote: The Student continues to struggle with organization, effort, completing work on time, and completing it to the best of his ability. His penmanship and lack of writing conventions hinder others, as well as himself, from being able to read his work. If he could stay focused and organized in class, he would perform better in reading and math. *Id.*

13. At the end of the school year, Ms. Strader's comments opened and closed with encouragement, saying the Student had a fantastic year and had grown a lot. The growth she talked about was in reading. In writing and organization she repeated the same concerns as previously: The Student is very bright, but he struggles to organize his thinking, and needs the development and practice of organizational strategies. His writing shows creativity, but he does not consistently use the writing process, particularly revising and editing independently. He needs extensive support in applying writing convention rules. He is bright in math, but struggles to organize and set up his work. *Id.*

⁸ The District's grading standards are as follows:

- 1 - Area of concern (needs considerable assistance and is performing significantly below standards).
- 2 - Approaching standards (demonstrates skill inconsistently).
- 3 - Meets standards (consistently and accurately demonstrates skills).
- 4 - Exceeds standards (consistently performs above end of year standards). J-18:1.

14. Near the end of 5th grade, Ms. Strader filled out another Vanderbilt for the Student's pediatrician. P-35:1-2. On symptoms of inattention/disorganization, she rated him as slightly worse than in early December: seven of nine symptoms were now at the most serious level, instead of six. He was also slightly worse on hyperactivity symptoms. The remaining areas she rated the same as before. This time she included narrative comments, which stated:

[The Student] is a very bright boy. However is [sic] organization and attention to detail hinder his work significantly. He's constantly missing assignments and missplacing [sic] work. His writing is unorganized and lacks conventions so it's difficult to understand his great ideas. Good kid – just struggles putting it all together.

P-35:2.

Private Evaluation by Dr. Chenault

15. Belle Chenault, PhD,⁹ evaluated the Student in four sessions from December 2011 to March 2012, when he was in 5th grade. J-5:2. Her report was completed and provided to the District in April 2012. J-5:1.¹⁰

16. Dr. Chenault found the Student's full scale IQ to be 115 (84th percentile – high average range). The cognitive assessment has four areas, or indices.¹¹ The Student's scores in the areas of Working Memory and Processing Speed were significantly lower than his scores in Verbal Comprehension and Perceptual Reasoning. Dr. Chenault wrote that this pattern is often seen in children with ADHD. J-5:4-8, 15. She noted that where there are significant differences among these indices, the test producer recommends the use of the General Ability Index (GAI) as a useful composite to estimate overall ability. The Student's GAI was 124 (95th percentile – superior range). J-5:5, 7.

17. In academic skills, written language was the only area where the Student's score was significantly below expectations based on his IQ. J-5:10. His written language score was at the 18th percentile (standard score 86), while his full scale IQ was at the 84th percentile (standard

⁹ There is no curriculum vitae for Dr. Chenault in the record. Her office is in Seattle, and she signed her report with the titles PhD and NCSP (nationally certified school psychologist).

¹⁰ Dr. Chenault conducted the following assessments and interviews: Wechsler Intelligence Scale for Children, 4th ed. (WISC-IV); Kaufman Test of Educational Achievement, 2nd ed. (KTEA-II); Gray Oral Reading Test, 4th ed. (GORT-4), Form B, selected stories; Test of Orthographic Competence (TOC), selected subtests; Rapid Automatized Naming and Rapid Alternating Stimulus Tests (RAN/RAS Tests); Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI); Delis-Kaplan Executive Function System (D-KEFS), selected subtest; Rey-Osterreith Complex Figure Drawing (RCFT); Moller Sentence Completion; semi-structured Student interview; and Parent interview. J-5:3.

¹¹ On the WISC-IV, the Student's index scores were as follows. See J-5:7.

Verbal Comprehension Index	128 (97 th percentile) – superior range
Perceptual Reasoning Index	115 (84 th percentile) – high average range
Working Memory Index	94 (34 th percentile) – average range
Processing Speed	103 (58 th percentile) – average range

score 115). The District's director of special education, Sean Whalen, explained that this is a "severe discrepancy" for purposes of establishing a specific learning disability in written language under special education regulations. Testimony of Whalen. Concerning the Student's writing, Dr. Chenault concluded:

Even though [the Student] was able to demonstrate average-level ability to punctuate single sentences in isolation, and even though he demonstrated good understanding and vocabulary in a written essay, he had great difficulty handling the coordination of all of the factors required for adequate composition of extended text. He had difficulty with the planning, organization, sentence structure, spelling, punctuation, capitalization, letter formation, and legibility aspects of both brief and extended text production . . .

J-5:16. Dr. Chenault noted that many students with ADHD have trouble managing the myriad of organizational and other tasks required for the production of written products. She recommended structured remediation covering the range from basic skills to higher-order written language organizational skills. *Id.*

18. Dr. Chenault observed that the Student had "extreme difficulties" with handwriting legibility. J-5:18. She administered an assessment involving visual-spatial, visual-motor, and processing speed skills.¹² Subjects are asked to copy figures made of geometric shapes. Their speed is measured, as well as their ability to draw the figure from memory after delays. The Student "took much more time than expected . . . to copy the design, indicating that this task took great effort on his part, which he was willing to give." He scored at the 2nd to 5th percentile in speed compared with same-age peers. Given this amount of time, his accuracy was within normal limits and he had good recall after delays. J-5:14-15.

19. On a test of visual-motor integration that assesses paper-and-pencil copying accuracy,¹³ "when given a task that separated motor skills from visual skills and had a time limit, [the Student's] motor skills were quite a bit lower than his visual perception," motor skills being at the 21st percentile, in the low average range. His visual perception and integration scores were significantly higher. These scores help account for the Student's difficulty with legible handwriting. J-5:14.

20. To address this, Dr. Chenault's recommendations included: an occupational therapy (OT) assessment; structured training in handwriting; speech-to-text software (to allow dictation some of the time); and teaching him keyboarding. J-5:18. Regarding keyboarding, she stated:

[The Student] will benefit from learning keyboarding in a structured way, so that he will be able to access writing support technology. In addition, proficiency with typing may help him organize his ideas, since once he is fluent with typing he will not have to concern himself with letter formation while writing and will have more

¹² The assessment was the Rey-Osterreith Complex Figure Drawing Task. J-5:14

¹³ The assessment was the Beery-Buktenica Developmental Test of Visual-Motor Integration. J-5:14.

mental energy for other aspects of writing. There are many commercially available keyboarding programs available for young people.

Id. She also recommended an assistive technology evaluation to determine what equipment or software would benefit him. *Id.*

21. Dr. Chenault summarized the Student's classroom needs as follows:

[The Student's] diverse abilities span the gamut from low average to highly advanced. In addition, his attention and focus may be inconsistent. Although he is quite skilled at abstract idea generation, he may "get stuck" on more mundane tasks like selecting a topic or book. Adults who work with him may find the variation in his success with various tasks puzzling. [The Student] will need patient and resourceful teachers who can appreciate his intelligence and enthusiasm while helping him work productively, without assuming that his academic challenges are rooted in a lack of effort.

J-5:16.

School District Evaluation – June 2012

22. A few weeks before Dr. Chenault's report was completed, the Parent told the District when she anticipated it would be issued and requested a meeting in late-April to discuss it. J-5:1. After receiving Dr. Chenault's report, the District agreed to evaluate the Student for special education. The District obtained the Parent's consent for evaluation in early May 2012.¹⁴ The evaluation was completed at a meeting on June 13, 2012, which the Parent attended. J-6.

23. Educational diagnostician Lynne Benson led the District's evaluation. She assessed the Student in two areas: social/emotional/behavioral (SEB) and written language. A District occupational therapist evaluated the Student's fine motor skills.¹⁵

24. The BASC-2¹⁶ was administered by Ms. Benson. It employs behavior rating scales filled out by parents and teachers. The teacher's ratings (regarding school behavior) were significantly worse than the Parent's ratings (regarding home behavior). The teacher, Ms.

¹⁴ The consent form sent to the Parent was dated May 3, 2012. The second page of the form -- which would contain her signature and the date of signing -- is missing from the exhibit. See J-6:12. The Parent must have signed consent sometime in early May because evaluation activities were underway on May 16 and 17, 2012. See J-6:2, 15.

¹⁵ The District's evaluation used the following assessments and information: Woodcock-Johnson III Tests of Achievement (written expression only); Behavioral Assessment System for Children – 2 (BASC-2); Behavior Rating Inventory of Executive Function (BRIEF); Bruininks-Oseretsky Test of Motor Proficiency, 2nd ed. (BOT-2) (fine motor only); classroom observation by Ms. Benson; written comments by classroom teacher (Ms. Strader); input from Parent; and review of records.

¹⁶ Abbreviations of the names of the assessments are used here. Their full names are listed in footnote, above.

Strader, rated the Student as having the most serious level of problems ("clinically significant" suggesting "a high level of maladjustment") on the subscales for Attention Problems, Atypicality, and Functional Communication. She rated him as "at risk" on the subscales for Hyperactivity, Learning Problems, Adaptability, Social Skills, and Study Skills. The BASC-2 groups the subscales into composite areas. The teacher rated the Student as clinically significant in the composite area of School Problems, and at risk in the composite areas of Behavioral Symptoms and Adaptive Skills. J-6:4.¹⁷

25. The Parent, by contrast, did not rate the Student as clinically significant on any subscale, or in any composite area. (Parents do not do ratings in the composite area of School Problems.) The Parent did rate the Student as at risk on the subscales of Hyperactivity, Attention Problems, Atypicality, Social Skills, Leadership, Functional Communication, and Activities of Daily Living. *Id.*

26. Ms. Benson also administered the BRIEF, which evaluates the processes responsible for guiding, directing, and managing cognitive, emotional, and behavioral functions, particularly during active and novel problem solving. J-6:5. The ratings by both Ms. Strader and the Parent resulted in global composite scores on the BRIEF in the clinically significant range. Again, the teacher's ratings were significantly worse than the Parent's, indicating the Student exhibits more problems at school than at home. *Id.*

27. Ms. Benson assessed the Student in written language using the WJ-III. The Student had participated in a great deal of testing by Dr. Chenault a few months earlier, and was not cooperative with this additional testing. J-6:3; Testimony of Parent. His score was extremely low: standard score 56 (which is at the 0.1 percentile). The District evaluation report states that caution should be used in considering the validity of this score, which probably understates his skills. The report instead used Dr. Chenault's standard score of 86 (18th percentile) on the KTEA-2 written language test, and Ms. Strader's comments on classroom performance, to determine whether the Student needed special education in written language. J-6:3.

28. Ms. Strader provided the Student's scores on classroom and statewide assessments and wrote comments for the evaluation. Ms. Strader's comments are quoted at length because they are thoughtful and pertinent to some issues in the case. (Paragraph breaks have been added at logical places for ease of reading; the original fit onto one page without paragraph breaks.)

When working with [the Student] one-on-one he demonstrates a more consistent understanding of skills. However, when asked to work independently his work suffers. My biggest concern for [the Student] is not necessarily his academic capacity, but his capacity to organize his thinking, his work, and fine motor skills (penmanship). [The Student] has been diagnosed with ADHD which is a huge contributor to his struggles at organization. Keeping track of homework and class work is extremely difficult even with procedures and strategies are [sic] in place (reminders on desk, planner, homework folder, to-do folder, personal attention/direction from the teacher).

¹⁷ The evaluation lists the BASC-2's composite areas and subscales. It does not state which subscales come within which composite areas. J-6:4.

Recently, for about three or four weeks now, I have placed [the Student] in a seat by himself towards the front in order to help him focus and stay organized. I have seen an increase in work completion, but mostly because with his close proximity to me, it's easier for me to keep in [sic] on tasks not from self-driven behaviors.

In reading, [the Student's] comprehension and fluency need to be closely monitored. It's hard to find a story that [the Student] is engaged in and puts forth the effort to read.

In writing we have tried a variety of graphic organizers and conferences with the teacher. In fact, he usually has good ideas, but struggles to organize, elaborate, and maintain focus. Additionally, his penmanship is so difficult to read, I often can't decipher his ideas anyway, no matter how good they are. With that, he also neglects to add capitals, punctuation, and use appropriate spelling patterns. When I work with [the Student] in math, he can often follow a procedure and explain how and why it works, but when asked him [sic] to write those ideas he struggles, again, to organize his plan and show his work correctly.

J-6:14.¹⁸

29. The final part of the District's evaluation was an OT assessment using the BOT-2. In the area of Fine Manual Control (skills involved in writing and drawing) the Student scored at the 38th percentile. In the area of Manual Coordination (skills involved in reaching, grasping, and manipulating objects) he scored at the 69th percentile. These yielded a Fine Motor Composite score at the 54th percentile. All of these scores were within the average range. The OT therefore found the Student did not have a fine motor disability. She stated that his handwriting skills were less mature than other fine motor skills, and excessive rotations of his paper and body during writing may indicate poor directionality. J-6:5-6.

30. The District's evaluation found the Student eligible for special education and recommended specially designed instruction in two areas: written language and SEB. J-6:6-7. The SEB instruction would be in the area of organizational skills. J-6:6.

31. The evaluation recommended the following accommodations: non-verbal signals to stay on task; preferential seating; use of a visual chart "so [the Student] can record progress toward his goals and objectives;" and use of visual organizers and editing charts for writing assignments. The accommodations section concluded: "These activities should include charting progress toward executed performance that engages [the Student] in the process of production." J-6:7. Dr. Chenault had made a similar recommendation. She felt the Student

¹⁸ Ms. Strader written statement is undated, but it was part of the District's special education evaluation completed in June 2012, at the end of 5th grade. See J-6:3, 14. The Parent mistakenly grouped Ms. Strader's statement in an exhibit with 4th grade documents, possibly because Ms. Strader taught the Student in both years, and because her statement lists his 4th grade MSP scores. See P-8:5. Those were the most recent MSP scores available when she wrote the statement at the end of 5th grade. The 5th grade MSP scores were not issued until the beginning of 6th grade. See J-12, dated September 6, 2012.

needed to improve his academic self-concept in order to succeed, so teachers and parents "need to help him keep track of his successes and develop a realistic view of the progress he is making." J-5:16.

32. The evaluation included a section on "Other Recommendations" that appear to have stemmed from the OT evaluation: participate in motor activities that require crossing the midline; use mazes, following pathways, dot to dot, and word search puzzles to improve pencil movement on paper; review letter formation using correction direction; and "practice keyboarding skills (i.e. Peninsula School District, TypingMaster program)." J-6:7.

June 2012 IEP

33. A few days after the evaluation was completed, the District adopted the Student's first IEP. The June 2012 IEP had seven goals in written language that called for the Student to: use strategies for generating ideas and planning writing; use a variety of forms/genres; select a narrow topic and elaborate it using details and examples; use an effective organizational structure; spell grade-level words accurately; apply capitalization rules; and apply punctuation rules. His specially designed instruction on these goals was to be delivered in an individual or group setting. J-7:2-3.

34. The Student's current level of performance on each of the seven writing goals was listed as 5%. His target was to reach 70% on all of them, as measured by "Observation, Informal [sic], Work Samples." The IEP required that progress be measured "every grading period" and reported to the Parents at least as often as report cards are issued. *Id.* The District issues report cards at the end of each trimester.

35. The IEP stated the Student would receive 120 minutes per week of specially designed instruction in written language. The location for delivery was listed as "Sp Ed" (special education). J-7:10. The written language objectives all included a setting in which the instruction would occur: "Given . . . an individual or group setting . . . [the Student] will . . ." J-7:2-3.

36. The IEP also adopted two SEB goals in organizational skills. However, the IEP provided for no service time, location, or provider to teach these goals. J-7:10. The SEB objectives left out the setting, producing a sentence that does not make sense: "Given [the Student] will . . ." J-7:4.

37. The two SEB goals called for the Student to: (1) organize homework assignments using his planner, and for larger assignments, using a checklist or timeline for completion; and (2) complete homework accurately and turn it in on time. The Student's current level of performance on both of these goals was listed as 0%. His annual goal was to reach 75%, as measured by observation. J-7:4.

38. Regarding accommodations, the IEP repeated verbatim the accommodations recommended in the District's evaluation (listed above). J-7:4.¹⁹ The IEP also adopted the

¹⁹ The verbatim repetition included the introductory phrase: "Accommodations for the IEP team to consider include: . . ." J-7:4. This phrase was carried forward to the next IEP as well. J-8:3. It was clear

following Curricular Adaptations: isolate portions of the assignment/instructional materials page to focus the Student's attention; "provide small group instruction;" provide shorter writing assignments; and repeat/review/drill with short, frequent practice sessions. J-7:6.

39. Regarding the Student's placement in the least restrictive environment, the IEP form listed seven environments from which to select, plus "Other" if the chosen environment was something other than the ones listed.²⁰ The option selected for the Student was: "General class with pull-out Special Education Services." One option was listed as having been considered and rejected: "General class with in-class Special Education Services." J-7:10.

40. The IEP was adopted on June 19, 2012, the last day of the Student's 5th grade year, at a meeting attended by the Parent. See J-1; J-7. The Parent spoke about the importance of a successful transition to middle school in the fall, where the Student would have the organizational challenge of six classes instead of one. The team told the Parent that staff from the elementary school and the middle school would meet to make sure there was a successful transition. Testimony of Parent. The Parent was glad the Student would be in some "integrated" classes (where a paraeducator is present) and that the IEP required pull-out time where the Student would be in a small group to address his individual needs and goals. In August 2012, the Parent met with the Student's middle school counselor to try to ensure that there would be a good transition to middle school. *Id.*

41. Over the summer before 6th grade, the Parent had the Student practice keyboarding at home. He is not a good typist and gets frustrated by it. Testimony of Parent.

