



STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS

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MAILED  
OCT 27 2015  
SEATTLE-OAH

October 27, 2015

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RECEIVED

In re: **Seattle School District**  
**OSPI Cause No. 2014-SE-0046**  
**OAH Docket No. 12-2014-OSPI-00006**

OCT 28 2015

SUPERINTENDENT OF PUBLIC INSTRUCTION  
ADMINISTRATIVE RESOURCE SERVICES

Dear Parties:

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

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

Sincerely,

Michelle C. Mentzer  
Administrative Law Judge

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

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

MAILED  
OCT 27 2015  
SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NO. 2014-SE-0046

SEATTLE SCHOOL DISTRICT

OAH DOCKET NO. 12-2014-OSPI-00006

**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 Seattle, Washington, on May 26, 27, 28, June 1 and 2, and August 27 and August 28, 2015. The Parent of the Student whose education is at issue<sup>1</sup> appeared and was represented William Dussault and Christopher Henderson, attorneys at law. The Seattle School District (District) was represented by David Hokit, attorney at law. The following is hereby entered:

**STATEMENT OF THE CASE**

The Parent's due process hearing request was filed with the Office of Superintendent of Public Instruction (OSPI) on June 9, 2014. Prehearing conferences were held on July 11, September 8, October 23, and November 10, 2014, and January 29, and February 11, 2015. A status conference was held on July 8, 2015, between days of the hearing.

Prehearing orders were issued on July 11, September 8, September 29, October 14, October 28, November 10, and December 11, 2014, and January 12, January 30, and February 11, 2015. Orders were issued on July 1 and July 8, 2015, between days of the hearing.

The due date for the written decision was continued to thirty (30) days after the close of the hearing record, pursuant to a joint request of the parties. See Order of Continuance, July 11, 2014. Post-hearing briefs were filed on October 2, 2015, but the parties subsequently filed a stipulation to admit a new exhibit (Joint Exhibit 31) on October 9, 2015. The hearing record therefore closed on October 9, 2015. Thirty days thereafter is November 8, 2015. The due date for the written decision is November 8, 2015.

**EVIDENCE RELIED UPON**

The following exhibits were admitted into evidence:

Joint Exhibits: J-1 through J-31;

<sup>1</sup> In the interests of preserving the family's privacy, this decision does not name the Parent or Student. Instead, they are each identified as "Parent," "Father," or "Student."

Parent Exhibits: P-1 through P-19;<sup>2</sup> P-21 through P-25; P-27 and P-28; and  
District Exhibits: D-1 through D-66.

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

The Parent of the Student;  
Bonnie Tierney, private educational consultant;  
Jeremy Turner, Emerald City School, head of school;  
Kari Hanson, former District principal; current District director of school-based special  
education services;  
Misa Nakamura, District special education teacher;  
Ann McCormick, District speech-language pathologist; and  
Alison Spencer, District special education teacher.

### ISSUES<sup>3</sup>

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 determine why the Student did not meet the annual goals of his February 2013 individualized education program (IEP), as amended in March 2013 and May 2013, before adopting a successor IEP on March 28, 2014;
  - b. Adopting an IEP and educational placement on March 28, 2014, that were inappropriate for the Student;
  - c. Failing to offer the Student extended school year (ESY) services for summer 2014;
2. Whether Emerald City School has been an appropriate educational placement for the Student since September 3, 2014;
3. Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate:
  - a. An order that the IEP and educational placement adopted on March 28, 2014 were inappropriate;
  - b. An order that the District fund the Student's attendance at Emerald City School beginning September 3, 2014, and continuing for at least one academic year after

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<sup>2</sup> One page of Exhibit P-18 was redacted by the ALJ after the hearing, with the consent of both parties. Page 15 of Exhibit P-18 was found to contain personally-identifying information about other students. That personally-identifying information was redacted.

<sup>3</sup> There were originally two additional issues in this case. They concerned the appropriateness of the Student's education at Dartmoor School and reimbursement for the tuition charged by Dartmoor School. See Second Prehearing Order of January 30, 2015. At the close of the Parent's case-in-chief, the ALJ granted the District's motion to dismiss the Parent's claims related to the Dartmoor School for failure to offer sufficient evidence.

March 1, 2015, or until the Student returns to public school, whichever occurs later; and

- c. An order that the District reimburse the Parent the costs of private tutoring purchased for the Student during summer 2014.

See Second Prehearing Order of January 30, 2015, and Third Prehearing Order of February 11, 2015.

### FINDINGS OF FACT

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

#### Background

2. The Student is currently 11 years old and in the sixth grade. He lives in Seattle with his Father (Parent herein). The Student began attending school in the Seattle School District (District) in the fall of his second grade year, September 2011, after relocating to Seattle from San Diego, California. The Student has attended only one elementary school in the District.<sup>4</sup> Testimony of Parent.

3. The Parent moved from San Diego to Seattle before the Student did, in 2003 or 2004. The Parent has spent every summer since that time in San Diego. He obtained custody of the Student in 2011, and moved the Student to Seattle. The Parent and the Student have spent each summer in San Diego since that time. During each of those summers, the Student has received tutoring from Bonnie Tierney, an educational consultant in San Diego.<sup>5</sup> *Id.* Testimony of Parent.

4. The Student was found eligible for special education at age three in California under the eligibility category Developmental Disability. D-66:11.<sup>6</sup> In the District, his eligibility category has been Health Impairments. J-1:10; J-11:2; D-66:6. The Student's diagnoses include Becker Muscular Dystrophy, attention deficit hyperactivity disorder (ADHD), and a vision problem that

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<sup>4</sup> To provide greater confidentiality for the family, the Student's elementary school is not named herein.

<sup>5</sup> Bonnie Tierney received a master's degree in counseling from San Diego State University in 1972. She became licensed in California as a school psychologist and psychometrist in 1977. She has worked for a school district as a school psychologist, for Child Guidance Clinic as a psychologist, for a private school as a consultant, and maintains a private practice as an educational consultant. Ms. Tierney helped write the licensing examination for educational psychologists in 1995. She has served as a national trainer for a literacy intervention curriculum called *LANGUAGE!* Ms. Tierney is a member of several professional organizations concerning educational psychology and learning disabilities. P-25; Testimony of Tierney.

<sup>6</sup> Citations to the exhibits are made in the following format. "D-66:11" refers to District Exhibit 66, at page 11.

was corrected with surgery and eyeglasses.<sup>7</sup> On a recent standard intellectual assessment, his scores on the four indices were: 23<sup>rd</sup> percentile in Verbal Comprehension, 12<sup>th</sup> percentile in Perceptual Reasoning, 2<sup>nd</sup> percentile in Working Memory, and 5<sup>th</sup> percentile in Processing Speed. J-4; Testimony of Tierney.<sup>8</sup>

5. The Student's diagnosis of Becker Muscular Dystrophy (BMD) was made in either 2011 or 2012, when he was in second grade.<sup>9</sup> BMD is a very rare form a muscular dystrophy where only part of the relevant gene is deficient. (In a more common form, Duchenne Muscular Dystrophy, the entire gene is deficient.) BMD affects only boys. It is incurable, progressive, and affects voluntary, and involuntary muscles. It is sometimes associated with cognitive impairments. Testimony of Parent; P-18:17; P-19:19; D-66:11-12.

6. During third grade, the Student's annual IEP review process began in February 2013. An IEP was adopted that month, but was amended in March and May 2013. J-6; J-7; J-9. The Issues statement, above, refers to the resulting IEP as the Student's "February 2013 IEP, as amended in March 2013 and May 2013." For ease of reference, that IEP is referred to herein as the "February/May 2013 IEP."

7. Four IEP meetings were held to develop the February/May 2013 IEP. All of the second meeting and much of the third meeting were spent discussing the Student's progress on his

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<sup>7</sup> Ms. Tierney wrote in her July 2014 evaluation report that the Student also has a Specific Learning Disability (SLD). She testified to the same effect. Testimony of Tierney. Ms. Tierney administered intellectual and achievement tests in her July 2014 evaluation. However, she did not calculate a full scale IQ score or an overall composite intellectual ability score from which an SLD could be established based on a "severe discrepancy" between intellectual ability and achievement scores. See OSPI, *Identification of Students with Specific Learning Disabilities: State of Washington Severe Discrepancy Table WAC 392-172A-03080* (December 2011). Nor is there evidence that Ms. Tierney engaged in the analysis required to establish an SLD on a basis *other* than severe discrepancy. See WAC 392-172A-03045 through -03080; see also 34 CFR §300.307 through §300.311. There is no evidence in the record that someone else has performed these analyses. The Student may have an SLD, but no finding is made on this point because there is no evidence anyone has done the analysis required by law to support such a finding.

<sup>8</sup> The intellectual assessment was the Wechsler Intelligence Scale for Children – IV, administered by Ms. Tierney in 2014. J-4. The Student had similar scores in 2011. Testimony of Tierney. A District school psychologist, Dr. Debra Vilhauer, contends Ms. Tierney made numerous procedural errors in her test protocols, and even when these are disregarded, Ms. Tierney made numerous errors in scoring. D-66:11. Ms. Tierney disputes both of these contentions and states that, even with the District's rescoring, there are only small differences in the results. Testimony of Tierney. Because Dr. Vilhauer did not testify, this dispute is resolved in Ms. Tierney's favor.