42. At the hearing, several District witnesses referred to the June 2012 IEP as the elementary school IEP, or said it was written for the elementary school rather than the middle school setting.²¹ However, the IEP was adopted on the day the Student finished elementary school. It was not written for use at the elementary school. It was written for use at the middle school. The elementary school that the Student attended feeds into the middle school he attended. It is the only elementary school that feeds entirely into that particular middle school. Testimony of

at the hearing that the District viewed these accommodations as having been adopted into the IEPs, not just considered for adoption. The introductory phrase may have been copied by accident, or it may have been deliberately included to signify that teachers should "consider" whether a particular accommodation applies to their class. For instance, "editing charts for writing assignments" did not apply to Math class (testimony of Rippon), and "preferential seating" would not generally apply to P.E. class. J-7:4; J-8:3.

²⁰ The options listed in the IEP form were: General Education Classes; General class with in-class Special Education Services; General class with pull-out Special Education Services; Special Education class with integration into general class and/or community; Residential School; Home Instruction; Hospital Instruction; and Other. J-7:10.

²¹ For instance, Robin Smith testified the IEP was appropriate for the elementary school, but not the middle school, because the elementary school uses pull-outs to a Resource Room, whereas the middle school uses integrated classes. However, Ms. Smith acknowledged that the middle school has *both* Resource Room and integrated classes. Testimony of Smith.

Smith. Thus, the elementary school IEP team knew what school the IEP would be implemented at; their special education students routinely moved to that middle school.²²

6th Grade – 2012-2013

43. Robin Smith was the Student's IEP case manager during 6th grade. She is a certificated special education teacher who has taught for 21 years, and for five years prior to that worked a paraeducator. She holds a bachelor's degree in education with an emphasis in special education, and a master's degree in technology. Testimony of Smith.

44. Ms. Smith taught both the Student's integrated Language Arts class and his general education Social Studies class during 6th grade. The integrated Language Arts class had 25 students. Five of them (including the Student) were special education students. Ms. Smith had five special education students on her caseload. A paraeducator named Ms. Kilbourne assisted in the Student's integrated Language Arts class. Ms. Kilbourne has a teaching degree. Ms. Smith designed the instruction for the class and supervised Ms. Kilbourne. Testimony of Smith.

45. In the first month of middle school, the Student was struggling with the volume of work, not finishing assignments, not turning some in, and not using his planner. The planner is a calendar book with daily sections for each class. All middle school families were required to purchase the planner. The Parent learned, by comparing assignments on the teachers' websites with assignments the Student brought home, that he did not receive shortened writing assignments - one of his IEP accommodations. Testimony of Parent.

46. The Parent requested an IEP meeting to address the struggles she saw the Student having. A meeting was held in the second week of October 2012, though not all members of the IEP team were present. (Ms. Smith, Ms. Rippon, and possibly the Student's physical education teacher were present. P-45:1; Testimony of Parent, Smith, Rippon.) The Parent asked that the Student receive more help in organizing and tracking his assignments. She brought Dr. Chenault's evaluation report to the meeting. She also brought and discussed a book recommended in that evaluation report, concerning improving executive functioning skills in children and adolescents. J-5:17; Testimony of Parent.

47. The middle school has a Study Skills class that addresses organization skills for students whose IEPs show a need for such skills. Ms. Smith testified that she does not know why the Student was not scheduled for the Study Skills class in 6th grade. Testimony of Smith.

48. As a result of the October 2012 meeting, an unrelated class schedule change was made for the Student, but the possibility of Study Skills class was not discussed. At no time did Ms. Smith point out to the Parent that the IEP allotted no service time, location or provider for the Student's SEB goals. At the October 2012 meeting it was decided that the Student would attend the after-school Homework Club. The Student attended Homework Club a couple of times, but it was too loud and distracting for him. The Parent informed Ms. Smith of this by

²² The exception to this routine would be for students placed in schools other than their neighborhood middle school.

email in November 2012. Ms. Smith did not thereafter raise the possibility of a Study Skills class. J-22:2; Testimony of Parent.

49. When asked about the specially designed instruction she provided on the Student's homework tracking goal, Ms. Smith responded that prior to January 2013 (when the IEP was revised), in the last five minutes of class she would tell the class to copy into their planners the homework assignments she had written on the board (or overhead projector). If someone said they needed help copying it, she would ask them to come to her desk. Testimony of Smith.

50. The Parent spent approximately 10 hours a week²³ at home with the Student trying to teach him to organize his papers, folders, and binder, and to write assignments in his planner, read postings on the teachers' websites, and plan how to tackle assignments. Testimony of Parent. With this assistance from the Parent, the Student received good grades in the first trimester: C's in Language Arts and Social Studies; B+ in Math; A- in Science and Band; and A in P.E. The teachers' comments on his report card were brief, but positive. P-4.

51. Shortly after the end of the first trimester, Ms. Smith sent home an IEP Progress Report for the Student. D-9. The report contains no entries for five of the Student's seven written language goals. On the two remaining written language goals, Ms. Smith rated the Student as having nearly met them: The goals were to improve from 5% to 70%, and she wrote he had reached 65%, after only one trimester.²⁴ On the other hand, she wrote "Skill Emerging" for these two goals, and her narrative comments say nothing positive and speak of no progress. On the goal of selecting a narrow topic and elaborating it using details and examples, she wrote:

[The Student] really needs to write using sensory details, his 6th grade vocabulary words which provide him vivid verbs and adjectives. He needs to slow his handwriting down to make it more legible. Check for conventions and follow directions on rubrics.

D-9:1.

52. On the IEP goal that read: "[The Student] will spell words appropriate for the grade level accurately . . . from 5% to 70%," the narrative comment remarkably stated that spelling was *not* one of the Student's IEP goals. The comment said nothing positive and spoke of no progress, despite rating the Student as having reached 65% performance on the goal:

Even though spelling is not an IEP goal it is a convention goal for 6th grade writing. The Student] needs to double check his work or use a computer to help with his convention practice. Sometimes it is more his handwriting that makes it seem spelling is a problem.

²³ The Parent worked with the Student 1 to 1.5 hours nightly, sometimes less, and up to 4 or 5 hours on the weekend. Testimony of Parent. This totals approximately 10 hours per week.

²⁴ Ms. Smith acknowledged at the hearing that the 65% progress ratings were incorrect, and were due to her not paying close enough attention to the progress report. Testimony of Smith.

D-9:2.

53. The IEP Progress Report contained no information for one of the SEB goals (completing homework accurately and turning it in on time). For the other SEB goal (organizing homework assignments using the planner and checklists or timelines), there was a self-contradictory report similar to the ones described above: Performance was said to have improved from 0% to 65%, nearly achieving the 75% annual goal in one trimester. On the other hand, the report stated "Skill Emerging" for the goal, and the narrative comment said nothing positive and spoke of no progress:

He takes a long time to find his work in his binder. He does not keep it organized. He places papers randomly in the binder and then when it comes to finding his assignments [sic] to correct it and [sic] can take up to 2-3 minutes of class time gone.

D-9:3.

54. No IEP Progress Report was issued for either the second or the third trimester. At the hearing, the District elicited from Ms. Smith percentage ratings on progress for each of the Student's IEP goals, for the first trimester and for the end of the school year. Ms. Smith acknowledged later in her testimony that she had not measured the Student's progress (by, for instance, using curriculum based assessments or by comparing the rate of errors in earlier writing samples with later writing samples). Ms. Smith's percentage estimates of progress given at the hearing are not found reliable or credible. In addition to not being based on measurements, Ms. Smith revised her percentage estimates on two goals by a significant amount from the first day she testified to the second day. She explained that her significant upward revisions were based on the fact the Student was *capable* of better capitalization and punctuation than he sometimes *produced*, because he knew the rules and was intelligent. Testimony of Smith.

55. Another reason Ms. Smith's attestations about the Student's progress are found unreliable is because her grading of some work was inflated. Toward the end of the school year, the class was assigned to write a monologue about a certain topic in the voice of one of two characters from a piece of literature they had read. P-12:4; Testimony of Parent. They were told to indicate which of the two characters they chose, and to write the monologue in that character's voice. These instructions were given to the Student in writing. P-12:4. The Student did not indicate which character he chose, making it very difficult to grade the monologue, since the stated goal of the assignment was to speak in that character's voice and have the monologue sound as much like that character as possible. The Student wrote only two sentences, consisting of less than 1.5 typed lines. These lines contained nine errors (capitalization, punctuation and spelling errors). Ms. Smith corrected only one word and graded the work 7/10 (70%), which is a C grade. P-12:4-5. Ms. Smith acknowledged at the hearing that the grade seems very high for the work. She stated she gave this grade because she did not want the Student to think he was not capable of doing the work. Testimony of Smith.

56. Ms. Smith acknowledged that as of May 2013 (when the parties met to discuss new strategies), the strategies, assistance and accommodations she had tried for the Student were not working. Testimony of Smith. This is an additional reason for finding that the percentage progress estimates to which she testified are unreliable.

57. After the first trimester, the Student continued to be disorganized and overwhelmed in his classes. By January 2013, he had an F in Science (his favorite subject) and D's in Language Arts and Social Studies. He talked about hating Math and said he was bad at it. Around this time, the Parent discarded the planner pages from the first half of the school year to reduce clutter for the Student. She retained the pages from mid-January forward, and they are in the record. Testimony of Parent; P-11.

58. In January 2013, the Student's Math teacher, Ms. Rippon, told the Parent that the Student was in such a daze in her class that she thought he might be over-medicated. He did not seem to hear questions she asked him; he would stare off with no eye contact. If she waited long enough, he would answer her question and answer it correctly, but would not elaborate. Testimony of Rippon; P-36:2. Ms. Rippon explained that the Student was not a "struggler" in Math, but had a hard time communicating his knowledge. Testimony of Rippon.

59. After hearing Ms. Rippon's concern about possible over-medication, the Parent consulted the Student's pediatrician. The pediatrician provided Vanderbilt assessment forms for Ms. Rippon and Ms. Smith to complete. The Parent dropped off the forms with the school counselor on or about January 31, 2013, as Ms. Smith instructed her to do. P-14; Testimony of Parent. Ms. Rippon did not fill out the Vanderbilt form until March 25, 2013, almost two months later. P-36:2. Ms. Smith did not fill it out until sometime in early April 2013. P-37.²⁵

60. In mid-January 2013, the Parent wrote to Ms. Smith that the Student was continuing to derail, and requested an IEP meeting. Ms. Smith scheduled an IEP meeting for January 17, 2013. J-25:1-2; Testimony of Parent.

61. Throughout this time, the Parent believed the Student was being pulled out of a large class to receive his specially designed instruction in a small group. Testimony of Parent. The IEP stated that his placement was: "General class with pull-out Special Education Services." "[P]rovide small group instruction" was the only entry under Instructional Strategies on the Curricular Adaptations page. J-7:6, 10. The Parent was never told that the Student's time in the Language Arts class constituted his specially designed instruction. The IEP team had "considered and rejected" the option of "General class with in-class Special Education Services." J-7:10.

62. Ms. Smith testified that on about 10% of the days, her Language Arts paraeducator would offer to work with the IEP students in a group inside the classroom, or else out in the hallway. They would work for an average of 10 to 15 minutes on these occasions. The Student almost always chose not to join them. Later in the hearing, Ms. Smith changed this estimate to say this had occurred on 40% of the days (twice a week) during the first half of the year, and on 60% of the days (three times a week) beginning in January 2013. She did not offer an explanation for her change in testimony. After the Student's January 17, 2013 IEP meeting, he was required to attend the small group, which working on vocabulary assignments on some days, and correcting

²⁵ Ms. Smith did not fill in the date line on her Vanderbilt assessment form. However, she wrote "7 mos." as the length of time she had been able to evaluate the Student. The school year started in early September 2012. Seven months thereafter is early April 2013.

error-filled sentences on other days. The Student would stay for about five minutes, then choose to return to the larger group. Testimony of Smith.

63. Regarding the Student's choice not to participate in the paraeducator's pull-out group, Ms. Smith stated she did not wish to force the Student to do so. Testimony of Smith. However, she did not testify to trying any alternatives to force, such as informing the Parent of the situation so the Parent could talk to the Student about it, providing an incentive for participation, or if these strategies did not work, proposing an IEP amendment to more effectively address the Student's need for small group instruction.

64. Ms. Smith's testimony on what happened prior to January 2013 is self-contradictory and unreliable. The unreliability of her assertions regarding pre-January 2013 pull-out services is corroborated by hearsay statements from Student and from Classmate 1²⁶ concerning pull-out services in the Language Arts class. Both of them stated these services began in January 2013, and there were none prior that. P-52; Testimony of Mother. It is found that none or virtually none were offered prior to January 2013.

65. Regarding the meaning of "pull-out" services in the IEP, Ms. Smith testified that the Parent did not understand the IEP's placement provision as Ms. Smith intended it. "General class with pull-out Special Education Services" (J-7:10) was intended to mean that students are pulled out of the general education environment and placed in an integrated class (despite the fact that the integrated class consisted of 80% general education students). Testimony of Smith. If a child's special education was delivered in a Resource Room, with the remainder of their day being spent in general education classes, Ms. Smith would check "Other" on the IEP placement form. She would not check "General class with pull-out Special Education Services." Testimony of Smith.

66. Ms. Smith defended her interpretation in part by stating that an integrated class is not one of the options on the IEP placement page. Testimony of Smith. However, "Other" is one of those options. She did not use it. J-7:10.

67. The District's own witnesses did not agree with Ms. Smith on this matter. The school psychologist who works at the same middle school, Dr. Christine Faulstich,²⁷ testified that, more accurately, the IEP should have stated the Student's placement was "General class with in-class special Education Services" -- the option listed as considered and rejected in the IEP. Testimony of Faulstich. The director of special education, Mr. Whalen, testified that "Other" is not for pull-outs to a Resource Room. Rather, "Other" is for situations such as placement at a

²⁶ Classmate 1 is not identified here by name or gender to protect that student's confidentiality. Classmate 1 was interviewed by the Parent in February 2014 in the presence of Classmate 1's mother. Classmate 1's mother signed a statement concerning how the interview was conducted and what her child said during the interview. P-52.

²⁷ Christine Faulstich has a PhD in clinical psychology. She has been employed as a school psychologist with the District for seven years, and prior to that with a Michigan school district for seven years. Earlier in her career, Dr. Faulstich practiced as a clinical psychologist for 20 years, serving children, families, and some adults. She was in private practice and also served at a hospital as director of psychological services and training programs. Testimony of Faulstich.

private school, or for home-schooled children who come to the District to receive special education services. Testimony of Whalen. These District witnesses attempted to explain and defend Ms. Smith's interpretation, but no one contradicted the Parent's testimony that she was never *informed* of Ms. Smith's interpretation. of the IEP placement provisions. Testimony of Parent.

68. Mr. Whalen testified that all 250 minutes per week of Ms. Smith's Language Arts class should be considered specially designed instruction, so the IEP (which only required 120 minutes) was faithfully implemented regardless of any problems with how it was written. Testimony of Whalen. However, Ms. Smith's work with the Student was nothing more than the accommodations she provided to the whole class. In addition to the five IEP students, others in the class had Section 504 plans²⁸ or they struggled with academics. Testimony of Smith. In her integrated classes (as compared to her non-integrated classes), Ms. Smith repeated directions more frequently, gave more examples during whole-class instruction, and the class spent more time formulating responses as a group. After whole-class instruction, there were two adults circulating to help students during independent work time (Ms. Smith and the paraeducator), whereas in her other classes there is one (Ms. Smith). The Student resisted adult help, and Ms. Smith did not require him to receive it. *Id.* Other than the times when the paraeducator pulled the IEP students aside for instruction (which are described above, and found to have occurred only beginning in January 2013), there is nothing in the record to suggest the paraeducator assisted only the students with IEPs.

69. While Ms. Smith provided the accommodations described above to everyone in the class, she acknowledged not providing several of *the Student's* IEP accommodations. She did not use a "visual chart so [the Student] can record progress towards his goals and objectives." She did not have him do "charting progress toward executed performance that engages [the Student] in the process of production." J-7:4. Regarding these provisions in the Student's accommodations, Ms. Smith stated she did not do them because the way they chart performance at the middle school is by letter grades. Testimony of Smith. In the next IEP of January 2013, Ms. Smith removed the quoted language from the Student's accommodations. See P-1:3; J-8:3. When asked if she used any incentives for making progress in her class, Ms. Smith responded that she says "good job." She does not do rewards, she stated. Testimony of Smith.

70. Witnesses at the hearing confirmed the need for the IEP accommodations in question for the Student. Dr. Faulstich, the school psychologist, stated that children who have attention deficits and handwriting problems, like the Student, benefit from incentives to motivate them to write more slowly. Testimony of Faulstich. Mr. Whalen noted that the Student needs incentives to attend to detail in his work, and that he responds well to token systems that motivate him to focus on the quality of his production. Testimony of Whalen. The Student's private school has the Student chart his own performance, and has incentives and rewards to motivate that performance. The Student loves the incentive systems, according to his private school teacher. Testimony of Mitchell. He eats them up, according to the Parent. Testimony of Parent.

²⁸ Section 504 refers to Section 504 of the Rehabilitation Act of 1973, 29 United States Code (USC) §701 *et seq.*

71. Ms. Smith did provide the accommodation of isolating portions of materials to focus the Student's attention. She and the paraeducator used their fingers or papers to show students the portions of materials to focus on. Testimony of Smith.

72. Ms. Smith did not provide another IEP accommodation, "shorter writing assignments." J-7:6. Her response when asked about this accommodation was that she does not require any particular length in her writing assignments, and is concerned more with quality. Testimony of Smith. However, of the seven work samples in the record that required written responses (excluding those that called for one-word answers),²⁹ four required written responses to a set number of questions, ranging up to 16. P-3:13-14; P-3:15; P-12:1; P-12:2. The number of questions to which the Student was asked to respond was not shortened. He completed all of them in these four samples. Ms. Smith testified she never shortened his assignments. The four work samples in question were from her Social Studies class. The Student's accommodations were supposed to be provided in all classes, not just the integrated class.³⁰

73. When the Parent asked Ms. Smith what specific strategies she used with the Student, Ms. Smith would respond by talking about things she did with the whole class. Testimony of Parent; J-29:2-3. Ms. Smith's testimony at the hearing did not add anything to this. Testimony of Smith. Ms. Smith also did not add anything to the interventions that Ms. Strader (the prior year's teacher) wrote in the District's evaluation that she had tried with little success. J-6:14.

January 2013 IEP

74. Pursuant to the Parent's request, an IEP meeting was held on January 17, 2013. The meeting invitation stated the purpose of the meeting was "to discuss [the Student's] *current* IEP." J-8:12 (italics added). It said nothing about *revising* the Student's IEP. At the meeting, the IEP team discussed the Student's performance, and what strategies were working and not working with him. Testimony of Parent.

75. Also at the meeting, a revised draft IEP was presented to the Parent for the first time. It was not an amendment that used the same term as the prior IEP, June 2012 to June 2013. It had a new term: January 2013 to January 2014. P-1. Ms. Smith did not state that the new IEP contained any changes in minutes of service, goals, or accommodations. Ms. Smith went through the IEP page by page, but she acknowledges she did not mention that any of these provisions were changed from the prior IEP. There was no discussion of any of the changes. Testimony of Parent, Smith. The Parent did not notice the changes; the IEPs looked the same to her. Testimony of Parent.

²⁹ The seven work samples in question are found at the following exhibit pages: P-3:4-5; P-3:6-12; P-3:13-14; P-3:15; P-12:1; P-12:2; and P-12:4-5. An additional page looks like a class essay, but it is from the Student's WIAT-II written expression test. See P-3:1-3.

³⁰ This finding of fact does not imply that the four Social Studies assignments in question should necessarily have been shortened. That would be a decision for the teacher to make depending on the Student's workload and situation at the time. Rather, the finding means that assignments did exist that were relevant to this accommodation, contrary to Ms. Smith's implication that none existed because she imposed no length requirements on assignments such as essays and stories.

76. At the meeting, the Parent asked that an accommodation be added to the IEP concerning the Student's planner. She requested that all teachers check the Student's planner daily to make sure he wrote down the appropriate assignments or homework for their class, and that they sign the planner daily to indicate that he had. The team agreed to add this to the IEP. Testimony of Parent. Everyone signed a page of the IEP indicating they had participated in the meeting. J-8:10.

77. On January 31, 2013, the Parent wrote an email to Ms. Smith asking for a final copy of the revised IEP from the January 17th meeting. Ms. Smith responded by asking if the Parent had anything else to add after looking it over. The Parent replied that the only addition she wanted was to have staff sign the Student's planner daily. Ms. Smith replied: "Well, the staff is pretty good at doing what I tell them. I will add signing planner daily on his IEP and get you the final copy." J-28. Ms. Smith added the following to the Student's IEP accommodations: "[The Student] will his [sic] planner to every teacher for a signature." J-8:3. She testified there was a missing word, and it should have read will "hand" his planner to every teacher. Testimony of Smith.³¹

78. Before sending out the final version, Ms. Smith made two other changes to the IEP. Neither of these changes were in the draft IEP distributed at the IEP meeting. Neither of them were discussed at the meeting, or discussed with the Parent subsequently. Testimony of Parent, Smith. On the Curricular Adaptations page, the adaptation "provide small group instruction" was changed to "provide small group instruction when and if necessary." Likewise, the adaptation "provide shorter writing assignments" was changed to "provide shorter writing assignments when and if necessary." See P-1:5; J-8:5. The signature page from the January 17, 2013 meeting was attached to the final IEP, which contained these two changes that were not in the draft distributed at the meeting. J-8:10.

79. On February 4, 2013, Ms. Smith sent the final IEP to the Parents, together with a Prior Written Notice. J-8:13. The notice did not mention any changes from the prior IEP to the new IEP. It described the action taken as: "The district proposes to review the annual IEP for [the Student]" and the reason for the action as: "The district will implement services per the attached [IEP]." The notice stated that no other factors or other options were considered. *Id.* The Parent checked the final version only to verify that it contained the accommodation about signing the Student's planner. Testimony of Parent.

80. The changes from the June 2012 IEP to the January 2013 IEP, in addition to teachers signing the planner, were as follows:

³¹ Regarding the planner, the Student's Math teacher, Ms. Rippon, believes it is obsolete because the teachers have websites listing the homework for their classes. Testimony of Rippon. There is no evidence whether she expressed this view to the IEP team. Some of the teachers, like Ms. Rippon and Ms. Smith, were very prompt about updating their websites. Other of the Student's teachers were less prompt. Testimony of Parent. Despite Ms. Rippon's beliefs, the middle school required all parents to purchase planners for their students, and use of the planner was required in both of the Student's IEPs. See J-7:4 (in the goals); J-8:3 (in the accommodations).

- The Student's services in written language were reduced from 120 minutes to 75 minutes per week.
- Four written language goals were eliminated: (1) use strategies for generating ideas and planning writing (e.g., pre-writing using notes, webs, or graphic organizers); (2) spell grade-level words accurately; (3) apply capitalization rules; and (4) apply punctuation rules.
- The remaining three written language goals were carried forward almost unchanged, with the same 5% baseline for his current level of performance as in the IEP seven months earlier.
- The setting for instruction on the Student's goals was changed from "individual or group setting" to "a large group setting . . . and minimal assistance."³²

And as mentioned above:

- Two provisions were cut from the Student's accommodations. They concerned the Student charting his own progress on his goals, objectives, and executed performance in order to engage him in the process of production.
- The words "when and if necessary" were added to the curricular adaptation of "small group instruction."
- The words "when and if necessary" were added to the curricular adaptation of "provide shorter writing assignments."

J-7; J-8.

81. Ms. Smith acknowledged there was no data to support these changes. Rather, she repeatedly stated that the changes were made to conform the Student's IEP to the program he actually received, or else to conform his IEP to the standard practice in her building. Testimony of Smith. For example, 75 minutes per week of special education time was chosen because the standard amount of time allotted at the middle school for children with one area of need is 15 minutes per day (15 minutes x 5 days a week = 75 minutes). If a child has two areas of need, the standard service time allotted is 30 minutes per day (150 minutes per week). This can vary in some cases, but it is the standard amount and that is why she used it for the Student. Testimony of Smith. (The January 2013 IEP allotted the Student 75 minutes per week of service time despite the fact that he had *two* areas of need, which under Ms. Smith's formula would yield 150 minutes of service.)

82. The baseline percentages on the goals appear to have been randomly assigned, not based on any measurement or even an estimate. For instance, both of the SEB goals had 0%

³² As mentioned above, the prior IEP listed "an individual or group setting" for the Student's written language goals, but the setting for his SEB goals had been left blank. J-7:2-4. In the new IEP, the setting for both types of goals was now "a large group setting . . . and minimal assistance." J-8:3.

as their current level of performance (the same level as in the prior IEP). The evidence showed the Student had significant problems organizing his homework assignments (the first SEB goal) and completing his homework assignments (the second SEB goal). However, he was way above zero in completing his homework assignments. District computerized records list all of the Student's homework assignments in each class. They are coded "HW" and marked as collected, late, missing, or graded. Prior adoption of the January 2013 IEP, the Student was way above zero in completing his homework assignments. These District records were available to Ms. Smith and easily accessible online. The Parent frequently accessed them. See J-20; Testimony of Parent.

83. The Present Levels of Educational Performance (PLEP) in the new IEP do not indicate any progress to support the changes listed above. Rather, the PLEP indicate no progress. They state that the Student's grades in Language Arts and Social Studies, both of which involve writing (per the PLEP) had dropped from C+ and B- respectively, to Ds. The PLEP also stated that his work was coming in late, rushed, and hard to read, and that he was spending more time socializing in class. J-8:1. Ms. Smith administered a standardized written expression assessment for the PLEP in January 2013 that resulted in a nearly identical score to what Dr. Chenault had found approximately one year earlier, meaning the Student was still at approximately the same percentile relative to his peers.³³ In the area of SEB organizational skills, the PLEP stated the Student was "still exhibiting the same behaviors as when he was evaluated in the spring" and that a "study skills class should be part of his schedule for next year." J-8:2-3.

84. Ms. Smith explained that three of the four written language goals that were dropped in the new IEP (spelling, capitalization, and punctuation) were incorporated into an SEB objective. That SEB objective concerns completing homework with "accuracy" by checking it prior to turning it in. Testimony of Smith. However, the same SEB objective was already in the prior IEP. The only change was that it now it said "with accuracy and clarity" instead of "with accuracy." Nothing in the objective -- or the SEB goal it was part of -- referred to spelling, capitalization, punctuation, or to writing conventions. J-7:4; J-8:3. If one could intuit that "with accuracy and clarity" referred to these things, the SEB goal still only concerned homework, not work done at school. The goals that were dropped concerned *teaching* the Student to use appropriate spelling, capitalization, and punctuation through specially designed instruction at school, not just having *him* check his homework for accuracy before turning it in.

85. Concerning the fourth writing goal that was dropped, Ms. Smith acknowledged there was no data to support doing that, and again claimed to have changed it for another writing goal. When it was pointed out to her that the other goal was already in the prior IEP, Ms. Smith then testified that she dropped goals because that is "the practice in our building -- we delete goals." Testimony of Smith.

³³ The written expression assessment that Ms. Smith used was from the Wechsler Individual Achievement Test (WIAT). The Student's standard score was 87. Ms. Smith wrote that this was the 50th percentile. However, Mr. Whalen (who is a school psychologist and the District's director of special education), testified this is at approximately the 17th percentile. Ms. Smith mistakenly wrote 50 in the column for percentile because the Student's raw score was 50% of the possible points. P-3:1-3; Testimony of Smith, Whalen.

86. Several things did not change in the new IEP. First, there was still no time allotted for instruction on the Student's SEB goals. J-7:10; J-8:9. Second, the SEB goals were barely revised despite the fact that, per the PLEP, the Student had made no progress under those goals. His stated baseline for the SEB goals did not change from the IEP adopted seven months earlier; it remained 0%. J-7:4; J-8:3. Finally, the placement adopted, and the placement considered and rejected, remained the same. J-7:10; J-8:9. The Parent continued to believe the Student received his specially designed instruction on a pull-out model, not an in-class model. Testimony of Parent.

Handwriting and Typing

87. Both the District's evaluation and Dr. Chenault's evaluation recommended that the District provide assistance to the Student in handwriting and typing. The District's evaluation included the following in the Recommendations section:

- use of mazes, following pathways, dot to dot, word search puzzles to improve pencil movement on paper
- review letter formation, possibly cursive, using correct direction (Handwriting Without Tears curriculum)
- practice keyboarding skills (i.e. Peninsula School District, TypingMaster program)

J-6:7. None of these recommendations were adopted into the Student's IEP – either in June 2012 or January 2013.³⁴

88. The District's evaluation made the following recommendations under Assistive Technology:

Use of items such as timers, reminders through technology, and computer assisted word processing as is provided for all students may be considered to aid [the Student] in task initiation, completion, or performance.

Id. However, under Assistive Technology, both IEPs stated: "No, [the Student] does not require assistive technology services or devices." J-7:5; J-8:4.

89. Nor is there evidence that the evaluation team's recommendations were used as part of any strategy to *achieve* the IEP goals. Handwriting and typing were addressed by the District only as follows. Sometime in the second half of the year, Ms. Smith handed the Student the book *Handwriting Without Tears*. The school OT had suggested it to her. Ms. Smith gave it to the Student and said: "Here's something to help you practice your letters." Testimony of Smith, Parent. Ms. Smith testified to no instruction or help with the *Handwriting Without Tears* curriculum having been provided by her or her paraeducator. Testimony of Smith.

³⁴ This matter is more relevant to the January 2013 IEP, because the Parent challenged the *appropriateness* of that IEP. She challenged only the *implementation* of the June 2012 IEP. The June 2012 IEP had no provisions on handwriting or typing, so there was nothing to implement.

90. Ms. Smith's strategy was to repeatedly tell the Student to handwrite more slowly. He knew convention rules and could write more legibly if he chose to do so, she explained, but he rushed because he could not write as fast as he thought. Her approach was to try to slow down his output -- which he resisted -- instead of having the paraeducator provide instruction to speed up his output in the ways recommended by the District's evaluation.

91. Regarding typing, Ms. Smith had no computer program to help the Student learn keyboarding. She acknowledged there should have been such a program. Testimony of Smith. She also explained that there were only two computers in her classroom and they were slow. Logging on alone could take five minutes. *Id.* The Student did not want to type; she does not know if he was apprehensive about using the computer. When directed to re-write his work on the computer, he would sometimes handwrite a better draft in order to avoid using the computer. *Id.*

92. Turning to Dr. Chenault's evaluation, four of her recommendations concerned improving the Student's handwriting and typing: First, provide a scribe at times, to separate the physical act of writing from the process of generating text, so he can get his ideas down on paper. Second, provide "structured training" in handwriting; for example using the *Handwriting Without Tears* curriculum (she did not recommend simply handing him the book). Third, have him learn keyboarding in a structured way using one of many commercially available keyboarding programs for young people, because once he is fluent in typing he will not have to focus on letter formation and will have more mental energy for other aspects of writing. Fourth, obtain an assistive technology evaluation and/or try speech-to-text software, or writing software like Co-Writer, which suggests text. J-5:18. None of these recommendations were adopted in the Student's IEPs or used as strategies to achieve the goals of his IEPs.

93. Dr. Faulstich, the District school psychologist, believes that keyboarding is often useful for children with the Student's problem: Typing is faster than handwriting once it is learned. This helps with the problem of being unable to record ones thoughts fast enough. Dr. Faulstich testified that home support is needed for typing, but she also thought that keyboarding was in the Student's IEP. Testimony of Faulstich. She was mistaken in this belief.

Events Subsequent to Adoption of January 2013 IEP

94. A few days after the January 2013 IEP meeting, Ms. Smith emailed the Parent stating: "What about having [the Student] evaluated for writing?" The Parent responded: "[The Student] has already been diagnosed with a writing impairment. What kind of testing were you thinking of doing?" Ms. Smith replied: "Do we have a copy of that assessment for the Student in his file at school?" P-13. Ms. Smith testified that her email referred to an OT evaluation for handwriting. She alleges she was aware the District had already done an OT evaluation, and she meant an OT should look at him again. Testimony of Smith.

95. Dr. Faulstich contradicted Ms. Smith's testimony on this matter. According to Dr. Faulstich, it was clear to her from talking with Ms. Smith that Ms. Smith wanted to know whether an OT handwriting evaluation had been done on the Student. Ms. Smith sent the school OT to Dr. Faulstich to find this out. Testimony of Faulstich. (The OT evaluation was done at the elementary school, so the middle school OT was unaware of it). Dr. Faulstich's testimony on this matter is credible. Ms. Smith's testimony is inconsistent not only with Dr. Faulstich's testimony, but with Ms. Smith's follow-up email to the Parent asking if the evaluation

was in the Student's file at school. Ms. Smith should have been familiar with the Student's file, and with the District's recent evaluation, as Ms. Smith wrote her first IEP for the Student a week before sending the Parent this question.³⁵

96. In mid-March 2013, the Parent wrote to Ms. Smith that the Student had failed his last two assignments for a certain chapter, and asked: "What is being done in class to help him with spelling and punctuation? Maybe we should meet again?" J-29:3. Ms. Smith replied to the first question by stating what she does with the whole class on spelling and punctuation. She did not mention any specially designed instruction for the Student. Ms. Smith replied to the second question by agreeing to meet. *Id.*

97. Ms. Smith and the Parent met a few days later, on March 18, 2013. The Parent again asked what was being done to help the Student in her class. Ms. Smith responded that the Student does not ask for help, does not practice, and does not write the posted assignments in his planner when all he has to do is copy them down. Testimony of Parent; P-16. At some point Ms. Smith also told the Parent (it is unclear if it was at this meeting or another time) that classmates do not like to correct the Student's work because they could not read it. Testimony of Parent. The only strategy that came out of this meeting was that the Student would do his work on the computer, and this would assist him with spelling and punctuation. Testimony of Parent; P-20:2.

98. After meeting with Ms. Smith on March 18, 2013, later that day the Parent met with the Student's school counselor. The Parent discussed that the Student should be getting specially designed instruction without having to ask for help, and without instruction being optional. The counselor said she would talk with Ms. Smith about these matters. The Parent does not know if this occurred. Testimony of Parent.

99. The Student's second trimester grades, issued March 21, 2013, were still good: C's in Language Arts and Social Studies, B+ in Math, A- in Science and Band, and A in P.E. There were two brief teacher comments, both positive. J-19:1.

100. In late March and early April 2013, Ms. Rippon and Ms. Smith, respectively, filled out Vanderbilt assessments for the Student's pediatrician. P-36; P-37. Both of them rated the Student at the most serious level ("very often") on the following behaviors: fails to give attention to details or makes careless mistakes; does not seem to listen when spoken to directly; has difficulty organizing tasks and activities; is easily distracted by extraneous stimuli; and is forgetful in daily activities. *Id.*

101. The ratings in these areas were similar to Ms. Strader's ratings from the previous school year. However, the Student now had new behaviors he did not have the previous year. Ms. Smith and Ms. Rippon rated the Student as "often" actively defying or refusing to comply with adult requests or rules, and "often" being afraid to try new things for fear of making

³⁵ The Parent read Ms. Smith's email as referring to an evaluation in written language, not an OT evaluation. The Parent was shocked that Ms. Smith did not know the Student had already been evaluated in written language. Testimony of Parent. However, it appears from Ms. Faulstich's testimony that Ms. Smith was referring to an OT evaluation.

mistakes. *Id.* Ms. Strader had twice rated the Student as "never" engaging in either of these behaviors. P-35. Another new development was that the Student now demonstrated internalizing problems. Ms. Rippon rated him as "occasionally" having five symptoms, and "often" having the remaining two symptoms (afraid to try new things for fear of making mistakes; and being sad, unhappy or depressed). Ms. Smith rated him as "occasionally" having one symptom, and "often" having two (afraid to try new things, as above, and self-conscious or easily embarrassed). P-36; P-37. Ms. Smith's narrative comment on the Vanderbilt was: "[The Student] can write neatly when pushed to be required to type out his assignments." P-37:2.