<sup>9</sup> The Parent testified the Student was diagnosed with BMD on September 26, 2011. Testimony of Parent. The District states that the diagnosis was in February 2012, the month following the District's January 2012 evaluation of the Student. District's Prehearing Brief at 3. The District appears to be correct because the January 2012 evaluation makes no mention of BMD or any form of muscular dystrophy. J-1. The medical/physical section of the evaluation (where such a diagnosis would appear, among other places in the evaluation report) mentions only ADHD. J-1:30. It is possible the Parent simply misspoke during his testimony. It is also possible the Parent testified correctly, but that he did not inform the District of the diagnosis for several months pending further testing. In any event, the diagnosis came during the Student's second grade year.

prior IEP goals. Testimony of Spencer; J-7:32; J-8:3. In developing the Student's new goals, significant changes were made based on input from the Parent and his educational consultant, Ms. Tierney. J-6; J-7; Testimony of Spencer, Hanson, Tierney.

8. Alison Spencer<sup>10</sup> has been the Student's special education teacher and case manager since third grade. During third grade, she provided 100% of his special education instruction (other than related services). During fourth grade, other special education teachers took over his Reading and Math instruction. Ms. Spencer continued providing his instruction in Written Language, Adaptive Skills, and Social/Behavior Skills. Testimony of Spencer. The Student's Communication and Motor Skills services were provided by a speech-language pathologist (SLP) and an occupational therapist (OT), respectively. J-9:20; J-11:20.

9. The Student has received his special education instruction primarily in a one-on-one (1:1) setting at his District elementary school. He is sometimes taught in a 1:2 or 1:3 setting. The exception is his Social Skills group, where the ratio has been up to 1:8. J-29; Testimony of Spencer, Nakamura. The reason for the Student's very low ratios during special education instruction is that he was not successful in a larger special education setting (Resource Room) or in general education classes. Testimony of Spencer, Nakamura. His elementary school does not offer a self-contained class where he could learn together with peers who have similar needs to his own. He is isolated with an adult for most his instruction instead of having a peer learning community. For these reasons, in the spring of his third grade year, District staff suggested a change of placement to a self-contained class at a different elementary school. Testimony of Hanson; P-17:17-18; P-18:19.

10. In March 2013, the Parent, Ms. Tierney, and several District staff visited two such classes, each with a different staffing and service model, at two elementary schools. P-2:2. Everyone agreed that the class at one of the schools (Sacajawea Elementary) was not appropriate for the Student because the other children were more severely impacted by their disabilities than the Student is. P-17:18. The class at the other school (Adams Elementary) was rejected by Ms. Tierney after she inquired about the other students' IQ scores. P-17:18; P-18:19-20; P-19:22. She also did not approve of the choice of curriculum in that class. D-4. The Parent rejected it. Testimony of Parent.

11. The rest of the IEP team did not reject the Adams Elementary program. However, they stopped considering it after the Parent rejected it. Testimony of Hanson; P-18:19-20; P-19:22. The special education consulting teacher on the IEP team, who went on the visits, testified the team never made a decision about Adams, but Adams would have been appropriate for the Student. It had students with a similar level of need to the Student, and he would benefit from the peer interaction instead of being so isolated with adults. P-18:19-20. The February/May 2013 IEP did not change the Student's placement. He remained at his same elementary school and continued to be taught in the same ratios as previously.

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<sup>10</sup> Alison Spencer received her master's degree in teaching from Seattle University in 2012. She holds a Washington residency teacher certificate in elementary education and special education. Ms. Spencer has worked as a special education teacher for the Seattle Public Schools since 2012. Prior to receiving her teaching certificate in 2012, she worked or interned in a number of educational positions with Seattle Public Schools, Shoreline School District, and Walla Walla Public Schools. D-62; Testimony of Spencer.

12. While the February/May 2013 IEP was being developed, the Parent also applied to a private school that serves special education students. Testimony of Parent. That school declined to admit the Student in late-April 2013. P-27.<sup>11</sup> The Student remained at his same elementary school full-time for the remainder of third grade and most of fourth grade.

13. The February/May 2013 IEP required written progress reports be provided every trimester, but the District provided five progress reports during the IEP year, and a sixth one during development of the successor IEP. J-9:9-15; J-12; J-13.

#### **IEP team's review of Student's progress on 2013 IEP goals, and development of new goals in March 2014 IEP**

14. In October 2013, during the Student's fourth grade year, the IEP team met at the Parent's request and discussed the Student's progress on the goals of his February/May 2013 IEP. P-10; Testimony of Hanson.

15. In December 2013, the IEP team met again to discuss the Student's progress in reading and his reading curriculum. Testimony of Tierney. The Student's reading instruction in fourth grade was provided by special education teacher Misa Nakamura.<sup>12</sup>

16. Three meetings were held to develop what became the March 2014 IEP. They took place on February 12, March 3, and March 28, 2014. At the first meeting, 20 minutes were set aside to review prior-goal progress. The Parent walked out of that meeting because he did not feel 20 minutes was sufficient to spend on prior-goal progress, and he did not believe this subject should be integrated with a discussion of new goals, as the school staff usually did. Testimony of Parent, Nakamura. The remainder of the IEP team completed the meeting and adopted an IEP after the Parent walked out, but scheduled another meeting with the Parent on February 24<sup>th</sup> to consider amending the IEP once he rejoined them. On February 14, 2013, the Parent filed a due process hearing request to prevent implementation of the IEP that had been adopted on February 12<sup>th</sup> (the stay-put provision of the IDEA prevented its implementation once his due process hearing request was filed). J-10:22-24; D-17; D-18; D-56; Testimony of Parent, Hanson.

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<sup>11</sup> The Parent applied twice to this particular private school, and admission was declined both times. Testimony of Parent. It was unclear from the record whether the rejection in late-April 2013 was the first or the second time this occurred.

<sup>12</sup> Misa Nakamura received her master's degree in education from the University of Washington in 2010. She began teaching for Seattle Public Schools prior to that time, after receiving her bachelor's degree in special education from Western Washington University in 2004. In addition to teaching in Seattle Public Schools, she interned with the Renton School District and at a school in New Zealand. Ms. Nakamura has received the highest ratings in Seattle Public Schools in all evaluated areas since 2010, and has served as a Mentor Teacher since 2012. At her elementary school, Ms. Nakamura serves as the Special Education Department Head, chair of the Professional Learning Committee, and chair of the Student Intervention Team. D-65; Testimony of Nakamura.

17. The Parent initially agreed to meet again on February 24<sup>th</sup>, but that date was changed to March 3<sup>rd</sup> based on the Parent's scheduling needs. Testimony of Parent, Hanson. The March 3<sup>rd</sup> meeting was entirely devoted to discussing prior-goal progress, in compliance with the Parent's wishes. The team was only able to discuss his Adaptive, Communication and Motor goal progress. The remaining subject areas were left to another day. Testimony of Hanson, Nakamura, Spencer; J-29. A third IEP meeting was scheduled for March 28, 2014.

18. At the March 28, 2014 meeting, the Parent and Ms. Tierney took an entirely different approach. As soon as a District representative began to discuss the present levels of performance on prior goals, Ms. Tierney interrupted and asked the team to skip that discussion (which had not yet occurred for the Student's prior goals in Reading, Written Language, Math, or Social/Behavior). Ms. Tierney also asked the team to skip over discussing the new goals for his new IEP. She said she wanted to move straight to the service matrix page near the end of the IEP, where she had some questions, in the interest of timely completing the meeting. J-29. (The reason the Parent and Ms. Tierney took this very different approach is discussed in a separate section of this decision.) The District members of the team compromised with the Parent and presented the "highlights" of the present levels of performance and goals. J-29. On 15 occasions during the course of the meeting, the Parent or Ms. Tierney either noted the time remaining to complete the meeting, or asked that the team move on and not further discuss a topic. Several times they noted a concern or disagreement for the record, but declined to discuss it. J-11:22-23; J-29.

19. Toward the end of the March 28, 2014 IEP meeting, Ms. Nakamura brought up a topic the team had discussed the previous spring: Whether the Student would benefit from receiving his instruction in a community of peers with similar needs, rather than being taught primarily 1:1. She noted the joy as well as the anxiety he experienced when with other students, and the isolation of his current instructional setting. She said he was making academic and social progress with the goals of his IEP, but she worried that he did not have enough access to other children. Ms. Tierney asked if Ms. Nakamura was saying she wanted to change the IEP. Ms. Nakamura said "no" several times, and other District staff chimed in and said "no." They discussed whether his placement continued to be appropriate, as opposed to the goals and services of his IEP. A District team member asked whether the Parent would want to consider a placement that would give the Student a peer community, such as programs available at other elementary schools. The Parent responded that they had been down that road the previous year with visits to other schools, and "there wasn't a really good fit in the system." He said he would be happy to think about it further, but it was a complex issue. At that point Ms. Tierney interrupted this discussion for the second time, attempting to move on to another topic. This time she was successful. The IEP meeting ended shortly thereafter. J-29.

20. The Parent makes three claims in this case. The first is that the District failed to determine why the Student did not meet the annual goals of his February/May 2013 IEP before adopting the successor IEP of March 2014. The second claim is that the IEP of March 2014 was inappropriate for the Student. (The third claim concerns ESY, and will be addressed in a separate section; below.) In order to determine the first two claims, what follows is an examination, for each of the Student's service areas, of: (1) the information about prior-goal progress that the District considered before adopting the successor IEP; and (2) the new goals of the successor IEP for that service area. Academic subjects are reviewed first, followed by Adaptive and Social/Behavior skills, and finally the related service areas of Communication and Motor Skills.



21. There is one dispute that concerns all service areas, so it is addressed first. To understand this dispute, one must know the rating scale used in the District's IEP progress reports: "1" means "Little or no progress made." "2" means "Some progress made." "3" means "Significant progress made." "4" means "Goal/Objective Met." "NA" means "Not applicable this grading period." J-13:1.<sup>13</sup>

22. Ms. Tierney had repeatedly stated to District staff that a mixed rate of progress over time (such as 2, 3, 1, 2) meant the Student's skills *regressed* in the third and fourth reporting period from where they had been in the second reporting period. Testimony of Spencer. District witnesses testified to the contrary: a "1" in the third period meant little or no *further* progress was made during that reporting period over the prior one, not that the Student's skills had regressed from where they were in the previous reporting period. The SLP, Ms. McCormick was asked at the hearing whether the final reporting period rating in an IEP year was a summative rating (so that a 1 would mean little or no progress *overall*, for the whole IEP year) or whether instead it meant that little or no *further* progress had been made since the prior reporting period. She responded that she used the latter rating system, not the former. Ms. Spencer likewise testified that she used the latter system, and she thinks everyone on the Student's IEP team was "on the same page" on this, but that there was no district-wide requirement to use one system over the other. Testimony of Spencer, p. 11. The Parent takes Ms. Spencer's testimony out of context and omits her final sentence to make it appear she stated that every teacher in the District has their own way of measuring and reporting progress. From this, the Parent extrapolates that the District uses no objective measurement of progress. Parent's Closing Brief at 5 – 6 and 33. What Ms. Spencer's testimony referred to was the narrow question described above. A more complete excerpt of her testimony than was presented by the Parent is set forth in footnote. *Italicized* in the excerpt is the small portion quoted by the Parent.<sup>14</sup> Finally, the Parent argues

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<sup>13</sup> The Parent makes an interesting point about this rating scale, which is a common scale used in many school districts. The Parent notes that the scale does not provide an option to show regression. Parent's Closing Brief at 36. To show regression, a teacher would have to use the "1" rating for "little or no progress" and include in the narrative comment area the measurement that showed regression below the original baseline.

<sup>14</sup> Q. You had indicated that progress is noted on progress reports relative to the last prior report. Does that make sense?

A. Yes.

Q. Would you agree with that?

A. Yes.

Q. So as an example of that, if a student's progress for one reporting period was a two, for the next reporting period was a four, and for the third reporting period went down to a two, would that indicate to you during the third reporting period that he continued to make progress or that -- or that he moved backwards?

A. Well, in that example for [four?] a met -- met goal so he went back --

Q. Sorry, a three. Let's say two, three, two.

A. That would mean that he had made some progress since the last reporting period.

Q. If -- and I believe you also testified that Ms. Tierney seemed to understand that a lower number in a subsequent progress period would indicate a decline, where you're saying that's not an accurate interpretation; is that correct?

A. Yes.

that if Ms. Tierney misunderstood the IEP team's period-over-period method of progress reporting, it was incumbent on the District to correct this misunderstanding. Parent's Closing Brief at 35 – 36. Ms. Spencer testified credibly that the District members of the IEP team did, in fact, correct Ms. Tierney on this, and did so at multiple IEP meetings. Testimony of Spencer, at p. 10.

23. We turn now to the individual goals of the Student's February/May 2013 IEP.

#### Reading Goals

24. The Student's February/May 2013 IEP had five goals in reading.

25. *Sequencing text (Reading #1)*. When given an expository text, the Student was to sequence what he read using the words "first," "then," "next," "when," "after that," and "before." He was to improve from doing this in 25% of opportunities to doing it in 75% of opportunities. J-9:13.

26. The Student made "some" progress on the goal in April and June 2013, and by December 2013 he made "significant" progress. At that time he was able to sequence texts using "first," "then," and "after that" 100% of the time, using "next" and "when" 75% of the time, and using "before" 25% of the time. By February 2013, he met the goal by using all of these words to sequence texts in 100% of opportunities. J-13:13; Testimony of Nakamura.

27. *Sequencing emotional cause/effect (Reading #2)*. When given a narrative text, the Student was to explain what happened in the story using "if/because," improving emotional cause/effect sequencing from 20% of opportunities to 80% of opportunities. J-9:13.

28. By April 2013, the Student had made "some" progress, but by June 2013 he was at his baseline of 20%, so he was rated as making "little or no progress." He improved steadily thereafter. By December 2013, he was at 60% on this goal, and by the end of the IEP year in February 2014 he had met the goal at 80%. J-13:13-14; Testimony of Nakamura.

29. Ms. Tierney criticized this goal and the progress reports on it, saying she did not understand the goal and had trouble measuring it herself. Testimony of Tierney. However, Ms. Tierney participated in four IEP meetings that led to the development of these goals, two more

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Q. If the source of these numbers that progress declined 40 percent, for example, were not Ms. Tierney and instead were someone else on the IEP, a school district employee, let's say, *would you assume that they would be accurate?*

A. *It depends. I think that every – from – from specialist to specialist to special ed teacher everyone has their own interpretation. There's no district-wide definition of how you report progress so it would depend on who was reporting the progress. But I think we were all on the same page when we were doing this progress report that it was from one period into another.*

Testimony of Spencer, pages 8 – 11 (italics added, indicating the excerpt quoted in the Parent's Closing Brief at 33).

IEP meetings thereafter to discuss progress on these goals (October and December 2013), and three IEP meetings in 2014. If Ms. Tierney had any difficulty understanding this goal or how it was measured, she had ample opportunity to ask prior to testifying at the due process hearing that she did not understand it.<sup>15</sup>

30. *Reading fluency – word endings (Reading #3)*. When given a list of 50 words ending in consonants or vowel blends, the Student was to accurately read the words, improving reading fluency and decoding from 50% correct readings to 96% correct. J-9:14.

31. The Student made “significant” progress in the April and June 2013 reports, reaching 88% by June. Out of 14 words the Student had misread in April, he was retested in June and now correctly read 10 of them. By December 2013, he had met the goal, scoring 97% to 100% on reading six different words lists (his average on the six lists was 99.3%). J-13:14-15; Testimony of Nakamura.

32. Ms. Tierney criticized the progress on this goal (and on Reading Goal #5, which was similar) as measuring decoding skills, not measuring reading fluency. Testimony of Tierney. Ms. Nakamura agrees. The two goals are simply decoding goals, and the assessments she administered were decoding assessments, not reading fluency assessments, which are different. However, Ms. Nakamura explained that improving decoding ultimately improves reading fluency. Testimony of Nakamura.

33. Ms. Tierney also criticized the progress reports on these two 50-word list goals because she said she had no idea how easy or difficult the 50 words were, so progress could not be objectively measured. Testimony of Tierney. The 50 words were all at reading Level J/18 (late first grade to early second grade level),<sup>16</sup> which was the Student's instructional reading level.<sup>17</sup> Ms. Nakamura testified credibly that she provided all assessments that Ms. Tierney requested, copying test pages and sending protocols. Testimony of Nakamura; J-31. It is not credible that Ms. Tierney had no idea what level the 50 words were at. While it would have been better for the goal to have stated that the words would be at Level J/18 (as was done in the successor

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<sup>15</sup> The Parent's claim regarding the goals of the February/May 2013 IEP is whether the IEP team determined why the Student (allegedly) failed to meet those goals before adopting the successor IEP. The Parent's claim does *not* encompass the substantive appropriateness of the goals of the February/May 2013 IEP. To the extent Ms. Tierney's criticism is that this goal was not written clearly enough to be replicated by a teacher with no further information and no contact with the IEP team, that criticism does not go to the Parent's only claim about the February/May 2013 IEP. The Parent and Ms. Tierney *did* have contact with the IEP team and were free to ask any questions about how the goal was implemented and why the Student did or did not meet it.

<sup>16</sup> Two different reading scales are commonly used, one using letters (e.g., “J”) and one using numbers (e.g., “18”). Equivalent levels in the two scales are often referred to together, hence “J/18”. One of the parties' joint exhibits is a chart that correlates grade levels, the letter scale (Fountas & Pinnell) and the number scale (DRA). J-31.

<sup>17</sup> Students are generally assessed to determine three reading levels: an “independent” reading level, in which they are able to accurately decode and comprehend without assistance; an “instructional” reading level, in which they require instruction in order to accurately decode and comprehend; and a “frustration” reading level, which is too high for them to benefit from instruction. Testimony of Nakamura.

IEP), if Ms. Tierney had any confusion about this she had many opportunities to ask, as discussed above.<sup>18</sup>

34. *Reading comprehension (Reading #4)*. When given a passage at his instructional level, the Student was to accurately summarize the story by including only the most relevant details from the beginning, middle, and end, improving reading comprehension from 20% of opportunities to 80% of opportunities. J-9:14.