102. In March and April 2013, the Parent noticed a decline in the Student's emotional state. He made three suicidal or self-harming comments. On one of those occasions, he said to the Parent, with an unusual and flat affect: "I'm not going to make it through middle school. I'm not going to make it through high school," and "Do you know that middle school kids commit suicide?" On another occasion, while frustrated with math homework, he said: "I just want to go throw myself off the back porch." The porch is one story up from the ground. The Student had one full-blown panic attack, and a second partial one during which the Parent was able to help him calm himself before it fully escalated. All of these behaviors were new for him. Testimony of Parent; P-38. During the second week of May 2013, the Student twice talked to the Parent about "when" he quits school. J-38:2; Testimony of Parent.

103. The Parent contacted the Student's pediatrician, who referred him for a psychiatric evaluation by Melanie Brace, M.D. This evaluation was scheduled for late May 2013. In the meantime, the Parent contacted the middle school principal and a meeting was held on May 6, 2013 with the principal, Ms. Smith, the Student's school counselor, the school psychologist Dr. Faulstich, and a District special education administrator. The Parent shared the incidents described above (except for the comments about quitting school, which occurred a few days after this meeting) and shared her increasing suspicion that the Student was not getting specially designed instruction.

104. The May 6, 2013 meeting resulted in a written list of strategies including: provide regular small group sessions to work on weekly language sheets (sheets that contain two error-filled sentences to correct for each day of the week); make sure daily that the Student has written in his planner the homework, projects, and due dates for all of his classes; check the planners of others around the Student so he does not feel singled out; continue to provide the use of a computer to type his work; and find activities at which he excels in order to improve his attitude towards writing and receiving help. P-50; P-12:3.

105. From January 17, 2013 (the date the IEP team agreed to add the accommodation of teachers signing the Student's planner),³⁶ through the end of the school year on June 18, 2013, there are initials or writing by classroom staff (teacher or paraeducator) only on the following number of days:

³⁶ The January 17, 2013 IEP meeting was held at 7:30 a.m., so it is appropriate to count this date in examining whether teachers signed the Student's planner. Ms. Smith did sign his planner on January 17th.

- Language Arts: 18 days³⁷
- Social Studies: 14 days³⁸
- Math: 0 days
- Science: 0 days

P-11. During the period in question, there were seven school days at the beginning of April for which pages of the planner are missing from the exhibit. *Id.* Excluding those seven days, and excluding the last day of school (when there would be no reason to check or sign a planner), there were 89 school days from January 17, 2013 through the end of the school year. See J-2. There were no teacher/paraeducator initials or writing in the Student's planner on 80% of those days in Language Arts, and on 84% of those days in Social Studies.³⁹ There were none at all in Math or Science.

106. From the May 6, 2013 meeting through the end of the school year, there were 30 school days (this does not count the last day of school, when there would be no reason to check or sign a planner). J-2. Of those 30 school days, there are initials or writing in the Student's planner by classroom staff on only 10 days in Language Arts, eight days in Social Studies, and none in Math or Science.⁴⁰

107. In the third trimester, the Student passed his classes, but his grades dropped in all except for Ms. Smith's classes. There they rose, perhaps due to inflated grading, as discussed above. He received a C+ in Language Arts, Social Studies, and Math; B in Science; B+ in Band; and C in P.E.⁴¹ Whereas past teacher comments on his 6th grade report cards had all been positive, he now had three comments, all of them negative. The comments concerned following instructions, improving the quality of work, and improving behavior. P-5.

108. Dr. Brace's psychiatric assessment occurred on May 29 and June 3, 2013. P-38. The Parents reported to her that the Student's emotional problems were related to academic performance, and that socially he was happy at school. The Student reported the same to Dr. Brace. He denied further suicidal thoughts. He said he would never hurt himself, but had simply felt stuck. He denied depression and said he was looking forward to the summer. He stated that his biggest stress right now was getting through the school year. Dr. Brace determined that the Student was not a suicide risk. *Id.*

³⁷ Language Arts: January 17, February 5 (written in row for Math, but content concerns Language Arts), February 6, 7, 8, March 19, 20, 26, May 13, 20, 21, 22, 23, 29, June 4, 5, 6, and 11, 2013. P-11.

³⁸ Social Studies: January 17, February 5, 6, 7, 8, March 21, May 6, 7, 13 (written in row for Science, but content concerns Social Studies), May 20, 21, 22, 29, and June 4, 2013. P-11.

³⁹ In Language Arts, there were no teacher/paraeducator initials or writing on 71 of the 89 days, which is 80%. In Social Studies, there were none on 75 of the 89 days, which is 84%.

⁴⁰ See dates listed in footnotes immediately above.

⁴¹ The Student's previous grades in P.E. were A's. He broke a toe on May 17, 2013, and was restricted from running for three weeks. The Parent reported this promptly to the school. J-39. It is therefore unlikely the P.E. teacher lowered the Student's grade for this reason.

109. Dr. Brace recommended the use of Dragon Speaking Naturally, a speech-to-text software. P-38:2. She referred the Student to psychologist Dr. Audrey Don for academic intervention and to relieve some of the stress the Student was experiencing in the academic environment. P-38:4. The Student worked with Dr. Don three times over the summer. At Dr. Don's recommendation, he attended a one-week summer program in Tacoma on sentence structure for middle schoolers. Testimony of Parent.

110. By the end of the school year, the Parent had lost faith in the District. She no longer believed the principal's statement, made at the May 6, 2013 meeting, that the problems she saw in the past would not happen again. Over the summer, the Parent began looking at other options for the Student for 7th grade. Testimony of Parent.

MSP Scores

111. The Student took the MSP in the spring of 3rd, 4th, 5th and 6th grades. For ease of reference, all of his MSP scores are listed in one place in this decision, following the last time he took the assessment. The parties made a variety of arguments concerning the Student's MSP scores that are not particularly persuasive. One thing notable is how disparate the Student's writing score is from all of his MSP scores in other subjects. This was true in other testing as well, as discussed above, not just on the MSP.

112. The MSP is scored in four levels: Below Basic, Basic, Proficient, and Advanced. A passing score is 400, which is at the bottom of the Proficient range. J-9 through J-12.

113. In Reading, the Student's scores from 3rd through 6th grade, respectively, were: 426 (Advanced); 407 (Proficient); 434 (Advanced); and 426 (Proficient). *Id.*

114. In Math, the Student's scores from 3rd through 6th grade, respectively, were: 410 (Proficient); 413 (Proficient); 440 (Advanced); and 410 (Proficient). *Id.*

115. Science was assessed only in 5th grade. The Student's score was 477 (Advanced). J-11.

116. Writing was assessed only in 4th grade, as mentioned above. The Student's score was in the lowest range (Below Basic). J-10.

Evidence Regarding Procedural Safeguards Notice

117. One of the Parent's claims in this case is that the District failed to provide her with a Notice of Procedural Safeguards in connection with the January 2013 IEP revision or thereafter. J-48:9-10. The Parent testified as follows regarding the Procedural Safeguards: She does not recall ever being offered, or receiving, the Procedural Safeguards in connection with the Student. Rather, she had a copy of the Procedural Safeguards, dated 2009, in her home for a very long time. She knew where it was and retained it over the years. The Parent has another child who became eligible for special education before the Student did. Testimony of Parent.

118. Ms. Smith did not testify to ever having provided or offered a copy of the Procedural Safeguards to the Parent.⁴² The only notice she sent the Parent about the Procedural Safeguards was sent on February 4, 2013, together with the final version of the January 2013 IEP. It stated: "You have been *previously provided* a copy of the Procedural Safeguards." J-8:13 (italics added). There was no other notice concerning the Procedural Safeguards sent to the Parent during the 2012-2013 school year.

119. Based on the evidence above, it is found that the Parent was not provided with, and was not offered, a copy of the Notice of Procedural Safeguards in conjunction with the January 2013 IEP, or at any time during the 2012-2013 school year.

120. However, numerous notices the District sent the Parents from February 2011 to February 2013 discussed the Procedural Safeguards. Some stated that the Procedural Safeguards concern protections their child has under the IDEA. Some stated the Parents had previously received a copy of the Procedural Safeguards. All of them provided the name and telephone number of a person the Parents could contact regarding the Procedural Safeguards, stating either that the Parents could obtain a copy from that person, and/or have questions about it answered by that person. See J-4:6; J-4:8; J-6:9; J-6:12; J-6:13; J-7:14; J-8:13. One notice, from March 2011, stated that a copy of the Procedural Safeguards was attached. J-4:6. (The person who issued that notice did not testify at the hearing to state whether it was attached, or what her customary practice was regarding attaching it.) There is no evidence the Parents ever contacted any District staff to ask for a copy of the Procedural Safeguards or to ask a question about them.

Withdrawal of Student from District and Enrollment at Crosspoint Academy

121. Over the summer after the Student's 6th grade year, the Parent became interested in the Arrowsmith Program at Crosspoint Academy (Crosspoint) in Bremerton, Washington. Crosspoint is a campus of Gateway Christian Schools (Gateway).

122. On August 14, 2013, the Parent submitted a form to the District requesting that some of the Student's records be sent to Gateway as part of the application process. The form was titled "Transcript Request - Gateway Christian Schools." In the top half of the page, the Parent authorized release of the Student's records. The bottom half of the page was addressed to District administrators. It stated: "The above named student is applying for admission at Gateway Christian Schools. Please send copies of the following forms." A few boxes were checked for the types of records sought. The form ended by requesting that the records be sent "for interviewing purposes to: ADMISSIONS" followed by an email address and fax number. J-21:4.

⁴² District counsel did not ask Ms. Smith about this at the hearing. The District did ask Mr. Whalen, the director of special education, about the standard practice concerning distributing copies of the Procedural Safeguards since he arrived in the District in July 2013. Testimony of Whalen. However, the Student last attended school in the District before Mr. Whalen arrived. Mr. Whalen's testimony on this matter is therefore of little relevance.

123. During late July and August 2013, the Parent and the principal emailed about elective classes for the Student in 7th grade. On August 13, 2013, the Parent wrote to the principal that the Student had chosen a Robotics class, and she hoped he could get into it. J-42.

124. However, District office staff mistakenly took the Gateway request for records to be a notice that the Student was transferring out of the District. The District disenrolled the Student effective August 22, 2013. J-21:1.

125. The Parent was unaware of the disenrollment. She had registered all three of her children in District schools in the spring of 2013 for the following year. In late August 2013, she checked her children's class schedules online. She found schedules for her other two children, but not for the Student despite repeatedly checking. She wanted to know if the Student was scheduled again with Ms. Smith. Testimony of Parent.

126. On August 30, 2013, the Parent signed a contract with Gateway committing her to pay tuition for the 2013-2014 school year. P-34. On that day, she came to the middle school to disenroll the Student. It was then that she learned the Student was not registered for school. The principal and the office manager were away. The Parent asked for a call from one of them. On September 3rd, the day before school was to start, the office manager called the Parent and said that when she received notice that the Student was transferring, she probably pulled his schedule. The Parent explained that she did not give notice the Student was transferring until August 30th. Testimony of Parent; J-43.

127. On September 11, 2013, Gateway sent a notice to the District stating the Student was enrolled in Gateway, and requested additional records. J-21:5.

128. In mid-September 2013, the Parent emailed Dr. Faulstich, the school psychologist, in response to a telephone message she had received. The Parent wrote that she wanted to discuss what District services might be available to the Student. J-44:5. They had difficulty connecting by telephone, so Dr. Faulstich explained the options in an email on September 23rd. The Student could attend a Language Arts class that has special education support at about 10:30 a.m. each day. She then stated: "I'm not thinking you could practically access social/emotional/behavioral services were he to come just one period a day, but we could talk about what that might look like, if you were interested in services." J-44:3. The Parents did not choose to access District special education services.

Arrowsmith Program and Crosspoint Academy

129. The Student is attending a private school, Crosspoint Academy, for 7th grade in the 2013-2014 school year. Crosspoint adopted an Arrowsmith Program two years ago. There is one Arrowsmith class at Crosspoint, with students ranging from the 6th to the 10th grades. When they are not in the Arrowsmith classroom, they attend regular classes and activities with other Crosspoint students. Testimony of Mitchell.

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Arrowsmith Program

130. The Arrowsmith Program has been in existence since 1980, when a school based on the program was established in Canada. Its founder and director is Barbara Arrowsmith Young. P-29:2, 4.⁴³

131. The director or program coordinator of the Student's Arrowsmith Program at Crosspoint Academy is Kathleen Mitchell.⁴⁴ Ms. Mitchell has a bachelor's degree and a fifth-year teaching credential. She has been a teacher at Crosspoint for many years. Two years ago, Crosspoint asked if she would like to take training in Toronto and start an Arrowsmith class at Crosspoint. Ms. Mitchell had three weeks of training from Arrowsmith in Toronto. Her co-teacher in the Arrowsmith class is Barbara Anderson. Neither Ms. Mitchell nor Ms. Smith has a special education credential. Testimony of Mitchell.

132. Arrowsmith is based on the research of a Russian neuropsychologist from the 1920's, A.R. Luria, as modified by methods developed at the University of Nebraska in the 1970's. Testimony of Whalen; P-29:4. The fundamental principal of Arrowsmith is that weak areas in the brain can be strengthened by cognitive exercises. Arrowsmith requires an initial commitment of four periods per day, five days per week, spent on these exercises. P-29:14-15. The exercises are selected for each student based on which of 19 areas of cognitive dysfunction they have, and the severity of their dysfunctions, as shown in an initial Arrowsmith assessment. P-31. "Students will usually spend four periods per day, five days a week, for three to four years" on their Arrowsmith cognitive exercises. P-29:14.

133. The typical Arrowsmith student has average to above-average intelligence and has learning dysfunctions, but does not have an autism spectrum disorder or severe intellectual, emotional or behavioral disorders. P-30:15. The program is based on a strict structure from the Arrowsmith Program in Toronto. Initial assessments and monthly progress records are delivered to the Toronto headquarters via the internet. The data is analyzed and a report is sent back to the teacher. The report states whether the student is meeting benchmarks for each exercise, and whether the teacher needs to change strategies. P-29:15; Testimony of Mitchell.

134. Howard Eaton runs the Eaton Arrowsmith School in Vancouver, B.C. The Arrowsmith website cites a book by Mr. Eaton, *Brain School*, in which he describes the success of students at his school. P-29:2. Mr. Eaton also wrote a paper in 2013 which states Arrowsmith does not directly teach reading, writing, spelling, or math, though it indirectly benefits these areas. He went on to state: "[I]t is recommended that students working on the Arrowsmith Program also

⁴³ Barbara Arrowsmith Young is listed in the organization's website as having an M.A. degree. P-29:21. The portions of the website in the record do not state the subject in which she received her master's degree.

⁴⁴ Ms. Mitchell referred to her position as "director" of the Arrowsmith Program at Crosspoint. Testimony of Mitchell. The Arrowsmith Program refers to her position as "program coordinator." P-29:15.

receive daily Math and Language (reading, writing and spelling) instruction during the implementation of the program." P-53, Exhibit A, p. 1;⁴⁵ see also D-8:1.

135. The Arrowsmith Program Reference Manual 2013 discusses the needs of students who transition to a full academic curriculum after completing the Arrowsmith Program:

Upon completion of the Arrowsmith Program students may require 1 – 2 years time to gain experience using their newly strengthened cognitive capacities. Students will now have stronger cognitive capacities but will not have had experience using these newly strengthened cognitive areas effectively. Before graduating from the Arrowsmith Program parents and students should be told that students will not necessarily learn all academic subjects as quickly as their peers, when they first mainstream into a full academic curriculum, as they will not have had as many years experience using the cognitive areas effectively as their peers have had. . . .

However, ultimately, Arrowsmith students will be able to accelerate their learning as they gain experience using their newly strengthened cognitive capacities.

The Arrowsmith Program works with students who have multiple learning disabilities and academic skills below grade level. As students complete the program they may need extra tutoring to bring the academic skills to grade level given the limited amount of time within the program to address these academic skill deficits.

P-32:11-12.

136. The Student has five Arrowsmith exercises. Each exercise has levels of increasing difficulty. The alleged benefits of each exercise on various cognitive weaknesses, and ultimately on certain academic areas, is described in the Student's Arrowsmith Initial Learning Profile. P-31. His five exercises are as follows.

137. "Tracing" is an exercise in which the Student is given a sheet of paper with symbols on it consisting of various curves, lines and angles. The Student places his pen on each symbol and traces it, trying not to let his pen stray outside the lines of the printed symbol, which lines are approximately 1/16th inch wide in the copy in the record. This exercise is timed, with the object being to trace quickly and accurately. It is done wearing a left eye patch, allegedly to force the hemisphere of the brain that has a weakness to work harder. D-10; Testimony of Mitchell.

138. "Word" is an exercise in which the Student copies (rather than traces) symbols. It is a complementary exercise to "Tracing." It is timed, with the object being to copy quickly and accurately. The Student spends 90 minutes each day on the combination of "Tracing" and "Word" (450 minutes per week), plus more time as homework. Testimony of Mitchell.

⁴⁵ Mr. Eaton's paper is attached as Exhibit A to the Declaration of Dr. William J. Lancee, Ph.D, which is exhibit P-53. Dr. Lancee's declaration states he contributed to the paper, but the only author on the paper is Mr. Eaton. P-53, Exhibit A, p. 18.

139. "Artifactual Thinking" or "R Think" is an exercise in interpreting non-verbal information such as facial expressions and body language. P-31:9. The Student is given a reproduction of a Norman Rockwell painting and "reads" the painting by writing what is presently taking place, what may have happened before the present, and what may happen after the present moment. Only Norman Rockwell paintings are used. The Student spends 90 minutes each day on this exercise (450 minutes per week), plus more time as homework. Testimony of Mitchell.