35. The Student made good progress on this goal in April and June 2013, reaching 50% on most aspects of the goal by June 2013. By December 2013, he met all aspects of the goal at 100%. The Student's reading had been assessed at the beginning of the school year, in September 2013. The progress report noted that he made one year's worth of reading growth in the three months since then. Ms. Nakamura increased the Student's instructional level to Level M/26 (late second grade), and continued working on reading comprehension with these more difficult texts. At the new instructional level, the Student was able to summarize the beginning of stories 80% of the time, the middle 80% of the time, and the end 40% of the time. J-13:15-16; J-31; Testimony of Nakamura. The Student's growth in reading comprehension was particularly significant because that was his weakest area in reading. He was relatively strong in reading rate and accuracy of decoding. Testimony of Nakamura.

36. Ms. Tierney criticized the December 2013 progress report (which stated the Student had met this goal) for not including the Student's "verbatim responses". D-56:8. The Parent has cited no authority for requiring this level of specificity in an IEP progress report. In any event, Ms. Nakamura testified credibly that she provided all of her reading assessments repeatedly to Ms. Tierney, at Ms. Tierney's request. Testimony of Nakamura.

37. Ms. Tierney also testified that she gave the Student curriculum-based assessments in reading comprehension in June and August 2013, and he scored in the 50<sup>th</sup> percentile for second grade on both assessments. Then in January 2014, on a mid-second grade assessment, he scored between the 20<sup>th</sup> and the 50<sup>th</sup> percentiles. She concludes that, as the level of reading difficulty increased, the Student had greater difficulty comprehending it. D-56:10; Testimony of Tierney. Ms. Tierney provided no evidence as to *where* between the 20<sup>th</sup> and the 50<sup>th</sup> percentile the Student scored in January 2014 (she did not provide this in the written statement she gave to the IEP team at the time, or in her testimony at the hearing). Nor did she state what level within "second grade" he was tested on in summer 2013, and what level within "mid-second grade" was used in January 2014 (Was it higher? How much higher?). There is nothing surprising in the fact that reading comprehension becomes more difficult as the level of difficulty of the text increases. Ms. Nakamura testified with much greater specificity about her assessments: In September 2013, her assessments found the Student's independent reading level was I/16 (mid-first grade), his instructional reading level was J/18 (late first grade to early second grade), and his frustration reading level was K/20 (early second grade). By December 2013, his instructional reading level was M/26 (late second grade). By February 2014, his independent reading level was O/34 (mid-third grade), and his instructional level was P/38 (late third grade). Testimony of Nakamura; J-11:7-8; J-31. Ms. Nakamura's testimony was

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<sup>18</sup> See footnote 15, above.

credible and much more specific than Ms. Tierney's, and she had much greater opportunity to assess the Student.

38. Ms. Tierney also criticized the goal for using a first-grade standard when she claims the Student was already reading at a second-grade level when the IEP began. Testimony of Tierney. Ms. Nakamura explained that only in the Horizons direct instruction curriculum was the Student classified at a second-grade level in reading when the IEP began. On the broader measures of reading comprehension that she used, his reading level was lower. Testimony of Nakamura. Ms. Nakamura's testimony is more credible on this matter than Ms. Tierney's.

39. *Reading fluency – specific phonemes (Reading #5)*. When given a list of 50 words with digraphs, long vowels, and “b” and “d” sounds, the Student was to accurately read the words, improving reading fluency and decoding from 50% to 96% correctly read words. J-9:14.

40. This is the second of the 50-word list decoding goals. The Student made good progress in April<sup>19</sup> and June 2013. By June 2013, he scored 100% on words with “b” and “d”, and correctly read all words with long vowels except for two. He struggled with one digraph (“ng” as in angst). His percentage scores on long vowels and digraphs were not provided in the June 2013 progress report. By December 2013, he had met the goal in all areas, scoring 100%. J-13:22-23; Testimony of Nakamura. Ms. Tierney's criticism of this goal has been discussed above, in the context of Reading Goal #3, the other 50-word list decoding goal.

41. A major dispute between Ms. Tierney and the teachers concerned which reading curriculum to use. Ms. Tierney advocated for using only Horizons, a highly scaffolded, direct instruction curriculum. D-56:10-11; Testimony of Tierney, Nakamura. Ms. Nakamura believed the Student was bored with Horizons and would benefit from moving on to a balanced literacy curriculum. Testimony of Nakamura. The parties compromised to some extent and both curricula were used, with more use of balanced literacy as time went on, over Ms. Tierney's objections. The evidence from Ms. Nakamura on which reading curricula were best for the Student is found more credible and well-founded than the evidence from Ms. Tierney, especially in light of his high rate of progress. In any event, as discussed in the Conclusions of Law below, choices among methodologies are left to a school district's discretion as long as the district's methodology provides a meaningful benefit to the student. The evidence establishes that the direct instruction methodology was not the only one that could provide a meaningful benefit to the Student. The District provided a great deal of educational benefit to the Student using other reading methodologies.<sup>20</sup>

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<sup>19</sup> The April 2013 progress report for Reading Goal #5 appears to have a mistake in some of the dates, listing dates of assessments as “3/29/12” and “4/1/12” that appear intended to have been 3/29/13 and 4/1/13. J-13:23.

<sup>20</sup> In another subject area, mathematics, Ms. Tierney likewise battled with the District over her view that only direct instruction curricula should be used with the Student. Testimony of Tierney, Hanson; J-6:25. However, after several months at the private school that Ms. Tierney and the Parent subsequently created, the head of school found the Student had an aversion to the direct instruction curricula and wrote: “My strong recommendation at this time is to dump all the scripted direct instruction in math with [the Student]”. D-46:2.

42. In preparation for creating the Student's new IEP reading goals, Ms. Nakamura tested his reading using two assessments in February 2014. The Kaufman Test of Educational Achievement-II (Brief) (KTEA-II Brief) is a nationally-normed standardized test. On the KTEA-II (Brief), the Student's standard score of 89 was in the 23<sup>rd</sup> percentile (within the "average" range) compared to same-age peers, and had a grade level equivalency of 3.4 (the Student was in February of fourth grade at the time). J-11:7. The second assessment was the Fountas & Pinnel Benchmark Reading Assessment. The Student's independent reading level on that assessment was Level O/34 (mid-third grade), and his instructional level was Level P/38 (end of third grade). J-11:7-8. The present levels of performance section of the new IEP explained these test scores in greater detail, and explained the scaffolding and methodology Ms. Nakamura had found most effective with the Student. Finally, it discussed the love of reading the Student had developed over the last year. *Id.* The Student would now often choose reading over computer time, Legos, or other games when offered a break. J-11:4.

43. The reading goals of the new March 2014 IEP were as follows: (1) Given a narrative passage at Level 46 (end of fourth grade) concerning the actions of a main character, the Student will orally state why the character engaged in the action. This goal was chosen because one of the weakest areas in the Student's reading comprehension was understanding why characters took the actions they did. This goal built on his prior goal of sequencing emotional cause and effect (prior Reading Goal #2). The Student was currently at an independent reading level of P/38 (end of third grade). One year's expected growth would put him at Level 46 (end of fourth grade), so this is the level at which he would be assessed throughout the year. Because this was significantly above his current reading level, his baseline score was 0%, and the goal was to reach 85% correct answers. J-9:13-14; J-11:13; Testimony of Nakamura.

44. The Student's second new reading goal was: (2) Given a main-idea statement from an expository passage, the Student will find at least two stated details that support the main idea. He was to improve from 0% on a Level 46 text to 85%. His prior goal in expository reading was to sequence what he read using the words "first," "then," "next," etc. (prior Reading Goal #1). The Student was now expected to see the relationship between main ideas and supporting details, and to do so using higher-level texts. J-9:13; J-11:13; Testimony of Nakamura.

45. The Student's final new reading goal was: (3) The Student will orally summarize a Level 46 story in correct sequence, including the most important details from the beginning, middle, and end of the story, with no extraneous details. This was similar to a prior goal (prior Reading Goal #4), but using higher-level texts. J-9:14; J-11:13; Testimony of Nakamura.

46. The Parent alleges the 0% baseline for the new reading goals was chosen randomly, without any assessment to show it was an accurate baseline. Parent's Closing Brief at 40. This is incorrect. Ms. Nakamura testified credibly that she assessed the Student on a passage at Level U/46 (one full year ahead of his current reading level) and he presently scored 0% correct answers. Testimony of Nakamura. She also explained this at the March 28, 2014 IEP meeting. J-29.

#### Written Language Goals

47. The Student's February/May 2013 IEP had two written language goals.

48. *Rewriting a story in sequence (Written Language #1)*. When given a story with sentences out of order, the Student was to independently use transitional words ("first," "then," "next," "last") to sequence story events and write four sentences about the story. He was to improve from doing this in 0% of opportunities to 60% of opportunities. J-9:15.

49. The Student was rated as meeting this goal. He made "some" progress by April 2013, but had a setback in June 2013 with a trial of voice-recognition software. The software was unable to recognize the Student's dictated words sufficiently to transcribe them with accuracy. When the teacher scribed the Student's first draft and cut up the sentences for him to sequence and edit, he was able to generate three to four times as many sentences as when using the voice recognition software. By December 2013, the Student had made "significant" progress. With teacher assistance he was able to use the transitional words listed in the goal and write seven to nine sentences in 70% of opportunities. By February 2014, he was rated as meeting the goal. After verbally dictating the sentences he wanted to write, he was able to generate nine to 15 written sentences with fewer than two teacher prompts. The previous year, he could only complete one to four sentences with 10 teacher prompts. J-13:20-21; J-11:9; Testimony of Spencer.