140. "Phrases" is an exercise in which the Student listens to a recorded text repeatedly (currently about three sentences long) until he has memorized the text and can recite it. He must recite it three times with no errors, and after a five or 10 minute delay, in order to pass on to the next Phrases exercise. He must try to memorize the text by listening to it as few times as possible. Testimony of Mitchell.⁴⁶

141. Finally, "Supplementary Motor" is an exercise in which the Student does addition and subtraction problems in his head. It is mental math using single digits up to double digits. He must remember add-ins and come up with the total. Testimony of Mitchell.

142. In addition to their individual exercises, the Arrowsmith students do journal writing for 10 minutes, twice a week. Once a month they do a longer writing assignment (there was no testimony as to how long). Testimony of Mitchell.

143. There are four periods a day at Crosspoint, each 90 minutes long. The Student spends three of the four periods on his Arrowsmith exercises (22.5 hours per week). He is required to work on his Arrowsmith exercises for prescribed periods as homework, as well. There are five to 10 minute breaks after 35 minutes of doing exercises, so the actual working time is less than the hours in parentheses. P-43; Testimony of Mitchell.

144. One period a day (90 minutes) is spent outside the Arrowsmith program. Crosspoint uses an alternating-day schedule, so every other day the Student had Math for this period, and every other day he had Band. That was during first semester. During second semester, he has Math every other day, and Science every other day. The Student will have no Reading or Language Arts class, and no Social Studies class, all year. Testimony of Mitchell.

145. In the Arrowsmith class, there are two teachers and a maximum of 13 students at any one time, with 15 total enrolled. All of them have learning disabilities, either diagnosed elsewhere or diagnosed in Arrowsmith assessments. The Student is responsible for charting his own progress, and a teacher signs after he has completed each exercise. Incentive and reward systems are used to motivate progress on the Arrowsmith exercises, and the Student responds very well to these. Testimony of Mitchell, Parent. The teachers give the Student a lot of positive feedback, and this is reflected in communications to the Parent. P-41; P-44; P-47.

⁴⁶ The ALJ does not have in her notes of the hearing the amount of time per week the Student spends on the "Phrases" or "Supplementary Motor" exercises. Ms. Mitchell may not have testified about this. The hearing was reported by a court reporter, but a transcript has not been prepared.

146. The Student is responsible for keeping a six-divider notebook and his papers organized. According to Ms. Mitchell, at first she would find the Student's materials everywhere, but now he has improved in his organization. In class, he manages his time using a timer. Testimony of Mitchell. (The Assistive Technology section of the District's evaluation recommended that timers and/or other reminders through technology be used to aid the Student's task initiation, completion and performance. This recommendation was not adopted in the Student's IEPs.) At Arrowsmith's recommendation, the Parent set up a separate homework area for the Student, apart from the rest of the family. According to the Parent, at home the Student has begun to plan the use of his time and get ready for school independently in the morning, which are new behaviors. Testimony of Parent.

147. The Student sometimes rebels against the Arrowsmith exercises, saying he does not see how they help him in any way, and he resists doing them. Other times he seems very happy about reaching his Arrowsmith benchmarks the rewards he gets for his progress. He misses his friends at the District middle school tremendously, and has not made close friends at Crosspoint yet. D-12; D-18; D-19; Testimony of Parent, Mitchell. Before winter break, the Arrowsmith class was assigned to write a letter home based on the prompt: "In the Arrowsmith program I have changed in these areas." The Student wrote that he has gotten better at reading, writing, memory, focus, and reading social situations due to Arrowsmith. P-33; Testimony of Mitchell. However, the following month he had two of his rebellious phases, described above. D-18, D-19.

148. Ms. Mitchell believes the Student will complete the Arrowsmith Program in less than the three-to-four years that were initially projected. Her belief is based on the fast progress he is making on his Arrowsmith exercises, which progress is being measured. Testimony of Mitchell; P-32:1-4.

Evidence Regarding Effectiveness of Arrowsmith Program

149. There is no independent, peer-reviewed evidence that the Arrowsmith Program is effective. The Arrowsmith website is replete with claims that it increases cognitive and academic performance, and testimonials from participants to that effect. P-29; P-30; P-54. However, none of the studies cited in the record has been published in a research journal, let alone a peer-reviewed journal. Some were authored by Ms. Arrowsmith Young, director of the Arrowsmith Program. See P-29:21; P-30:7. Others were authored by Mr. Eaton of the Eaton Arrowsmith School. See P-29:21; P-30:7, 11-12. These studies are not independent and none were published in a research journal.

150. Two studies on Arrowsmith were conducted by William Lancee, PhD. His declaration states that he is an associate professor in the Department of Psychiatry at the University of Toronto, and former head of research in psychiatry at Mt. Sinai Hospital in Toronto. P-53. There is nothing in the record about what areas of psychiatry he has done research in. There is no curriculum vitae attached to his declaration. He did not testify at the hearing. He could not be questioned about whether he has any personal connection to the Arrowsmith Program. His declaration simply attaches a paper written by Mr. Eaton, on which Dr. Lancee was a consultant. P-53, Exhibit A. Although Dr. Lancee's declaration states that the attachment is a "published report," it does not say where it was published. The attachment shows no sign of having been published anywhere. *Id.*

151. A January 2003 study by Dr. Lancee is summarized in two places on the Arrowsmith website. P-29:20; P-30:10. (It may be summarized in more places on the website, but these are the ones in the record.) This is one of the few Arrowsmith studies that attempted to use a control group. However, the control group was one-third the size of the Arrowsmith group. The summaries state the Arrowsmith students made significant gains in performance, while the students in traditional special education classes did not. One of the summaries acknowledges that the study had some design limitations and a small sample size. There is a link to the full study at the bottom of one of the summary pages. P-30:10. When that link is opened, a report appears; it gives no indication of having been published anywhere.

152. A November 2005 study by Dr. Lancee had no control group. P-29:19; P-30:9. There is a link to the full study at the bottom of one of the summary pages. P-30:9. When that link is opened, a report appears; it gives no indication of having been published anywhere.

153. A January 2007 report by the Toronto Catholic District School Board on the Arrowsmith Program offered by its own schools is not independent; it is an entity studying itself. P-29:18; P-30:8; P-54. The report does not list any author. It is unknown whether the person or persons who analyzed the data and wrote the report had any particular expertise to do so. The study used no control group. There is no indication it was published anywhere except the Arrowsmith website. A link to the full study opens to a portion of the Arrowsmith website that is printed in the record. P-54.

154. Linda Siegel, PhD, is a professor at the University of British Columbia in the Department of Educational and Counseling Psychology and Special Education. She received her doctorate in psychology at Yale University. She has received numerous grants and awards, served on the editorial boards of numerous peer-reviewed scientific journals, and published many articles in such journals, including many in the field of learning disabilities. D-5. Testimony of Siegel.

155. Dr. Siegel pointed out a number of problems with the studies of Dr. Lancee and the Toronto Catholic District School Board cited above, in addition to the lack of control groups. She also noted that despite the Arrowsmith Program being in existence since 1980, there have been no independent, peer-reviewed studies published on the program. The Canadian Social Sciences and Humanities Research Council provides grant money to conduct educational research. Dr. Siegel believes that if a good study on Arrowsmith was designed, it would have no problem receiving funding from this Council. Testimony of Siegel.

156. Dr. Siegel conducted a small-scale study in 2002 of an Arrowsmith Program for the Vancouver, B.C. school district. D-8. The study compared an Arrowsmith Program at one of the district's elementary schools with a control group in a special education program. However, there was an unusually high turnover that year among the control group children (D-8:12) and the study was too small to be scientifically valid. Dr. Siegel reported her conclusions to the school district but did not attempt to publish the study in a journal. Testimony of Siegel.

157. Dr. Siegel's skepticism about Arrowsmith is not based on her Vancouver school district study. It is based on Arrowsmith's lack of foundation in contemporary science, and the lack of any peer-reviewed research supporting its effectiveness. Testimony of Siegel. Arrowsmith's 19 areas of cognitive dysfunction and the exercises that allegedly improve them do not reflect contemporary scientific views about academic functioning and the working of the brain. (Mr. Whalen, who is a school psychologist and the District's director of special education,

discussed this in his testimony as well.) When asked on cross-examination whether the "Tracing" exercise might be similar to exercises an OT would use, Dr. Siegel responded that there is a lot of variation in the therapies used by OTs, but she has never seen anything like that done by an OT. Testimony of Siegel.

158. There are many testimonials from teachers on the Arrowsmith website. Dr. Siegel explained that there have been studies on the reliability of teacher perceptions of student progress. Teacher perceptions have been found only somewhat reliable, not consistently reliable. Testimony of Siegel.⁴⁷

159. Dr. Siegel is concerned about the lost educational time that results from the many hours spent doing Arrowsmith exercises, and the few hours (or none) teaching reading, writing, and spelling. She is also concerned with the high dollar cost of the Arrowsmith Program, given the existence of much less costly programs whose effectiveness, unlike that of Arrowsmith, have been established in peer-reviewed research. Testimony of Siegel.

160. Mr. Whalen is concerned that the Student spends an extraordinary amount of time on very rudimentary skills (e.g., memorizing, copying, tracing, addition and subtraction) that do not engage higher levels of reasoning or critical thinking. Mr. Whalen is also concerned that for a full school year – and possibly more – the Student will receive no instruction in reading, written language, or social studies. Only in second semester did the Student begin receiving science instruction. Mr. Whalen is also concerned that the Student's teachers lack special education credentials. He is skeptical that Ms. Mitchell's three-week Arrowsmith course is a substitute for that.

161. Mr. Whalen pointed out that the Student's math class (and now his science class) meets only every other day. These classes are 90 minutes long, so the Student receives 225 minutes per week in these subjects (90 minutes x 2.5 periods = 225 minutes). At the middle school, he would receive 245 minutes per week, which is 20 minutes longer (50 minutes x 4 periods plus 45 minutes on Wednesdays = 245 minutes). See J-44:3. There was no evidence in the record as to the effect of longer, less frequent classes in math or science. Regarding the difference in time, there are 180 instructional days in the school year (see J-3), so the Student is receiving 12 fewer hours of instruction in math than he would in public school (180 days ÷ 5 days = 36 weeks. 36 weeks x 20 minutes per week = 12 hours). It is the same for science, except that he

⁴⁷ While Dr. Siegel's Vancouver school district study is not a valid basis for comparing the effectiveness of Arrowsmith as against a special education program, it is interesting to note that teacher perceptions of progress were unreliable for the teachers from both programs. This is an additional basis for not accepting at face value the testimonials of teachers on the Arrowsmith website. In four of Dr. Siegel's 10 Arrowsmith case studies, the teacher gave a definite opinion as to whether the student did well and made significant progress, or did poorly and did not make progress. The teacher's perceptions were at odds with the achievement testing in all four cases -- both for those the teacher thought made significant progress (Cases #2, #6, #8) and for the one the teacher thought did not, because he worked halfheartedly and had negative behavior and attitude toward schooling (Case #10). D-8: 5-9. Similarly in the special education class, the teacher gave a definite opinion about progress in two of the seven cases, believing that both students made great progress. This was in conformity with the achievement testing in one case (Case #4), and at odds with the achievement testing in the other case (Case #5). D-8:17.

received no science instruction for the first half of the year. He gave up band class in order to take science.

162. Regarding the left eye patch used by Arrowsmith, Mr. Whalen explained that this is based on a fundamental misunderstanding of how the brain works. Both eyes transmit information to both sides of the brain. An eye patch does not limit the amount of information going to either hemisphere. Also, the corpus callosum in the brain integrates both hemispheres. The only way to achieve what Arrowsmith wants to achieve would be to give an injection to put half of the brain to sleep. Testimony of Whalen.

163. The testimony of Dr. Siegel and Mr. Whalen's regarding the Arrowsmith Program is found more persuasive than the testimony of Ms. Mitchell. They, especially Dr. Siegel, have more expertise in cognitive functions, psychology, and learning disabilities than does Ms. Mitchell. The absence of any independent, peer-reviewed publications on the effectiveness of the Arrowsmith program is persuasive. It is also significant that none of Dr. Chenault's 13 recommendations involved anything like the Arrowsmith exercises, or any cognitive strengthening exercises. Dr. Chenault conducted a comprehensive cognitive and neuropsychological evaluation of the Student, and discussed his areas of cognitive weakness. She recommended a number of curricula, books, strategies, and assistive technology, but nothing bearing any similarity to the Arrowsmith exercises.

Religious Nature of Crosspoint Academy

164. Crosspoint is a campus of Gateway Christian Schools. Gateway is based in Poulsbo, Washington, and appears to have two campuses: Poulsbo and Bremerton (Crosspoint). See P-34. The Student's Arrowsmith teachers, Ms. Mitchell and Ms. Anderson, are employed and supervised by Gateway.

165. All Crosspoint students, including the Student, are required to attend weekly religious services on Wednesdays. The Arrowsmith curriculum is secular, but Ms. Mitchell begins every day in her class with a short prayer and devotional activity. All Crosspoint teachers have the option of leading their classes in prayer. Testimony of Mitchell. Ms. Mitchell is featured in video presentation on the Gateway website discussing how God spoke to her about her work, and her belief that God brought her to the school to be the hands and feet of Jesus. The video concludes with a statement on the screen: "Living the Jesus Centered Mission." D-4:9. All of Ms. Mitchell's emails to the Parent concerning the Student end with a bible quotation that is part of her email signature. Emails from both Ms. Mitchell and Ms. Anderson to the Parent include sentences about God, blessings, and prayers. D-14; D-15; P-41; P-44; P-45.

166. A copy of Crosspoint's weekly email newsletter in the record contains statements such as: "God is moving his Church to pray, as one," "Our Gateway School community is joining in this movement of God," and "Join us THIS Thursday evening [on the Crosspoint Campus] to collectively pray to our sovereign God" for the release of Christian pastors imprisoned abroad. D-11. The newsletter invites participation in a weekly prayer group for mothers and caregivers. The group meets during school hours in the Crosspoint school library. The newsletter states that the reason for the group is: "We trust God's Word. He commands us to pray in all things . . . We also thank Him and worship Him for who He is. . . . Join us as we seek God first, and experience how the Holy Spirit knits us all together . . ." D-11:3-4.

167. When not in Ms. Mitchell's Arrowsmith class, the Student participates in other Crosspoint classes (Math, Science, and/or Band) and participates in lunch, assemblies, and Wednesday religious services with the larger Crosspoint community. Testimony of Mitchell. The Parent chose Crosspoint because it offered the Arrowsmith Program, not because of the school's religious nature. Testimony of Parent.

Evidence Regarding Compensatory Education Claims

168. The Student's tuition and fees at Crosspoint for the 2013-2014 school year (7th grade) are \$22,875. (They will be approximately \$18,000 for 8th grade if he continues there; the first year is more expensive due to evaluation and registration fees.) P-34; P-49; Testimony of Parent. The Parent works in Bremerton most days, and that is where Crosspoint Academy is located. She drops off and picks up the Student most days. Testimony of Parent. The Parent's testimony about the extra mileage, above her commuting costs, that are due to transporting the Student was too imprecise to make a finding of fact on her transportation costs.

169. The Parent's Complaint requested reimbursement for the Student's tuition and transportation expenses. J-48:15. It did not request reimbursement for the services of Dr. Chenault, Dr. Don, or the one-week writing program the Student attended in Tacoma during summer 2013. These three expenses were all incurred before the Parent filed her due process hearing request in November 2013. J-46. The Second Prehearing Order of January 6, 2014, listed the Issues and Remedies for hearing, including: "Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate." The list of requested remedies that followed did not include reimbursement for the three expenses in question. The Parent did not file an objection to the Second Prehearing Order.

170. The Parent requests reimbursement of her out-of-pocket expenses not covered by health insurance. Those expenses were: \$291 for Dr. Chenault;⁴⁸ \$102 for Dr. Don; and \$215 for the summer writing program plus 400 miles of driving expenses transporting the Student to and from the summer program. P-48; Testimony of Parent.

171. At the hearing, the Parent was permitted to put on evidence of these expenses over the District's objection, on the ground that they are the type of expenses that are potentially reimbursable under the IDEA. The ALJ left to be determined in this decision whether they are reimbursable under the aegis of "other equitable relief as appropriate" (Second Prehearing Order).

⁴⁸ The Parent testified that Dr. Chenault's total charges were \$2,060. However, Dr. Chenault's billing statement states that her total fees (including testing, consultation, and report preparation) were \$1,940. P-48. The Parent testified there was a \$120 remainder fee listed on another document, but that document is not in evidence and Dr. Chenault's billing statement states that it covers all services rendered. \$1,940 is therefore found to be Dr. Chenault's total charges. The Parent could not recall whether health insurance paid 80% or 85% of the total. The ALJ stated that it would be assumed to be 85% unless the Parent presented further testimony to clarify the percentage. The Parent did not do so. It is therefore found that the Parent's out-of-pocket expense for Dr. Chenault's evaluation was \$291. The Parent's closing brief requested \$305 in travel expenses related to Dr. Chenault's evaluation. However, this amount was stated for the first time in the closing brief. There is no evidence about it in the record.

172. The Parent chose not to offer evidence on alternative remedies that might be equitable to award in the event the tribunal found a denial of FAPE, but did not find the Parent's unilateral placement appropriate. The District did offer such evidence. Mr. Whalen testified about the type of compensatory education that would be appropriate for the Student if, contrary to the District's position, compensatory education was found warranted. Although Mr. Whalen did not work with the Student, he was present at the hearing for nearly all of the testimony and reviewed every document he could find about the Student. Testimony of Whalen. His testimony regarding appropriate compensatory education was uncontested and credible, and is adopted below except where indicated.