50. Ms. Tierney testified she could not understand what the Student was doing on this goal. Testimony of Tierney. However, the progress reports are quite explicit about each step of his writing process. J-13:19-20. Ms. Tierney also criticized the teacher's use of insect pictures to inspire the Student's dictation of stories as being outside the goal (he was fascinated by insects). However, this was actually an advancement on the goal, which provided that the teacher would *give* the Student a story for him to write more about. Sometimes she did this, and sometimes she went beyond the goal and had him generate an original story inspired by insects. Testimony of Tierney; J-13:19-20. There is nothing objectionable in this procedure, and it is documented in the progress report. Finally, Ms. Tierney noted that the Student was doing his writing process with teacher assistance, not "independently" as stated in the goal. *Id.* Ms. Tierney is correct on this. The goal stated the Student would write sentences "independently." At the time the teacher determined he "met" the goal, he had made great progress on independence (the previous year requiring 10 prompts to produce fewer sentences), but he still required up to two teacher prompts so he was not independent. *Id.* Therefore, it is concluded that the Student made significant progress on this goal but did not meet it.

51. *Phonological awareness - spelling (Written Language #2)*. When given a dictated list of 20 words with ending blends, short vowels with blends and digraphs, the Student was to spell them correctly, improving phonological awareness from 25% to 90% correct answers. J-9:15.

52. The Student did not meet this goal, but made "significant" progress by the end of the year. On two days in April 2013, he scored 74% correct on one assessment, 27% on another, and 90% on a third. He struggled with "b" and "d" reversals. The June 2013 progress report said he made "significant" progress and went into detail on the phonemes he spelled correctly and incorrectly, but did not give assessment scores. The December 2013 progress report stated he made "significant" progress, but also stated he was currently spelling only 30% of the target words correctly, which seems contradictory. In January 2014, he scored 84%, in February 2014 he scored 74%, and in March 2014 (after the end of the IEP term, and during development of the new IEP), he scored 77%. J-13:21-22. The last three months of consistently higher assessment scores merited the teacher's "significant" progress rating. The teacher noted that

spelling was a very difficult subject for the Student, whose understanding of basic sounds early in the IEP year was primarily based on phonetics. J-13:21. He did better with rule-based spellings than with words that were exceptions to the rule. J-11:9.

53. Ms. Tierney criticized the teacher's methodology as allegedly not following a proper scope and sequence of instruction, and teaching helter-skelter, sometimes sight words and sometimes words following a pattern. She claimed the Student could have made more progress if better taught. Testimony of Tierney; D-56:9. Ms. Tierney stated her testimony was based on reviewing the teacher's "data", but if Ms. Tierney is referring to something outside the progress reports, that data was not placed in evidence. Testimony of Tierney. Nor was that data set forth in Ms. Tierney's testimony in sufficient detail to support her criticism. Her criticism does not negate the progress the Student made in moving from a baseline of 25% correct answers to consistently scoring from 74% to 84% correct answers at the end of the IEP year.

54. The successor IEP of March 2014, in the present levels of performance section, included additional anecdotal comments about the Student's writing. The teacher had recently been interrupted by a telephone call for two to three minutes while working with the Student. While she was occupied, he completed five sentences with no prompts during that time. The previous year, a behavior plan had to be put in place to get the Student to produce any written work independently. Although he continued to need support, his perseverance and ability to generate sentences had increased greatly since the prior year. He was also beginning to understand the importance of neat work, as well as the steps of the writing process. J-11:9.

55. The successor IEP contained three written language goals. The first two expanded on prior Writing Goal #1, requiring higher level skills. (1) Pre-writing: The Student was to generate three to five writing topics with a graphic organizer and teacher assistance, and then independently generate three to five supporting details about those topics. He was to improve to this level from his current level, which was generating on average less than one topic idea and less than one supporting detail with teacher assistance and prompts. J-11:14. (2) Writing (with OT collaboration): The Student was to take a writing topic and supporting details that he had generated for the first goal, and write or type 15 to 20 sentences about that topic. He was to do this with adult assistance and fewer than two teacher prompts. He was to improve to this level from his current level, which was generating nine to 12 sentences with 100% adult assistance.<sup>21</sup> J-11:15. (3) Spelling (with OT collaboration): When given a dictated list of 20 words with consonant-vowel-consonant and ending in an "e," or with ending digraphs, the Student was to correctly spell the words. He could spell them verbally, in handwriting, or by

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<sup>21</sup> It is unclear how generating nine to 12 sentences "with 100% adult assistance" could have been the Student's current level of performance, given that he could generate nine to 15 written sentences "with less than 2 teacher prompts," according to the present levels of performance in the same IEP. J-11:9, 15. The teacher, Ms. Spencer, testified about how the Student's baseline was determined for this goal. However, the ALJ's notes of the testimony are insufficient and no transcript was made of Ms. Spencer's direct examination (only her cross-examination was transcribed). The underlying goal for these two performances is different, so that may account for the different levels of adult support needed. In the prior goal, the Student was given a story already written, and he had to write more about it (after putting the pieces of the story in the correct order). In the new goal, he was to start his writing from only a topic and supporting details. However, without an adequate record of the testimony, no finding of fact is made on whether this apparent contradiction is resolved.



typing. He was to improve from 10% correct answers to 90% correct. *Id.* The teacher chose these two word patterns for the goal because the Student had struggled to spell these patterns correctly. P-17:10-11. On writing goals (2) and (3), the OT was to make sure the Student had access to a typing program or device to assist his written expression. J-11:7. The Student was to continue developing his keyboarding skills, and another trial of voice-recognition software would be implemented. J-11:9-10.

### Mathematics Goals

56. The February/May 2013 IEP had four goals in mathematics. The Student was mostly instructed using the direct instruction curricula that Ms. Tierney desired.

57. *Bigger than, smaller than, equal to (Math #1).* When given two numbers between 0 and 100, the Student was to describe one number as "bigger than," "smaller than," or "equal to" the other number. He was to improve from 20% correct to 80% correct responses. J-9:11.

58. The Student struggled with this concept and only made "some," not "significant" progress on the goal. His scores on assessments were erratic, finally settling on 50% in December 2013, February 2014, and March 2014. He had particular trouble distinguishing numbers such as 13 and 31, and 19 and 91. All items were read aloud to the Student as well as being presented in written form. J-13:8-9.

59. The reasons for his lack of progress and the IEP team's decisions about his new math goals are discussed below, after his progress on all four math goals is presented.

60. *Using coins (Math #2).* When given a word problem asking him to use two to three coin combinations to "buy" various objects, the Student was to provide the correct amount of coins for the purchase. He was to improve from 20% correct to 70% correct responses in four out of five opportunities. J-9:11.

61. The progress reports say the Student made "some," but not "significant" progress on this goal. His scores were erratic and, by June 2013, the teacher's assessments focused away from "buying" objects to simply identifying coins and counting their value. In June 2013, the Student scored 80% on identifying coins and pointing to various coin combinations. In December 2013, he scored 80% on identifying individual coins and stating their value. He also worked on counting the value of groups of coins, doing better when they were all the same coin (e.g., four nickels) than when given a mixed group of coins. No percentage scores were provided on his counting work in December 2013. J-13:9-10.

62. In January<sup>22</sup> and February 2014, the Student was struggling to distinguish between the value of a nickel and a quarter, and identified the value of three nickels as three cents, and six dimes as six cents. In March 2014, he was 80% correct in identifying the value of nickels and pennies, but continued to confuse nickels and quarters. J-13:10. The teacher recommended that going forward, instruction should focus on skip-counting (e.g., 5, 10, 15, 20) in order to target the area in which the Student struggled most. *Id.*

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<sup>22</sup> The date "1/5/13" is given in the progress report for this goal, but from the context it appears there was a typographical error, and the year was actually 2014.

63. *Addition problems (Math #3)*. When given addition problems using numbers up to 20, the Student was to use a variety of tools (manipulatives, number lines, supplemental worksheets) to solve the problems. He was to improve from 50% correct to 90% correct answers in four out of five opportunities. J-9:11.

64. As of June and November 2013, the Student made "significant" progress on addition problems. He was given more difficult assessments as time went on, even assessments that exceeded the goal expectations, and still scored 86% (numbers up to 50, instead of 20, and including subtraction problems along with addition). J-13:11. The teacher noted an increase in confidence and a willingness to persevere through difficult math problems, whereas previously the Student would get frustrated even before beginning. J-13:10-11.

65. However, by February 2014, his scores dropped to 30% and 10% on two consecutive days. In March 2014, his scores were 20% and 50% on two consecutive days. On all of these assessments, he used Touch Math, a system that assists students by showing dots on the numbers themselves, e.g., four dots arrayed on the number "4". He was also given a number line to help with calculations. J-13:11.

66. *Subtraction problems (Math #4)*. When given subtraction problems using numbers up to 10, the Student was to use a variety of tools (manipulatives, number lines, supplemental worksheets) to solve the problems. He was to improve from 0% correct to 90% correct answers in four out of five opportunities. J-9:12.

67. The Student made "significant" progress on this goal as of June and November 2013. When the IEP was initiated in February 2013, he had not understood what subtraction was and could not do calculations. As mentioned above, by the end of the school year, he scored 86% on mixed addition and subtraction assessments with numbers up to 50. On subtraction alone, the teacher reported he was consistently able to calculate subtraction facts up to 50 with minimal assistance. J-13:18-19.

68. However, in the last two months of the IEP year (January and February 2014) there was inconsistency and the teacher reported "little or no progress". In February 2014, on subtraction assessments given over two consecutive days, he scored 80% then 40%. In March 2014 (after the IEP expired but during development of the new IEP), on another two-day assessment he scored 20% and 70%. *Id.* The Student consistently confused the operations of subtraction and addition, even with explicit instruction and modeling, and had difficulty counting the dots on Touch Math. The teacher concluded the Student would benefit from developing stronger foundational skills in number sense, including the sub-skills of counting forward from any number (not just from "1"), comparing numbers, and place value. He would benefit from using manipulatives and physical math tools to develop a deep understanding of what it means to add and subtract. J-11:6.

69. Ms. Tierney presented two theories about why the Student's math skills declined at the end of the IEP year. One theory is that he was bored and did not give the right answers because he was tired of doing the same thing for the last two years. Testimony of Tierney. Ms. Tierney may be correct about this. When the Parent subsequently moved the Student to a private school that he and Ms. Tierney created, the head of school (who was teaching the Student math 1:1) concluded after several months that the Student had developed an aversion

to the direct instruction curricula that Ms. Tierney put in place for him. The head of school recommended they drop all direct instruction curricula in math. D-46:2. Ms. Tierney's second theory, which concerned the Student's lack of progress on the coin goal, was that the goal was at too high a level: before he could use coins to "buy" things he needed to work on the lower-level skills of identifying and counting coin values. Testimony of Tierney. The teacher apparently agreed, because she had shifted to teaching these lower-level skills when the Student was unable to do the higher-level ones.

70. In light of the fact that the Student was not making significant progress on any of his math goals at the end of the IEP year, the team proposed that the new goals focus on building foundational skills in number sense, including counting forward from any number, comparing numbers, place values, and skip-counting. J-11:6, J-13:9-10. Accordingly, the math goals of the March 2014 IEP were as follows: (1) When given place-value manipulatives and a place-value mat, the Student will decompose a number up to the thousand's place, improving number sense and place value. He was to improve from 0% (skill not yet introduced) to 80% correct answers. (2) When given a word problem requiring single-digit addition or subtraction, the Student will create and solve the corresponding number sentence using manipulatives or pictures and a number equation, improving math reasoning. He was to improve from 0% (skill not yet introduced) to 80% correct answers. (3) When given math frames and manipulatives, the Student will add or subtract single digit numbers in more than one way, improving basic math calculation skills. He was to improve from 0% (skill not yet introduced) to 85% accuracy. J-11:12-13. (4) The coin goal was now in the Adaptive/Life Skills section of the goals, instead of the math section. It provided that when given a word problem asking the Student to use two to three coin combinations to "buy" objects, the Student will skip count to provide any coin combination that correctly matches the request. He was to improve from 0% to 80% correct responses. J-11:11.

71. The Parent alleges that the 0% baseline in the coin goal was incorrect because the Student was able to identify coins and had used them in the past. Parent's Closing Brief at 39-40. However, the goal was at a higher level than simply "identifying" coins, and to any extent the Student was able to "use" coins in the past, he was not able to do so in the present.<sup>23</sup> His final progress reports from the prior IEP found he consistently confused nickels and quarters and was wrong about their value, and thought six dimes was worth six cents. The goal called on him to do the following: "[W]hen given a word problem asking [the Student] to use 2 – 3 coin combinations (XX, XY or XXY) to 'buy' various 'objects' [the Student] will skip count to provide any coin combination (XX, XY or XXY) that correctly matches the request". J-11:11. Based on his prior progress reports, 0% is the correct baseline for the Student's present ability to complete all the steps of this goal.

72. The Parent argues it was wrong of the District to use 0% baselines with the notation "skill not yet introduced" for the remaining math goals of the new IEP, instead of taking data to see what his baseline actually was for these skills. Parent's Closing Brief at 40. This argument has merit. There are some math skills where a 0% baseline can be assumed without testing because the skill is so new and different from anything the student knows (e.g., long division for

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<sup>23</sup> The Student would frequently gain a skill and then lose it later. He had a tendency to forget things after learning them, and to perform very inconsistently. Testimony of Tierney.

a student who only knows addition and subtraction). Here, however, the skills in question were lower-level skills in areas in which the Student was already working: use of math manipulatives, place values, single-digit addition, and single-digit subtraction. It cannot be assumed that his baseline was 0% on these skills.

#### Adaptive/Life Skills Goals

73. The February/May 2013 IEP had five goals in Adaptive/Life Skills.

74. *Knowing emergency contact information (Adaptive #1).* The Student's February 2013 IEP goal regarding knowing his emergency contact information was as follows: He would improve from 0% to 80% accuracy in stating his home address, his Father's cell phone number, and other emergency contact information. J-9:9. The other emergency contact information would be his Grandmother's name and cell phone number. J-13:6.

75. By April 2013, the Student was accurate in stating his home address and his Father's cell phone number, though he sometimes recited a different number for his Father's cell phone. It was not discovered until the following spring that the Father had acquired a second cell phone number but had not advised the school of this. When the Student recited the second number, the teacher thought he was making a mistake. P-17:8; J-29. Regarding identifying the Grandmother as his secondary emergency contact and knowing her cell phone number, the Student was still unable to do this. J-13:6.

76. By June 2013, the Student was 80% accurate in stating his home address, his Father's cell phone number (but sometimes provided a "wrong" number), and identifying his Grandmother as his secondary emergency contact. However, he was still unable to state his Grandmother's cell phone number (0% of the time). *Id.*

77. By December 2013 and again by February 2014, the Student had regressed in his skills on this goal. By February 2014, he was accurate only 20% of the time in stating his Father's cell phone number (probably due to the confusion about the actual correct number). He was also accurate only 20% of the time in stating his home address. He was able to name his Grandmother as his secondary emergency contact 100% of the time, but still unable to state her cell phone number (0% of the time). *Id.*

78. Ms. Tierney criticized the progress reports on the emergency contact goal for not stating the frequency and duration of instruction provided on this goal. Testimony of Tierney. The IEP stated the frequency and duration of instruction on the Adaptive/Life Skills goals collectively (30 minutes, five times a week), but not each goal separately. J-6:20. The Parent has cited no authority for requiring this level of specificity in an IEP progress report. Ms. Tierney also alleged that the same goal was present in prior IEPs, and should have been changed. Testimony of Tierney. First, there are no prior IEPs in the record. Second, the appropriateness of the goals of the February 2013 IEP is not at issue here. At issue is whether the IEP team failed to determine why the Student did not meet those goals, and whether the goals of the successor IEP (March 2014) were inappropriate. See Issues statement, above, and Parent's due process hearing request, J-20.

79. The District proposed continuing this goal in the successor IEP of March 2014, because the Student had decreased to 20% accuracy by the end of the term of the February/May 2013

IEP. The first draft of the new IEP called for him to continue with this goal and improve to 80%. J-10:10. However, the Parent said the Student knew his home address and the Parent's cell phone number, though he did not know his grandmother's telephone number. The Parent asked that the goal be discontinued and instruction focus on other skills. The IEP team agreed to this. J-10; J-11; J-29.

80. *Telling time (Adaptive #2)*. The Student's February 2013 IEP goal in telling time was to improve from 20% correct answers to 80% correct answers in reading a clock face by the hour, half-hour, and quarter-hour. J-9:9.

81. By April 2013, he was only accurate reading a clock by the hour (on the hour). J-13:12. By June 2013, he was accurate reading a clock both on the hour and on the half-hour, scoring 100%. He was also accurate moving clock hands to those positions, scoring 100%. However, he still struggled with quarter-hours, both reading a clock and moving the hands of a clock to quarter-hour positions. *Id.* By December 2013, the Student was still accurate only 20% of the time on quarter-hours, but maintained his 100% accuracy on the clock positions he had previously mastered. *Id.*

82. By February 2014 (the end of the IEP year), the Student was able to manipulate a clock face to times a quarter-after and a quarter-till the hour with 100% accuracy. Although it was a more advanced skill than required by the goal, he was also able to write down correctly the time he read on a clock in 80% of opportunities. The Student met the time-telling goal. J-11:4; J-13:12. Ms. Tierney testified that a teacher saying the Student continued to "struggle" with aspects of a goal, and the fact that he sometimes made mistakes in writing down the time (as documented in the progress report) contradicted the teacher saying he had "met" the goal. Testimony of Tierney. However, the goal called for the Student to achieve 80% accuracy, not to be struggle-free the remaining 20% of the time. District's Closing Brief at 6.

83. At the IEP meetings on March 3 and March 28, 2014, the Student's present level of performance on the time-telling goal was discussed. J-29. The District proposed to drop this goal, since it had been met. The teacher recommended that the Student wear a watch and learn to read digital time, in order to improve his independence in organizing his day. J-10; J-11:4; J-12:3. The Parent noted that the Student was now wearing a dual digital/analog watch, and requested that the time-telling goal be retained to increase the Student's functional skills in reading time. The IEP team agreed, and the goal was added back into the IEP at a more difficult skill level. The new goal required the Student to read time accurately at five-minute intervals (the previous goal was 15-minute intervals), improving from 0% accuracy to 80% accuracy. J-11:11; J-29; Testimony of Spencer.