173. Compensatory education should be delivered outside of school hours so that the Student's participation in the general education curriculum would be the least impacted.⁴⁹ Services should therefore be delivered after school and/or during the summer. The Student would benefit from explicit, direct instruction in written expression, provided one-on-one by a certificated special education teacher. Incentives, such as a token reward system, should be used to motivate the Student to attend to quality in his writing. Testimony of Whalen.

174. The District is willing to provide such compensatory education tutoring whether the Student is in public or private school. The District made an informal proposal to the Parent on December 18, 2013, to amend the IEP to provide 30 minutes per day, five days per week of specially designed instruction (150 minutes per week), effective immediately. D-1; Testimony of Whalen. While the informal proposal lists the location of services as an integrated classroom, Mr. Whalen anticipated that the services would be offered as extended-day services if the Student remained at Crosspoint. D-1:2; Testimony of Whalen. Like his prior IEPs, the District's proposed amendment to the IEP did not include services for his SEB organizational goals. It offered services only in written language. D-1:2.

175. The maximum amount of after-school tutoring the Student would likely tolerate, and thus be able to benefit from, is three hours per week. (This is equivalent to 36 minutes per day, five days per week.) An hour of one-on-one tutoring would compensate for three to four hours of missed classroom instruction, based on the Student's intelligence and the fact that there are fewer distractions in a one-on-one setting than in a busy classroom. Testimony of Whalen.

176. Mr. Whalen testified that, if the tribunal finds a denial of FAPE, the Student should receive services at no more than a 1:3 ratio (tutoring hours to classroom instruction hours missed), and for no more than 36 weeks (one school year), some of which could be provided during the summer. Testimony of Whalen. Both Mr. Whalen and the District, in its closing brief, argue the Student would actually be entitled to fewer than 36 weeks of tutoring in the event the tribunal found a denial of FAPE. This portion of Mr. Whalen's testimony is not adopted. The amount of compensatory education to which the Student may be entitled is determined in the Conclusions of Law, based upon the Findings of Fact, above.

⁴⁹ At public school, the Student would receive special education services during the school day and this would likely remove him from the general education setting to some extent already. Delivering compensatory education during the school day would remove him from that setting further.

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 United States Code (USC) §1400 *et seq.*, the Individuals with Disabilities Education Act (IDEA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

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

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

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

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

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

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

4. 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. "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).

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

6. Procedural safeguards are essential under the IDEA:

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

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

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

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

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

Parent's Claims⁵⁰

Did the District fail to timely evaluate and identify the Student as eligible for special education prior to June 2012?

8. School districts must "conduct child find activities calculated to reach all students with a suspected disability" for the purpose of locating, evaluating and identifying students in need of special education and related services. Former⁵¹ WAC 392-172A-02040(1); see 34 CFR § 300.111.

9. A school district may consider whether a student is achieving grade-level benchmarks, but violates its Child Find obligations if it "relie[s] too heavily on those benchmarks to the exclusion of other circumstances that indicate[] the presence of a disability." *Central School District v. K.C.*, 61 IDELR 125 (E.D. Pa. 20013). In 5th grade the Student was *not* meeting grade-level benchmarks in writing. The grade-level benchmark is a 3 on the District's scale. The Student's grades in all aspects of writing were 1's and 2's, except in Effort, where he

⁵⁰ The Parent's claims are addressed here more or less in chronological order, rather than in the order they are listed in the Issues section, above.

⁵¹ Some regulations in Chapter 392-172A WAC were amended effective October 25, 2013. The question whether the District failed to timely evaluate the Student prior to June 2012 concerns events that occurred prior to October 25, 2013. Therefore, the former regulation is cited.

earned a 3. This indicates that even with good effort the Student did not meet grade-level standards in writing. In addition, his struggles with organization impeded his learning not only in writing but in other subjects as well.

10. At the beginning of 5th grade, the school received the Student's 4th grade MSP score in writing. In contrast to his MSP scores in reading and math, which were both Proficient, his score in writing was in the lowest range – Below Basic.

11. By the beginning of December 2011, after the first trimester of 5th grade, the District had reason to suspect the Student might have disabilities in written language and SEB organizational skills. It should have referred him for a special education evaluation no later than that point. An earlier point is not found for the following reasons. First, the statute of limitations period began on November 15, 2011, two years before the Parent's original complaint was filed, so no liability can be found sooner than that. See WAC 392-172A-05080; see also 34 CFR §300.507. Second, there was some improvement in the Student's writing and organization during 4th grade. It was therefore reasonable to monitor his progress during the first trimester of 5th grade and not refer him for special education yet. The school did receive the Student's very low score on the 4th grade MSP writing test at the very beginning of 5th grade. However, the Parent has not met her burden of proof that this fact was sufficient to negate the indications of progress from the prior year.

12. However, by the end of the first trimester of 5th grade the Student's writing grades dropped from where they had been in 4th grade. The fact that he had the same teacher both years makes this more significant. He always earned 3's in "effort" in writing during both years. But in the other areas of writing his grades dropped from 3, 2, 2 and 2 at the end of 4th grade to 2, 2, 2 and 1 in the first trimester of 5th grade. This, together with the very low MSP writing score, and the fact that the Student's problems in writing were long-standing (as seen in his writing grades ever since 1st grade), rather than a new development that might pass, gave rise to a duty to evaluate the Student in writing.

13. The District argues the Student's writing was not at a level to raise a suspicion of disability and the possibility of a need for special education prior to when the District initiated its evaluation. In support of this, Mr. Whalen testified that the Student's written expression score in Dr. Chenault's testing barely made him eligible for special education. This testimony is puzzling based on OSPI's *Identification of Students With Specific Learning Disabilities: State of Washington Severe Discrepancy Table WAC 392-172A-03055 – 03080* (December 2011)⁵² The Student's full scale IQ score of 115 yields a "criterion score" of 92 on the Washington severe discrepancy table. *Id.* at p. 9. That means the Student has a severe discrepancy for purposes of establishing a specific learning disability if his academic achievement standard score in an area is 92 or lower. *Id.* at p. 5. Had the Student's written language standard score been 92 or 91, it would be accurate to say that a learning disability was barely established. However, the Student's written expression standard score was 86. Dr. Chenault observed that the Student worked hard and was eager to do well in her testing, so it is unlikely the score underestimated his abilities. See J-5:3. Subsequent standardized testing by the District on the WIAT in written expression during 6th grade produced approximately the same score.

⁵² This OSPI publication is available online at: https://www.k12.wa.us/SpecialEd/pubdocs/SLD_Guide.pdf

14. In the SEB area, the Vanderbilt assessment completed by Ms. Strader at the beginning of December 2011 – immediately after the end of first trimester of 5th grade – shows that the Student's problems in the SEB organizational skills area, noted in his 4th grade report card, were continuing and were serious. Ms. Strader rated the Student at the most serious level on six of the nine symptoms of inattention/disorganization, and at the second most serious level on another symptom.

15. The Student's longstanding problems in writing and SEB organizational skills, and the level of those problems by December 2011, make it more likely than not he would have been found eligible for special education had the District evaluated him in December 2011, five months sooner than it began its evaluation.

16. The fact that there was a prior evaluation in March 2011, during 4th grade, did not end the District's Child Find obligations. That evaluation assessed only whether the Student had a communication disability. It did not evaluate the Student in written language or SEB. *C.f., Ridley School Dist. v. M.R.*, 680 F.3d 260, 273 (3rd Cir. 2012) ("When a school district has conducted a *comprehensive evaluation* and concluded that a student does not qualify as disabled under the IDEA, the school district must be afforded a reasonable time to monitor the student's progress before exploring whether further evaluation is required." (Italics added)).

17. For these reasons, the Parent has established that the District violated the IDEA and denied the Student a FAPE by failing to evaluate him during the five-month period from early December 2011 until early May 2012, when the District obtained Parental consent and initiated its evaluation.

Did the District fail to properly implement the June 2012 IEP?

18. 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, 821-822 (9th Cir. 2007).

19. The Parent claims the District failed to properly implement the June 2012 IEP in six ways that are set forth in the Complaint at page 10.⁵³ They are discussed separately below.

Did the District fail to provide 120 minutes per week of pull-out services in written language?

20. The June 2012 IEP provided that the Student's specially designed instruction would be provided on a "pull-out" model, and not an "in-class" model. The "in-class" model was the option considered and rejected. J-7:10. Ms. Smith had a counterintuitive interpretation of these placement options that perhaps could have been read into the IEP if she had explained it to the Parent and described the actual model on which specially designed instruction would be

⁵³ Page 10 of the Complaint is found at page 11 of exhibit J-48. That page of the Complaint also discusses matters related to the successor IEP of January 2013. Only the allegations regarding the June 2012 IEP are addressed in this section of the decision.

provided, and if the evidence clearly established that the Parent understood Ms. Smith's counterintuitive reading at the time. However, Ms. Smith never explained this to the Parent. The IEP must therefore be read as it was written and as the Parent logically understood it. Together with the IEP's curricular adaptation of "provide small group instruction," the Parent justifiably believed the Student was receiving his 120 minutes of specially designed instruction in written language by being pulled out of a large class into a small group. That is what the IEP provided and that is what the District was required to implement.

21. As stated in the Findings of Fact, virtually no pull-out instruction was provided under the June 2012 IEP (from September 2012 to mid-January 2013). Even if Ms. Smith's testimony to the contrary were accepted (which it is not), she stated that it was optional and the Student did not participate. The following year in private school, the Student repeatedly resisted and rebelled against his Arrowsmith exercises. Yet in a small group where everyone was required to do them, including him, and with incentive and reward systems and charting his own progress, the Student has responded strongly and made good progress on his Arrowsmith exercises.

22. Incentive and reward systems are positive behavioral interventions. IEP teams are required to:

Consider the use of positive behavioral interventions and supports, and other strategies, to address behavior, in the case of a student whose behavior impedes the student's learning or that of others;

WAC 392-172A-03110(2)(a)(i); see also 34 CFR §300.324. The Student had SEB goals and his behavior (e.g., resistance, inattention, rushing) impeded his learning. The Vanderbilt assessments completed by Ms. Smith and Ms. Rippon confirmed this.

23. Ms. Smith essentially blamed the Student for his lack of progress, since he resisted adult help and resisted the tasks he was supposed to do to meet his goals (e.g., use the planner, organize assignments and get them done on time, handwrite more carefully, and take the time to apply the writing convention rules he knew). If 120 minutes of pull-out small group work had been provided and attendance required, with the Student charting his own progress and engaged in it via incentives (as provided by his IEP and required by WAC 392-172A-03110(2)(a)(i)) -- it cannot be assumed the same lack of progress would have occurred.

24. Requiring attendance does not mean physically forcing a child to attend. If the Student's attendance could not be obtained through the use of positive behavioral interventions and supports, then the teacher and ultimately the IEP team must review and change those interventions and supports, or conduct a functional behavioral assessment. See WC 392-172A-03110(2)(a)(i); see also 34 CFR §300.324.

25. The District failed to implement the 120 minutes per week of pull-out specially designed instruction in written language provided for in the June 2012 IEP. This was a material failure, not a minor discrepancy, because the Student received virtually no specially designed instruction. See *Van Duyn, supra*, 502 F.3d at 821-822. The Parent has established that the District violated the IDEA by materially failing to implement this portion of the June 2012 IEP.

Was the paraeducator in the Student's Language Arts class unqualified to provide specially designed instruction?

26. Paraprofessionals must "present evidence of skills and knowledge necessary to meet the needs of students eligible for special education" and must "be under the supervision of a certificated teacher with a special education endorsement or a certificated educational staff associate . . ." WAC 392-172A-02090(1)(f); *see also* 34 CFR §300.156. Paraprofessionals "may assist in the provision of special education and related services, provided that the instruction is designed and supervised by special education certificated staff." WAC 392-172A-02090(1)(g); *see also* 34 CFR §300.156.

27. The paraeducator in the Student's Language Arts class had a teaching degree, according to the uncontested testimony of Ms. Smith. Ms. Smith is a certificated special education teacher who designed the instruction provided in her class and supervised the paraeducator. The Parent offered no evidence that the paraeducator failed to meet the requirements of the regulation cited above.

28. The Parent has not established that the paraeducator in the Student's Language Arts class was unqualified to provide specially designed instruction.

Did the District fail to implement the IEP's progress reporting requirements?

29. The Student's IEP obligated the District to provide three IEP Progress Reports during the school year. The District provided only the first of the three, and that one reported on only two of the Student's nine goals. The reports on those two goals contained self-contradictory information and were based on no measurement of progress.

30. This was a material failure to implement the IEP, not a minor discrepancy. *See Van Duyn, supra*, 502 F.3d at 821-822. Two out of three IEP Progress Reports were never provided, and the remaining one failed to report on most of the Student's goals. The Parent has established that the District materially failed to implement the IEP's progress reporting requirements.

Did the District fail to implement the IEP's accommodation of shorter writing assignments?

31. Ms. Smith acknowledged that she did not provide shorter writing assignments for the Student. In Language Arts. However, her uncontested testimony is that there were no length requirements on those assignments so there was no need to shorten them. By contrast, in Social Studies there were assignments that could have been shortened. The Student was asked to respond in writing to up to 16 questions per assignment (based on the examples in the record).

32. There is no evidence in the record that the Student's Science, Math, Band or P.E. classes had writing assignments that potentially could have been shortened.

33. The Student was slow at writing. He often had trouble completing his homework, which contributed to his disorganization and the emotional health problems that emerged in the spring of 6th grade. The Parent testified about great frustration the Student experienced with his Math homework, but did not provide similar testimony about his Social Studies homework. All of the items were completed in the four Social Studies assignments in the record that called for

substantial written responses. While it is possible this came at great cost to the Student, there was no evidence to this effect.

34. There was evidence to establish that shorter writing assignments could have been provided in one of the Student's six classes. In that class, there was no evidence that the absence of shorter writing assignments had a material effect on the Student's ability to benefit from his education. For these reasons, the Parent has not established that the failure to provide shorter writing assignments was a material failure to implement the Student's IEP. See *Van Duyn, supra*, 502 F.3d at 821-822.

Did the District fail to implement the IEP's accommodation of isolating portions of materials to focus the Student's attention?

35. The Parent offered no evidence to contradict Ms. Smith's testimony that she did isolate portions of materials to focus the Student's attention. The Parent has not established a failure to implement this accommodation.

Did the District fail to implement a homework tracking system (planner)?

36. One of the Student's two SEB goals was to "organize homework assignments." An objective of that goal was: "[The Student] will use planner to list and track his homework assignments." He was to improve from 0% to 75% on both the goal and the objective. J-7:4. The accommodation of teachers *signing* the Student's planner was not in the June 2012 IEP, so that is not at issue here.⁵⁴

37. What is at issue is whether the District implemented the goal – whether it delivered specially designed instruction in organizational skills to address the objective. Implementation does not guarantee that a student will make progress. The amount of progress (or lack thereof) that the Student made is not the central question.⁵⁵ It may shed some light on whether the goal was implemented, but it is not determinative. What is determinative is whether the District actually provided the Student specially designed instruction. It is concluded that the District did not.

38. The June 2012 IEP mistakenly omitted a location, frequency, time, and provider for the Student's SEB goals. Both Ms. Smith and Dr. Faulstich, the school psychologist, acknowledged

⁵⁴ The Parent challenged the implementation of the June 2012 IEP; she did not challenge its appropriateness. See J-48; Issues section, above. Therefore, the question whether the June 2012 IEP should have contained a teacher-signature provision, or should have been amended sooner to add one, is not at issue.

⁵⁵ Progress might be seen in the planner pages themselves. However, the record does not contain planner pages from the period when the June 2012 IEP was in effect, i.e., September 2012 to mid-January 2013. The Parent discarded those pages mid-year in order to reduce clutter for the Student. The planner pages in the record begin in mid-January 2013.

this was an error.⁵⁶ Ms. Smith does not know why the Student was not assigned to a Study Skills class to provide his SEB services. In January of her year with the Student, she wrote in his revised IEP that he was still exhibiting the "same behaviors" in SEB as before entering her class, and she recommended a Study Skills class. J-8:2-3. Her recommendation was for the following school year, 7th grade. She did not explain why she did not make that recommendation for the second trimester of 6th grade (which began December 3, 2013) or for the third trimester (which began March 18, 2013). See J-2. Whether a Study Skills class would have been the Student's least restrictive environment for implementing his SEB goals was not addressed by his IEP team, which provided *no* environment or time for implementing them. Given that the Student was otherwise in the general education environment at all times (his Language Arts class being 80% general education students, and all of his other classes being general education), this would have been his only removal from the general education environment.

39. The District argues that despite the IEP lacking any location, minutes, or provider for the SEB goals, the Student actually received specially designed instruction in them in Ms. Smith's Language Arts class. Regarding the objective in question, the instruction consisted of telling all the students in the last five minutes of class to copy into their planner the homework assignments written on the board. This is not specially designed instruction. It was not specially designed to address the Student's resistance to writing in his planner and his lack of understanding of the importance of doing so. It was also not pull-out services, which is the environment in which the IEP stated his special education would be provided. The paraeducator's pull-out services did not begin until January 2013, and even then they concerned vocabulary and writing conventions. They were not specially designed instruction in SEB goals.

40. The June 2012 IEP and the District's evaluation stated the importance of the Student charting his own progress toward his goals in order to engage him in improving his performance. This is in the accommodations section of his IEP. An incentive system for charting and increasing the number of days on which the Student used his planner was one way to address his resistance to using it. Using it, then using it accurately, and using it with fewer adult prompts, could have been part of such a system. Or staff could have used some other strategy. However, in this case there was no specially designed instruction and no strategy provided.

41. It would have been heroic if Ms. Smith and her paraeducator had been able to provide specially designed instruction in all of the Student's SEB goals as well as his written language goals during their one-period class, where they had 24 other students to attend to. Four of those other students had IEPs with their own individual goals and accommodations. The remaining 20 students either had 504 plans with their own accommodations, or else they struggled academically. The IEP did not call for such heroics. It provided that the Student would receive his specially designed instruction by being pulled out of a large group setting into a small group setting. Unfortunately, it provided SEB goals but neglected to provide a time,

⁵⁶ Neither Dr. Faulstich nor Ms. Smith was responsible for the initial error; it was made by the IEP team at the elementary school. However, Ms. Smith failed to correct the error during the first half of 6th grade, and then repeated the error when she drafted the revised the IEP in January of 6th grade.

place or provider to implement them. The unlikelihood of addressing the Student's SEB goals during a one-period Language Arts class was acknowledged by Dr. Faulstich, the middle school psychologist, the following fall. She proposed that the Student, who was now at private school, could return to the middle school for an integrated Language Arts class. However, she followed that by writing that she does not think he could practically access SEB services were he to come for just that one period a day.

42. The failure to implement the SEB objective about the planner was a material failure, not a minor discrepancy. See *Van Duyn, supra*, 502 F.3d at 821-822. The IEP team thought using the planner was important enough that in the successor IEP (January 2013), they added an accommodation requiring *all* teachers to check and sign the planner. The implementation failure might have been less material if the other SEB goals and objectives had been implemented and the Student had made overall progress in organizational skills under the June 2012 IEP. However, there is no more evidence they were implemented than there is for the objective in question, and no credible evidence of progress in organizational skills under the June 2012 IEP.

43. The Parent has established that the District materially failed to implement the homework tracking system (planner) that was part of the goals of the Student's June 2012 IEP. The District failed to provide specially designed instruction in this area.

Did the District provide a Notice of Procedural Safeguards to the Parent in connection with the January 2013 IEP revision?

44. The District did not provide, or offer a copy of, the Notice of Procedural Safeguards to the Parent in connection with the January 2013 IEP revision, or at any time during the 2012-2013 school year. The Student was eligible for special education during that school year, having been found eligible in the prior school year.

45. WAC 392-172A-05015(1) provides, in pertinent part:

School districts must provide a copy of the procedural safeguards that are available to the parents of a student eligible for special education *one time a school year*, and:

- (a) Upon initial referral or parent request for evaluation;
- (b) Upon receipt of the first state complaint and receipt of the first due process complaint in a school year.⁵⁷

(Italics added). See also 34 CFR §300.504.

46. The District violated the IDEA by failing to provide the Parent with a Notice of Procedural Safeguards during the 2012-2013 school year. The Factual Background section of the Parent's Complaint states she was not provided the Procedural Safeguards "at the January 2013 IEP

⁵⁷ Mr. Whalen does not believe the District provided a Notice of Procedural Safeguards to the Parent when she filed her due process hearing request in November 2013. Testimony of Whalen. However, the Parent did not raise this as an issue in her Complaint so no violation may be found.

meeting or anytime thereafter." The list of IDEA violations at the end of the Complaint states the District violated the IDEA when it "failed to provide a Procedural Safeguards Notice." J-48:9-10. The Parent's claim is close enough to the statutory requirement of receiving the Procedural Safeguards one time a school year to avoid running afoul of the regulation barring a complaining party from raising issues at the hearing "that were not raised in the due process hearing request unless the other party agrees otherwise." WAC 392-172A-05100(3); see also 34 CFR §300.512.

47. As stated above, however, procedural violations of the IDEA amount to a denial of FAPE only if they impede a child's right to a FAPE, significantly impede a parent's opportunity to participate in the decision-making process regarding the provision of FAPE, or cause a deprivation of educational benefits. None of these things occurred here as a result of the District's violation. The Parent already had a copy of the Notice of Procedural Safeguards in her possession and she knew where it was. This alone would be insufficient to avoid a denial of FAPE without the many written notices the Parent had received concerning the Procedural Safeguards. They told her what the Procedural Safeguards concerned and invited her to request a copy or ask questions about them. These notices provided the name and telephone number of a person to contact. The last of this series of written notices was provided to the Parent during the 2012-2013 school year. The Parent testified to no action she might have taken, or taken sooner, had a copy of the Notice of Procedural Safeguards been provided to her during the 2012-2013 school year.

48. The version of the Procedural Safeguards that the Parent possessed, dated 2009, was current during the period at issue. OSPI did not amend its special education regulations from 2007 until amendments became effective on October 25, 2013. The regulation specifying the subjects that must be covered in the Notice of Procedural Safeguards was not one of those amended in 2013. See WAC 392-172A-05015.

49. For these reasons, the Parent has not established that the District's violation of the IDEA in failing to provide her with a Notice of Procedural Safeguards during the 2012-2013 school year resulted in a denial of FAPE.⁵⁸

Was the District obligated to reevaluate the Student before making the revisions that were made in his January 2013 IEP?

50. The January 2013 IEP reduced the Student's written language services from 120 minutes per week to 75 minutes. It also eliminated certain goals and accommodations from his

⁵⁸ The IDEA violation of failing to provide a Notice of Procedural Safeguards during the 2012-2013 school year is relevant to another claim at issue in this case. A parent who requests tuition reimbursement after unilaterally placing a child in a private school may be subject to a reduction or denial of reimbursement if the parent did not give certain notice to the District at the most recent IEP meeting or at least 10 business days before removing the child from public school. WAC 392-172A-04115(4); see also 34 CFR §300.148. However, reimbursement must not be reduced or denied for failure to provide this advance notice if "[t]he parent had not received the procedural safeguards containing notice of the requirement" to provide this advance notice. WAC 392-172A-04115(5); see also 34 CFR §300.148. Because this decision concludes that the Parent is not entitled to reimbursement for the unilateral placement for other reasons, this issue is not reached.

IEP. It is concluded below that these IEP revisions were not based on data about the Student or any progress (or lack of progress) that he had made. The changes were made to conform the IEP to the services (or lack thereof) that Ms. Smith's classroom provided, not because of any changes in the Student's needs.

51. However, this is a separate matter from whether the District was obligated to conduct a *reevaluation* of the Student before making the changes it made to his IEP. A reevaluation is only one of the bases that can be used to revise an IEP; it is by no means the exclusive one.

52. WAC 392-172A-03110(3) concerns the review and revision of IEPs. It requires that the IEP team:

- (a) Reviews the student's IEP periodically, but not less than annually, to determine whether the annual goals for the student are being achieved; and
- (b) *Revises the IEP, as appropriate, to address:*
 - (i) Any lack of expected progress toward the annual goals described in WAC 392-172A-03090 (1)(b) and in the general education curriculum, if appropriate;
 - (ii) The results of any reevaluations;
 - (iii) Information about the student provided to, or by, the parents, as described under WAC 392-172A-03025;
 - (iv) The student's anticipated needs; or
 - (v) Other matters.

Id. (italics added); see also 34 CFR §300.324. This regulation provides that the results of reevaluations -- if there have been any reevaluations -- must be considered. But it lists several other sources of information upon which IEP revisions may be based. The regulation does not state that reductions in service minutes, or any other particular type of IEP revision, must be preceded by a reevaluation.

53. Another regulation provides that present levels of performance must be included in every IEP, but that is quite different from a reevaluation. See WAC 392-172A-03090(1)(a); see also 34 CFR §300.320. Reevaluations are generally required after three years (WAC 392-172A-03015; see also 34 CFR §300.303) whereas IEPs must be revised at least annually. A reevaluation must be conducted before a student is determined no longer eligible for special education, but no such determination was made here. See WAC 392-172A-03030; see also 34 CFR §300.305.

54. For these reasons, the Parent has not established that the IDEA required the District to reevaluate the Student before making the revisions that were made in his January 2013 IEP.

Did the District alter the January 2013 IEP after the IEP meeting and without the Parent's knowledge or consent?

55. The draft IEP distributed at the January 2013 IEP meeting contained the following curricular adaptations, which were in the prior IEP as well: "provide small group instruction" and "provide shorter writing assignments." J-7:6. After the January 2013 IEP meeting, and without the Parent's knowledge (there is no evidence that the rest of the IEP team was notified either), Ms. Smith altered these adaptations by inserting the words "if and when necessary" after each

of them. J-8:5. There was only one change to the draft IEP that the team agreed to make in the final IEP: adding an accommodation that teachers would sign the Student's planner. Email between the Parent and Ms. Smith after the IEP meeting, and before a copy of the final IEP was distributed, confirmed that this was the only change to the draft that the Parent knew of.

56. Changes to an IEP may be made only by the IEP team at an IEP meeting, or by the following procedure: *If the parent and the school district agree* not to convene an IEP meeting to make changes to an IEP, they may develop a written document to make those changes. If changes are made by a written document rather than at an IEP meeting, the school district must ensure that the IEP team is informed of the changes. WAC 392-172A-03110(2)(c) and (d); see also 34 CFR §300.324. Ms. Smith's unilateral changes to an IEP agreed to at an IEP meeting violated the IDEA.

57. This violation of the IDEA constituted a denial of FAPE because it significantly impeded the Parent's opportunity to participate in the decision-making process. The first of the adaptations in question, small group instruction, was particularly important her. She believed -- based the wording of the June 2012 IEP and draft January 2013 IEP, and never having been told otherwise -- that the Student received his specially designed instruction in pull-out small groups. Her testimony made it clear she would have wanted to discuss the changes in question and would probably not have agreed, especially the small group one. At an IEP meeting, changes may be made to an IEP over a parent's objection if consensus is not reached. See *Ms. S. v. Vashon Island School Dist.*, 337 F.3d 1115, 1131-1132 (9th Cir. 2003), cert. denied, 544 U.S. 928, 125 S. Ct. 1662 (2005). However, such changes cannot lawfully be made outside an IEP team meeting absent the parent's written agreement. WAC 392-172A-03110(2)(c) and (d); see also 34 CFR §300.324.

58. It is unknown whether this IDEA violation also caused a deprivation of educational benefits to the Student. This is because the District had failed to implement the adaptations in question prior to Ms. Smith changing them. As she testified, she changed the IEP to conform with what she was already doing in her class.

Did the District give proper Prior Written Notice concerning the January 2013 IEP revisions?

59. The Student's IEP was not due for an annual revision in January 2013. His current IEP would not expire for another six months.

60. The January 2013 revision was undertaken for another reason or reasons. However, no reason was stated in the prior written notice (PWN). And none of the extensive revisions in the new IEP are mentioned in the PWN, even in brief form.

61. PWNs under the IDEA must include:

- (a) A description of the action proposed or refused by the agency;
- (b) An explanation of why the agency proposes or refuses to take the action;
- (c) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (d) A statement that the parents of a student eligible or referred for special education have protection under the procedural safeguards and, if this notice is not an initial

- referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (e) Sources for parents to contact to obtain assistance in understanding the procedural safeguards and the contents of the notice;
 - (f) A description of other options that the IEP team considered and the reasons why those options were rejected; and
 - (g) A description of other factors that are relevant to the agency's proposal or refusal.

62. WAC 392-172A-05010(2); *see also* 34 CFR §300.503.

63. The PWN adopting the January 2013 IEP included parts of subsections (d) and (e), above, but none of the rest of the required information. It provided, in pertinent part:

The purpose of this letter is to notify you of the district's actions regarding [the Student's] educational program.

Description

The district proposes to review the annual IEP for [the Student].

Explanation

[The Student's] services will be implemented as per this IEP.

Reason

The district will implement services per the attached Individualized Educational Program.

Other Factors

The team has determined there are no other factors related to the proposed action at this time.

Other Options

Other options considered include: none at this time.

You have been previously provided a copy of the Procedural Safeguards. Please review them in conjunction with this Notice.

If you have any questions regarding your rights or about this Notice, please contact me at [telephone number and Ms. Smith's name are provided].

J-8:13 (bold in original). This PWN conveys the following information: An annual review of the Student's IEP was done (this is incorrect) and the IEP will be implemented. No reason is given for doing the review. No other options or factors were considered.

64. Concerning the Procedural Safeguards, the PWN fails to state that "parents . . . have protection under the procedural safeguards." While it gives Ms. Smith's contact information, it fails to state that the she (or someone else) may be "contact[ed] to obtain assistance in understanding the procedural safeguards." WAC 392-172A-05010(2)(d) and (e); *see also* 34 CFR §300.503. The absence of this language violated the IDEA, but for the reasons stated above it did not result in a denial of FAPE.

65. However, the absence of the other information required in a PWN did result in a denial of FAPE. It significantly impeded the Parent's opportunity to participate in the decision-making process. Oral explanations do not substitute for the contents of a PWN, but an explicit oral explanation of matters that should be in a PWN might be a factor in determining whether the improper PWN resulted in a denial of FAPE, depending on the circumstances. Here, the Parent was told nothing orally about the extensive revisions made in the IEP. The IEP meeting was held at her request because of problems the Student was encountering, and his drop in grades. The meeting invitation did not inform her that a new IEP was going to be discussed. None of the revisions in the new IEP were mentioned during the meeting. If they had been mentioned, the Parent might have scrutinized the IEP to find them, but she was unaware there was anything to find. The PWN did not mention any of these revisions, either. The Parent did not agree with the revisions when she much later discovered them. She would have wanted at a minimum to discuss them.

66. The Parent has established that the District violated the IDEA by failing to give proper prior written notice concerning the January 2013 IEP revisions, and that this resulted in a denial of FAPE.

67. The Parent also claims the District failed to *conduct* the steps required in a PWN before reducing and revising the Student's IEP services. See Issues section, above. That claim is governed by the regulation concerning the development, review, and revision of IEPs (WAC 392-172A-03110; see also 34 CFR §300.324) rather than by the PWN regulation discussed above. That claim is addressed in the section below, concerning whether the January 2013 was appropriate.

Was the January 2013 IEP appropriate?

68. WAC 392-172A-03110(3), quoted above, requires that when revising IEPs, teams must do several things including: determine whether the annual goals are being achieved, address any lack of expected progress, and address the student's anticipated needs. See also 34 CFR §300.324. As discussed in the Findings of Fact, the IEP team did not do these things.

69. The resulting IEP was inappropriate and failed to offer FAPE to the Student. It provided no service time, location, or provider for his SEB organizational skill goals. It cut his service time in written language from 120 minute to 75 minutes per week, not based on any needs of the Student or any progress he had made, but based on the middle school's standard time of 15 minutes per day, per area of need (mistakenly forgetting that he had two areas of need, not one). The January 2013 IEP stated that the Student's special education would be in a "pull-out" environment, not an "in class" environment, when the District intended to provide the opposite. To the limited extent that some pull-out services were provided (within the classroom or out in the hallway), the Student was permitted to leave after five minutes and given no incentive to stay. Four of his written language goals were dropped and not incorporated elsewhere, despite no evidence the Student had met them (or even made progress on them) and no evidence they were inappropriate.

70. The baseline percentages on all of the goals seem to have been randomly assigned, not based on any data. The baseline on all the writing goals was an identical 5%, and on the SEB goals 0% -- identical to the prior IEP. The 0% baseline on the homework completion goal was

highly inaccurate, as shown in District computerized records that were easily accessible to Ms. Smith.

71. All of the settings for the Student's goals were changed to "a large group setting . . . and minimal assistance" (J-8:2-3), not based on any data or progress, but to conform the IEP to what Ms. Smith's Language Arts class looked like. Goals in IEPs often target greater independence and ultimately minimal assistance. But the goals and objectives here contained no steps to increase the Student's independence. Nor was there testimony to any methods used to increase his independence. Similarly, "provide small group instruction" was changed by adding the words "when and if necessary" (J-8:5) without any basis in data or progress. The Student was provided with no small group instruction during the first half of the year, so there could not be any data on it.

72. The accommodation concerning signing the Student's planner was inappropriate as written. It put all of the burden on *the Student* for compliance. It stated: "[The Student] will [sic] his planner to every teacher for a signature." J-8:3. There is nothing requiring *teachers* to check the planner, prompt him to write in it, or prompt him to bring it to them for signature. The discussion in the paragraph immediately above concerning fostering independence applies equally here. The accommodation was inappropriate because it assumed complete independence at a time when Ms. Smith knew the Student was far from demonstrating independence, and it provided no steps or methods to increase his independence. Although it was not part of the accommodation, Ms. Smith did provide some prompting for the Student to bring his planner to her for signature. But the implementation failure was total in Math and Science classes. Even in Ms. Smith's classes, it failed 80% of the time in Language Arts and 84% of the time in Social Studies. This was because the accommodation as written was inappropriate.

73. Finally, accommodations were dropped in the January 2013 IEP that had called for the Student to chart his own progress in order to engage him in the process of making progress. Ms. Smith did this because letter grades are how the middle school charts progress, not because of any individual determination about the Student. Dropping these accommodations ran counter to recommendations in the District's own evaluation. The Student responded very well the following school year when such a system was provided, even in the face of schoolwork that he sometimes thought was pointless.

74. The Parent has established that the District violated the IDEA by adopting an inappropriate IEP in January 2013. The IEP was not reasonably calculated to provide FAPE to the Student and it did not do so.

Remedies

75. The Complaint requests reimbursement of the Parent's expenses "for private education meeting the Student's educational needs" for a two-year period. The requested remedy does not specify Crosspoint Academy. However, no evidence was offered concerning any other private placement. The tribunal may only adjudicate the appropriateness of placements about which evidence is presented.

76. The Parent's request has two parts: reimbursement of Crosspoint expenses incurred thus far in 7th grade, and prospective placement through the end of 8th grade. Both awards turn on the appropriateness of the Parent's unilateral placement.

77. A school district may be ordered to reimburse parents for the cost of enrollment at a private placement selected unilaterally by the parents if the ALJ finds the school district "had not made a free appropriate public education available to the student in a timely manner prior to that enrollment and that the private placement is appropriate." WAC 392-172A-04115(3); *see also* 34 CFR §300.148. The District did not make FAPE available to the Student in a timely manner prior to his enrollment in private school. It must therefore be determined whether the private placement selected by the Parent is appropriate. A parental placement may be found appropriate "even if it does not meet the state standards that apply to education provided by a school district[.]" *Id.*

[P]arents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

S.L. v. Upland Unified School Dist., ___ F.3d ___, 2014 U.S. App. Lexis 6127, 114 LRP 15370 (9th Cir. 2014), (quoting *C.B. v. Garden Grove Unified School Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011)).