84. The Parent alleges the 0% baseline is incorrect for this new goal since the Student was significantly above 0% in many aspects of time-telling. Parent's Closing Brief at 39. However, the 0% baseline only pertained to telling time at five minute intervals -- a skill that was new for the Student. The Parent alleges that it "appears" the Student was not tested on this skill to know his baseline. Parent's Closing Brief at 42. However, the Parent did not question the Adaptive Skills teacher (Ms. Spencer) about this and cites no evidence to support the assertion. *Id.* The Parent's argument is therefore rejected.

85. Ms. Tierney testified that she knows from her summer work with the Student that he cannot understand or tell time. She did not specify which summer(s) she was referring to.

Testimony of Tierney. In June 2013 (immediately prior to Ms. Tierney's summer work with him), it is true that the Student was unable to read a clock or manipulate clock hands by the quarter-hour. However, by February 2014 he had met this goal. Ms. Tierney criticized the goal as having two different parts: reading a clock vs. manipulating the hands on a clock. However, both are aspects of telling time and both were taught. By the end of the IEP year in February 2014, he was able to manipulate the hands accurately 93% of the time, and write the time he saw on a clock 80% of the time. J-13:12.

86. Ms. Tierney also criticized the goal as focusing on the mechanical aspects of reading time, rather than understanding the *concept* of time, e.g., that 10:00 a.m. is a morning time, when the Student is at school. Testimony of Tierney. Neither she nor the Parent advocated for a more conceptual approach in the next IEP. The Parent instead advocated to continue the mechanical goal of reading a clock face. The IEP team agreed to this. J-29.

87. *Cleaning up work area (Adaptive #3)*. The Student's February 2013 IEP set a goal to clean up his work area faster and with fewer teacher prompts. He was to improve from taking up to seven minutes to clean his work area with nine or more prompts, to accomplishing this in two minutes with no more than three prompts. J-9:9.

88. By April 2013, the Student was successfully cleaning up his work area with fewer than three teacher prompts. The improvement was due in part to being in a smaller classroom environment with more support. J-13:5. By June 2013, the Student continued to be able to clean up with two to three prompts 80% of the time. The number of minutes it took to complete the clean-up was not listed in this report. *Id.* By December 2013, the Student remained at the same level. But by February 2014 (the end of the IEP year), he was cleaning up his work area within one minute with fewer than two teacher prompts 60% of the time. The Student had met the goal, which was to reach 60%. He often continued to clean up the work area in his special education classroom that involved messes he did not create, and seemed to have gained an appreciation of the importance of a clean work area. He was helping other students clean up their messes without any adult requests or assistance. J-11:8; J-13:5-6. The District proposed discontinuing this goal area in the successor IEP because the goal was met. J-10. There is no evidence the Parent suggested otherwise.

89. Ms. Tierney criticized the progress reports on this goal because they did not tell her exactly *what* the Student did in his cleaning. Testimony of Tierney. The Parent cites no authority requiring this level of specificity in a progress report. The goal does specify that the Student was to clean up "his desk and the surrounding area." J-9:9. The progress reports state he was being taught to "keep track of his materials and keep his area clean" and that he also volunteered to clean up "messes that he didn't create." J-13:5-6. Ms. Tierney also criticized the progress report as contradictory for saying that the Student "met" his goal, while also saying he continues to need support. Testimony of Tierney. There is nothing contradictory in this. The Student met his goal of needing only two prompts 60% of the time, but he continued to need the support of two prompts, and he continued to need even more support than that 40% of the time.

90. *Initiating assigned tasks (Adaptive #4)*. The Student's February/May 2013 IEP set a goal for him to initiate assigned tasks with fewer teacher prompts. When given an assigned task and a three-step teacher-made checklist, the Student was to initiate the task with two prompts, instead of his current level of needing five or more prompts. J-9:9.

91. In April, June and December 2013, the Student made "significant" progress on this goal. By February 2014 he had met the goal. Using a checklist and with no more than two teacher prompts, he was initiating assigned tasks 100% of the time. J-13:4-5.

92. *Completing assigned tasks (Adaptive #5)*. The Student's February/May 2013 IEP set a goal for him to complete assigned tasks with fewer teacher prompts. When given an assigned task and a three-to-four-step teacher-made checklist, the Student was to complete the task with four prompts, instead of his current level of 10 prompts. J-9:10.

93. The Student made "significant" progress in April and June 2013. By June 2013, he was completing assigned tasks with one to seven prompts, down from his previous level of 10 prompts. In December 2013, the teacher reported "significant" progress again, but no measured data was provided. She did cite an anecdotal example (mentioned above in the context of Written Language) where she was called away for a phone call and the Student completed a writing assignment independently. J-13:23-24; J-29. By February 2014 (the end of the IEP year), the Student needed five to seven prompts to complete assigned tasks. He did not meet the goal of needing only four prompts, but he had made "significant" progress from needing 10 prompts. The teacher noted that Student argued about doing work he felt was too easy, too hard, or not interesting to him. She advocated engaging him in academic tasks by finding ways to link them with his interests and thereby improve his willingness to work. J-13:23-24. His argumentativeness became the target of a new Social/Behavior goal in the successor IEP, as discussed below.

94. Ms. Tierney criticized the progress reports on Adaptive Goal #5, stating there is no indication whether the tasks assigned were at the Student's correct instructional level. Testimony of Tierney. The teacher, Ms. Spencer, is found to have a thorough knowledge of the Student's instructional level, having delivered 100% of his special education instruction in third grade and somewhat less in fourth grade. Testimony of Spencer. To the extent Ms. Tierney's criticism implies that Ms. Spencer did not know how to select the Student's correct instructional level, that criticism is rejected as not supported by the record.

95. The successor IEP of March 2014 broadened the goal from assigned tasks to include all teacher directions and requests. J-11:4-5, 11. The new IEP addressed the desired behavior in two goals: (1) An Adaptive/Life Skills goal to complete tasks or directions with no more than two prompts 80% of the time, instead of the current five to seven prompts; and (2) A Social/Behavior goal to complete tasks or directions without defiance or refusal 80% of the time, instead of the current 20% of the time. J-11:11, 14.

96. Ms. Tierney criticized the new adaptive goal concerning task completion (new Adaptive goal (1), above). She stated the baseline number of prompts required (five to seven) belied the Student having met the prior year's goal of cleaning up his work area with fewer than two teacher prompts. Testimony of Tierney. However, cleaning up a work area is only one task. The new goal concerned completing all types of teacher-assigned tasks and requests, including academics. It is a much broader goal on which the Student's skills were less developed. For this reason Ms. Tierney's criticism is rejected.

#### Social/Behavior Goals

97. The Student's February/May 2013 IEP had two Social/Behavior goals.

98. *Self-regulation and self-advocacy (Social/Behavior #1)*. When given a challenging work task, the Student was to use strategies for frustration: "I feel frustrated," "I need help," or "I don't understand," improving self-regulation and self-advocacy from 20% of opportunities to 80% of opportunities. J-9:14.

99. The Student was rated as making "significant" progress on this goal throughout the IEP year, but this does not appear to be true toward the end of that period. At first, in the April 2013 report, the Student's frustration decreased because his special education services increased and he spent little to no time in the general education classroom. When he did experience frustration, he did very well at using his words. A visual schedule of required tasks and breaks from the TEACCH methodology was also helping his self-regulation. J-13:3. The June 2013 progress report stated he had benefitted tremendously from the TEACCH schedule, and any frustration he experienced was alleviated or extinguished quickly. J-13:3-4.

100. The December 2013 progress report noted "significant" progress. In the new school year, the Student no longer required the use of a behavior chart in order to be motivated or successful. He continued to need prompting to use appropriate language when frustrated or upset, instead of crying or hitting his head. However, he was generally able to persevere through tasks and complete them without crying. J-13:4.

101. However, in February and March 2014, the progress reports noted that the Student's work was becoming more challenging, and he was using appropriate language for handling his frustration only 20% of the time, which was his original baseline. His inappropriate responses included interrupting the teacher's directions to say he does not know how to do the task, putting his head down on his desk, or arguing that he knows how to do a task (when he does not). February and March 2014 is also the period when the Student was having more difficulty with math, as discussed above. He was rated as having made "significant" progress in February and March 2014 on this goal, but the 20% success rate and the teacher's narrative comments indicate this was an incorrect rating. J-13:4. Ms. Tierney pointed out this inconsistency in her testimony. Testimony of Tierney.

102. *Initiating social interaction (Social/Behavior #2)*. When given an opportunity to initiate social interaction with a peer, the Student was to use expected behaviors (e.g., maintaining personal boundaries, using friendly body language), improving from using these behaviors in 40% of opportunities to using them in 100% of opportunities. J-9:15.