Appropriateness of Arrowsmith Program at Crosspoint Academy

78. The Parent has not established that her unilateral placement is appropriate for the Student in 7th grade, or that it would be an appropriate for him in 8th grade. As set forth in the Findings of Fact, above, there is no peer-reviewed research on the effectiveness of the Arrowsmith Program. The theories of brain activity on which Arrowsmith is based are not supported by current scientific research. None of the studies described on the Arrowsmith website have been published anywhere, let alone in a peer-reviewed scientific journal. All of them were conducted by Arrowsmith providers, except for unpublished papers by Dr. Lancee. There is no information in the record about Dr. Lancee's areas of research or whether he has any personal relationship to the Arrowsmith Program.

79. The Student is receiving no instruction in reading, written language, or social studies for the entire school year, and no instruction in science for half the year. He spends inordinate amounts of time on very rudimentary skills (e.g., memorizing, copying, tracing, addition and subtraction) that do not engage his higher reasoning or critical thinking skills. They are below his grade level, below his intellectual level, and there is no credible evidence they address his special education needs.

80. Dr. Chenault, the Parent's private evaluator, administered two standardized assessments of visual-motor skills. She found the Student's ability to copy figures was hampered by extreme slowness and that his motor skills on such tasks were weak. She provided recommendations on how to address his resulting handwriting problems. None of those recommendations bear any similarity to the Arrowsmith exercises on which the Student spends 7.5 hours a week of his school instructional time (and more time at home) tracing and copying figures. Dr. Chenault

found other areas of cognitive weakness in the Student, and made many recommendations, but none of them bear any similarity to the other three Arrowsmith exercises, either.

81. The District's OT recommended that the Student improve his pencil movement on paper by doing things such as mazes, following pathways, dot to dot and word search puzzles. There is no evidence that she or any OT would endorse the Student spending 7.5 hours per week of his school instructional time doing such activities.

82. The only witness who testified in favor of the Arrowsmith Program (other than the Parent) was Ms. Mitchell. Ms. Mitchell is a caring and experienced teacher, but she has no background in special education and only three weeks of training from Arrowsmith. This is her second year teaching the Arrowsmith Program, so she has no experience regarding how her students will fare when they are faced with full academic curricula after their years with her in the Arrowsmith Program. She believes what Arrowsmith has told her about this.

83. The Parent and Ms. Mitchell testified to observing improvements in the Student's organizational skills, writing, and sometimes in his attitude toward school. This was anecdotal testimony unsupported by any data or measurement of progress. Regarding writing, only one writing sample was presented. Even if the testimony is accepted as true, what the Parent and Ms. Mitchell observed cannot be assumed to be due to the Student's Arrowsmith exercises. It is likely due to some of the following factors: The Student now has only his Arrowsmith class and one other class a day to manage, instead of the six classes he had in public school. All of his Arrowsmith classmates have learning disabilities, either diagnosed elsewhere or diagnosed by Arrowsmith. The Student therefore does not have to compare himself with, or try to keep up with, non-disabled peers other than in math and science, subjects in which he does not have a disability. (There was no evidence how he is faring in his math or science classes at Crosspoint.) Four of the Student's five exercises are rudimentary tasks (tracing, copying, memorizing sentences, and mental addition and subtraction) that do not call on him to organize, devise plans, problem-solve or execute plans – the SEB organizational skills that are the greatest challenge for him. He is receiving praise, incentives and rewards for progressing on his Arrowsmith exercises. The Student could be spending all day on a curriculum of crossword puzzles or Sudoku (as the District argues) with incentives and rewards, and feel a sense of accomplishment, self-esteem, and a resulting lowering of anxiety. This can have major salutary effects, but it does not mean that the educational program is appropriate. It also does not mean that the salutary effects of lowered anxiety and a greater sense of control will translate to more challenging surroundings. This is especially true when the Student returns to a full academic curriculum, where his peers have been receiving academic instruction for two years that he has not received.

84. It is terribly unfortunate that the Parent, who appears to be very intelligent and committed to finding help for the Student, was misled first by the District and then by Arrowsmith. It is a terribly unfortunate outcome for the Student. It would not improve that outcome for this tribunal to award an inappropriate placement, which award would also be unlawful.

85. The Parent has not established that the Student's private placement in the Arrowsmith Program at Crosspoint Academy is appropriate.

Washington Constitutional prohibition on public money being applied to religious instruction

86. Administrative agencies lack the authority to declare that a regulation violates a statute, or that a regulation or statute violates the Washington State or federal constitution. Only a court of general jurisdiction, which this tribunal is not, has the authority to issue such rulings. ALJs must interpret and apply the regulations and statutes before them. See *Taylor v. Morris*, 88 Wn.2d 586, 588, 564 P.2d 795 (1977); *Tuerk v. Dept. of Licensing*, 123 Wn.2d 120, 125, 864 P.2d 1382 (1994). However, ALJs are not free to violate the State constitution when issuing remedial awards. ALJs are bound to obey the State and federal constitutions, provided that doing so does not require the ALJ to declare any statute or regulation unconstitutional. In the present case, the Parent requests a certain remedy, and the District argues the ALJ would violate the Washington constitution by awarding that remedy. The constitutional issue is therefore properly before this tribunal.

87. Article I, section 11 of the Washington Constitution provides in pertinent part: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[.]" Parsing that provision as it applies to this case, it means that no public money *shall be applied* to any religious worship, exercise, instruction, or the support of any religious establishment.

88. Article IX, section 4 of the Washington Constitution provides: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Parsing that provision as it applies to this case, it means that schools supported *in part* by public funds must be free from sectarian control or influence.

89. The analysis set forth in the District's closing brief (pages 46 through 50) appears to be sound and would prohibit reimbursement or prospective placement at Crosspoint because Crosspoint provides religious worship, exercise and instruction, and is under sectarian influence. However, it would be imprudent to rule on this question for several reasons.

90. First, it is unnecessary to do so because the Parent's requested remedy must be denied on other grounds, as set forth above. Second, the Parent chose to present no briefing or argument on the constitutional issue, so the tribunal has not heard an opposing argument. Finally, two days ago the Ninth Circuit issued the decision in *S.L. v. Upland Unified School Dist.*, *supra*. Neither party has had the opportunity to address this new case in briefing. *Upland* awarded tuition reimbursement under the IDEA for a unilateral placement at a parochial school. The decision did not discuss any issue dealing with religion or the California or federal constitutions. Neither did the underlying ALJ or district court decisions.⁵⁹ This may be because the matter has already been settled under the California Constitution which, like the federal constitution, has a narrower prohibition on the funding of religious education than does the Washington Constitution.⁶⁰

⁵⁹ The ALJ and district court decisions are not available on the specialconnection.com website. The ALJ decision in *Upland*, issued February 18, 2011, was found on the website of the California Office of Administrative Hearings. The district court decision, issued April 9, 2012, was found on the federal court PACER service.

⁶⁰ California Constitution, Article 9, section 8, provides, in pertinent part: "No public money shall ever be *appropriated for* the support of any sectarian or denominational school[.]" (Italics added.) The Washington Constitution contains a stronger prohibition: "No public money or property shall be *appropriated for or applied to* any religious worship, exercise or instruction, or the support of any religious

91. For the reasons set forth above, it is unnecessary to decide the constitutional issue in this case and would be imprudent to do so.

Compensatory Education

92. 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). 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.

93. 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. In this case, the equities weigh completely in favor of the Parent. The District's conduct has been described in the Findings of Fact and more need not be said about it. The Parent was cooperative with the District at all times, was forthcoming with information, and supported the Student's academics at home.

94. The Parent did not offer evidence on a compensatory education remedy as an alternative to Crosspoint in the event that unilateral placement was found inappropriate. The District did offer such evidence.

95. It would be inequitable to deny the Parent any relief where the District has denied FAPE for a prolonged period. Such a denial of relief could also unnecessarily prolong these proceedings (and leave the Student without compensatory education for years) by causing a remand for award of a remedy, or the imposition of such an award, by a court on appeal. See *A.G. v. District of Columbia*, 794 F. Supp. 2d 133, 140-141 (D.D.C. 2011). For these reasons, and because the equities weigh heavily in the Parent's favor, as stated above, the Parent will be awarded one-on-one tutoring by a certificated special education teacher at a ratio of one hour of tutoring for every three hours of FAPE denied.

96. The period during which FAPE was denied began February 10, 2012. This is the date by which an IEP would have been adopted had the District initiated a special education evaluation, as it should have done, by December 1, 2011. The date of February 10, 2012 was arrived at as follows: The District had 35 school days to complete its evaluation.⁶¹ Thirty-five school days after December 1, 2011 was February 6, 2012. See J-1. It took the District four school days, which is a reasonable amount of time, to adopt an IEP after the Student's

establishment[.]” Washington Constitution, Article I, section 11 (italics added). The California Constitution, Article 9, section 8, goes on to prohibit sectarian or denominational instruction from being permitted, directly or indirectly, “in any common schools” of the state. (Italics added.) The Washington Constitution goes farther. It prohibits sectarian influence not only in common schools, but in “[a]ll schools . . . supported wholly or in part by the public funds[.]” Washington Constitution, Article IX, section 4.

⁶¹ See WAC 392-172A-03005(3); see also 34 CFR §300.301.

evaluation was completed. Applying that same four school day period here, four school days after February 6, 2012 was February 10, 2012.

97. While at the District, the Student received *general education*, but as found above, he received no *special education* in either written language or SEB organizational skills. The 120 minutes per week of special education time specified in his June 2012 IEP (but not delivered) was only for written language; it did not include SEB services. While it would have been preferable to have the IEP team determine, based on the Student's needs and least-restrictive environment considerations, the appropriate amount of special education he needed for both of these areas, the IEP team did not do so. This tribunal is not permitted to delegate its remedial authority to the IEP team at this juncture. See *Board. of Educ. of Fayette County v. L.M.*, 478 F.3d 307, 318 (6th Cir.), *cert. denied*, 552 U.S. 1042, 128 S.Ct. 693 (2007); *Reid v. District of Columbia*, 401 F.3d 516, 526-527 (D.C. Cir. 2005). It is therefore determined for remedial purposes that one class period per day (245 minutes per week)⁶² would have been an appropriate amount of time to remove the Student from the general education environment to receive his specially designed instruction in written language and SEB organizational skills. This could have been accomplished by pull-out services in a small group (or groups) in a Resource Room setting to address written language and study skills (organizational skills) during those 245 minutes per week.

98. The denial of FAPE was continuous through the present time. The District is responsible for the denial of FAPE while the Student was in its schools. The District is also responsible for the denial of FAPE since the Student had been at Crosspoint Academy. The Parent only looked for a private placement after the District had denied the Student FAPE for approximately a year and a half, and only as a result of that denial. There is no evidence the Parent had any interest in private schooling for the Student prior to that time. She was not interested in the religious aspect of Crosspoint; she chose it only because it offered what she thought was an alternative way to address the Student's special education needs, the Arrowsmith Program.

99. The Parent was drawn in by Arrowsmith's claims that its program had been proven effective by scientific research. The District left the Parent to her own devices when it denied the Student a FAPE for a prolonged period, misinformed the Parent about the nature of his placement and services, and gave her no information about his progress. Being left to her own devices by the District does not mean the Parent should be left without a remedy for the period in question. The Parent did not have the benefit of the expertise of the witnesses who testified on behalf of the District at the hearing, Dr. Siegel and Mr. Whalen. They testified about the lack of any independent, peer-reviewed research supporting Arrowsmith's claims, and the lack of current scientific support for the theories of brain activity on which Arrowsmith is based. For these reasons, it is equitable to award compensatory education for the period the Student has been denied FAPE while attending the Arrowsmith Program at Crosspoint Academy.

100. The period of denial of FAPE has been from February 10, 2012 to the present. During that time, there have been 79.4 school weeks. (This excludes the winter, mid-winter, spring, and summer breaks in the District's calendar.) See J-2; J-3. Two hundred and forty-five

⁶² See footnote above concerning whether classes at the middle school are a total of 245 minutes versus 250 minutes per week.

minutes per week times 79.4 weeks yields a total of 324 hours of missed special education. Awarding one hour of tutoring for every 3 hours of missed special education, the Parent is awarded 108 hours of tutoring. An additional 20 hours is awarded due to the procedural violations that significantly impeded the Parent's opportunity to participate in the decision-making process regarding the January 2013 IEP, for a total of 128 hours of tutoring. These additional 20 hours are not awarded to punish the District. They are awarded as a matter of equity to substitute for what the Parent might have been able to advocate for had the District not impeded her opportunity to participate in decision-making concerning the January 2013 IEP revisions, and to enhance the Student's ability to catch up academically and emotionally from the District's failures in its obligations to him.

101. The 128 hours of compensatory education tutoring must be used within two calendar years from the date of this decision, with at least half of that amount being used in the first calendar year, unless unforeseeable circumstances make it impossible for the Student to utilize the services with these time periods.

102. The tutor shall be a certificated special education teacher. (The word "tutor" is used in the singular here, but the parties may decide it would be best to use more than one tutor at a given time.) The District and the Parent shall jointly select the tutor and the location for tutoring, but in the event of a disagreement the District shall make the final selection on both of these matters. Tutoring may occur before school hours, after school hours, and/or during the summer break. The Parent shall determine the days and times she wished the Student to receive tutoring. The District shall provide tutoring at those times unless it is unable to find a qualified tutor available at those times.

103. The Parent is not limited to using three hours of tutoring per week. She may use less or more, depending on what she believes the Student will tolerate and benefit from. Mr. Whalen believes that three hours per week is the maximum amount the Student could benefit from while school is in session, but Mr. Whalen has never worked with the Student.

104. If one of the Parents or the Student cancels a scheduled tutoring session without giving 24 hours advance notice of cancellation, then the missed session will count against the Parent's compensatory education award unless the cancellation was due to an unforeseeable emergency.

105. The Parent also requests an award of the out-of-pocket expenses that were not covered by health insurance⁶³ for the services of Dr. Chenault (\$291.00), Dr. Don (\$102.00), and a one-week writing program in the summer of 2013 (\$215.00), plus associated travel expenses. These expenses were incurred prior to the Parent filing the Complaint, but the Complaint did not request any of them. Reimbursement may therefore be awarded only if they come within the aegis of "other equitable relief as appropriate." See Issues section, above. Only the expense incurred for Dr. Chenault's evaluation will be awarded. The District violated its Child Find obligations by failing to initiate an evaluation in the period beginning December 1, 2011. Dr. Chenault's evaluation began shortly thereafter. The Parent had informed the Student's teacher approximately two months earlier that she was going to obtain a private evaluation, so

⁶³ Cf. WAC 392-172A-07005; see also 34 CFR §300.154.

the District had reason to know it would occur. A few weeks before Dr. Chenault's report was completed, the Parent notified the District of this fact and requested that a meeting be scheduled to review the report. The District subsequently used parts of Dr. Chenault's report in its own evaluation. For these reasons, it is equitable to award the cost of Dr. Chenault's evaluation despite it not having been requested in the Complaint. There was no evidence at the hearing as to what the Parent's transportation expenses were for her visits to Dr. Chenault. The first mention of these expenses was in her closing brief, which does not constitute evidence. Transportation expenses associated with Dr. Chenault's evaluation therefore cannot be awarded.

106. The requests for reimbursement related to Dr. Don and the summer writing program will be denied for the following reasons, in addition to the fact that they were not mentioned in the Complaint. The District had no knowledge these expenses were going to be incurred. There is no evidence in the record regarding the appropriateness of the interventions that these expenses purchased, whereas Dr. Chenault's report is in the record and it shows what was purchased.

Prospective Order

107. The District will be ordered to convene an IEP team meeting within three weeks after the date of this decision to adopt a new IEP for the Student in light of the Findings of Fact and Conclusions of Law in this decision. A three week period is allowed due to the intervening District spring break.

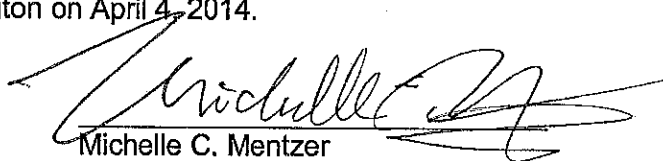
108. All arguments made by the parties have been considered. Arguments not specifically addressed herein have been considered, but are found not to be persuasive or not to substantially affect a party's rights.

ORDER

1. The District violated the IDEA and denied the Student a FAPE by:
 - a. Failing to provide a proper Prior Written Notice concerning the January 2013 IEP revisions;
 - b. Altering the January 2013 IEP after the IEP meeting and without the Parent's knowledge or consent;
 - c. Failing to timely evaluate and identify the Student as eligible for special education;
 - d. Failing to properly implement the Student's June 2012 IEP; and
 - e. Adopting an inappropriate IEP in January 2013 that did not provide FAPE to the Student.
2. The Parent's requested remedy of reimbursement for tuition and transportation expenses for the Arrowsmith Program at Crosspoint Academy is denied because it is not an appropriate placement.
3. The Parent's requested remedy of prospective placement at the Arrowsmith Program at Crosspoint Academy is denied because it is not an appropriate placement.

4. The Parent is awarded 128 hours of compensatory education tutoring by a certificated special education teacher on the terms set forth in the Conclusions of Law, above.
5. The Parent is awarded reimbursement for the Student's evaluation conducted by Dr. Belle Chenault in the amount requested by the Parent, \$291.00, to cover her out-of-pocket expenses for this evaluation.
6. The District is ordered to convene a meeting of the Student's IEP team within three weeks after the date of this decision to adopt a new IEP for the Student in light of the Findings of Fact and Conclusions of Law of this decision.

Signed at Seattle, Washington on April 4, 2014.



Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

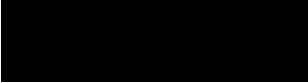
Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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

Parent



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