103. The Student was rated as making "some" progress on this goal through the end of the school year in June 2013. The April 2013 progress report noted great improvements in his ability to maintain personal boundaries with peers, except when a peer was upset. He often put his arm on their shoulder or rubbed their back, which may be irritating to a child with heightened sensory needs. The Student continued to try to attract attention by inappropriate behavior that sparked laughter (e.g., coughing loudly or burping). The June 2013 report noted continued progress, with the Student needing reminders to maintain personal boundaries, but quickly catching himself when he was too close to someone or not touching them appropriately. This was now occurring only when he wanted to comfort another child who was upset. In social skills group, the Student was playing a very helpful role. J-13:7.



104. By December 2013, the Student had made "significant" progress, displaying appropriate social interactions with peers 80% of the time, and continuing to need reminders about personal boundaries 20% of the time. In the previous school year, he frequently said he did not want to go to recess because he did not have any friends. In the current school year, he was enjoying recess and had made friends with whom he looked forward to playing. The February and March 2014 reports continued to find 80% achievement of the goal, with the remaining 20% usually occurring during non-monitored time (recess), involving attempts to initiate play with irritating methods (e.g., following a child around, poking). Although the Student was maintaining 80% performance, the goal called for 100%. He therefore did not meet the goal but was rated as making "significant" progress toward it. J-13:8.

105. The present levels of performance in the successor IEP of March 2014 included further discussion of the Student's progress on these goals. Regarding Social/Behavior goal #1, it noted that the Student exhibited defiance at completing tasks. He became frustrated easily, often refusing to complete a task. J-11:8. This assessment was in line with the Student meeting his self-regulation/self-advocacy goal only 20% of the time (his original baseline) in February and March 2013. The progress reports had failed to provide percentage measurements earlier in the IEP year, but the narrative comments were clear that the Student exhibited minimal levels of frustration, and handled them appropriately, prior to the February and March 2013 reporting periods. J-13:3-4. The present levels of performance in study/organizational skills elaborated: "His ability to stay focused tends to depend on a variety of factors including but not limited to whether he wears/doesn't wear his glasses, how much he ate at lunch, fatigue, general attitude/mood, daily medication, and/or boredom with a task that he is not interested in or frustration with a task that he feels is too difficult." J-11:8.

106. Regarding Social/Behavior goal #2, the present levels of performance in the March 2014 successor IEP noted the Student was enjoying socializing and was expressing genuine interest and excitement about recess, social groups, scheduled breaks, and Lunch Bunch. He had also recently shown insight in discussing an instance of seeking attention inappropriately. He identified why the behavior was inappropriate ("it's annoying," "they don't like to be touched," "they think I'm being bossy") and alternative ways to seek attention that are more appropriate (ask a friend to play, find a common interest by asking a question or sharing an idea). J-11:8.

107. The new IEP goals in Social/Behavior skills targeted the areas in which the Student's progress had lagged under his prior goals, and called for him to increase his skills in other areas. The new goal concerning peer social relations provided that in unstructured play opportunities, the Student would display expected behaviors toward peers (e.g., maintaining personal boundaries and using friendly body language) throughout the duration of the activity. He was to improve from his current level of 80% of opportunities with teacher assistance to 100% of opportunities independently. J-11:14. The new goal focused on unstructured situations, where the Student's skills were weaker. It increased the expectations from *initiating* play appropriately, to maintaining appropriate behavior throughout the duration of the activity. Finally, the new goal targeted increased independence, requiring the Student to demonstrate his skills without teacher assistance.

108. The new IEP goal concerning the Student's response to assigned tasks and directions targeted the work refusals that were increasing toward the end of the prior IEP year. The new goal provided that the Student would complete teacher-requested tasks and directions without

verbal or physical defiance or refusal, improving compliance from 20% of opportunities to 80% of opportunities. J-11:14.

### Communication Goals

109. The February/May 2013 IEP had three goals in communication, all concerning narrative language.

110. *Produce verbal narrative based on picture (Communication #1)*. The goal was to produce a verbal narrative when shown a picture. The Student would be given a single image, with access to written and verbal prompts, and would produce a verbal narrative including character(s), setting, and at least three events likely to occur in that setting. He was to improve from producing such narratives in 0% of opportunities to producing them in 80% of opportunities. J-9:10.

111. The Student was rated as meeting this goal. When given a single image, the Student was able to independently describe it using six to seven cue words from the Visualizing and Verbalizing program that Ms. Tierney asked the SLP to use. He was easily able to state three actions that could occur in each setting. J-11:5; J-13:6; Testimony of McCormick. Verbatim examples of the Student's narrative responses to five images were provided to Ms. Tierney during development of the successor IEP, and they are in the record. P-24; J-30.

112. This goal was discontinued in the successor IEP of March 2014 because the Student had met the goal. J-11; Testimony of McCormick.

113. Ms. Tierney correctly criticized the progress reports as lacking measured data. Testimony of Tierney. The progress reports make statements about what the Student was able to do at various points in time and give anecdotal examples, but they do not state where the Student fell on the scale of 0% to 80% before finally stating he met the goal. J-13:16. Presumably he reached 80%, but that is not explicitly stated.

114. *Use of "so" to react to a narrative with another narrative (Communication #2)*. In this goal, the Student was presented with a verbal narrative approximately five sentences long. With access to written and verbal prompts and a graphic organizer, the Student was to produce a reactive narrative sequence by describing an initiating event that kicks off reactions, using the cohesive tie "so".<sup>24</sup> He was to improve from producing such narratives in 0% of opportunities to producing them in 80% of opportunities. J-9:10.

115. In the IEP as adopted in February 2013, this goal allowed the use of several different stimuli to which the Student could respond: an auditory-only narrative, a sequence of pictures, or a video clip. J-6:10. The SLP explained that, against her better judgment, she changed the goal to comply with Ms. Tierney's request that the stimulus be auditory-only, with no use of visual support. Testimony of McCormick. This change was made in the March 2013 amended

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<sup>24</sup> The SLP cited a Wikipedia page to explain cohesive ties to laypersons: [https://en.wikipedia.org/wiki/Cohesion\\_\(linguistics\)](https://en.wikipedia.org/wiki/Cohesion_(linguistics)). They are words that set up a relationship between two clauses in a sentence.

IEP, and remained in the May 2013 amended IEP. J-7:10; J-9:10. As discussed below, the SLP worked with the Student using auditory-only stimuli, as well as auditory plus visual supports.

116. The Student made only limited progress with auditory-only stimuli. By the end of the IEP year, in February 2014, without visual support he was able to react to a narrative with an initiating "kick off" event and subsequent actions only 20% of the time. J-13:17. He did better when visual support was used, as reflected in this excerpt from the present levels of performance:

Instruction targeted developing the concepts of "kick off" and feelings, and to do so visual material was used, as in still images and videos. With these supports, [the Student] is increasingly including a kick off in his retells, and is able to string together the sequence of events quite well. He demonstrates limited language of cause/effect in his independent retells, particularly around the relationships between multiple characters. When the story has one character, he is better able to retell. However, when the stories are broken down and the complexities of the story/relationship are explained, [the Student] has demonstrated that he is able to retain and retell the more complex stories, even a week later. The visuals of the story help him to anchor his understanding of the situation, so he can better access the structural elements being taught.

As [the Student] improves in his understanding of cause/effect narrative elements and his use of emotional language for himself and/or other characters, he will also benefit from continued focus on decontextualizing text so that he is forced to make his own pictures in his head . . . Now that [the Student] has gained much stronger descriptive skills, he is ready to work at this next level.

J-11:5.

117. The progress reports on this goal were inadequate because the use of "so" was not tracked or measured. It was mentioned only once, in a March 2014 progress report (produced after the end of the IEP year but before the final meeting to develop the new IEP). This progress report states the Student recently used "so" to indicate a reactive sequence: "She is wearing oven mits [sic] so she doesn't get burned." J-13:17. This sentence was produced with the use of a picture as visual support. Testimony of McCormick. The SLP consistently rated the Student as having made "some" but not "significant" progress on this goal. There is no statement about where the Student fell in the range of 0% to 80% that was supposed to be used to measure his progress.

118. *Use of "because" in retelling a narrative (Communication #3).* Under the same conditions described in the preceding goal, this goal was for the Student to retell a narrative he heard, including character, setting, initiating event, and how the character feels, using the cohesive tie "because". He was to improve his ability to do this from 0% of opportunities to 80% of opportunities. J-9:11.

119. As with the preceding goal, this goal as written in the February 2013 IEP allowed the use of several stimuli to which the Student could respond: an auditory-only narrative, a sequence of pictures, or a video clip. J-6:10. The SLP provided the same explanation of why the goal was

changed to auditory-only, against her better judgment, based on Ms. Tierney's wishes. Testimony of McCormick. This change was made in the March 2013 amended IEP, and remained in the May 2013 amended IEP. J-7:11; J-9:11. As with the preceding goal, the SLP worked with the Student using auditory-only stimuli, as well as auditory plus visual supports.

120. By June 2013, the Student was repeatedly able to talk about initiating events and feelings using "because" to make accurate cause/effect statements. He was able to do this when telling his own personal stories or talking about an image. However, he still had not applied these skills to verbally presented narratives (the goal was to use these skills in retelling a narrative he heard verbally). J-13:18. The SLP consistently rated the Student as having made "some" but not "significant" progress on this goal. J-13:17. There is no statement about where the Student fell in the range of 0% to 80% that was supposed to be used to measure his progress.

121. The December 2013 progress report stated that in watching movies, the Student was demonstrating "some difficulty" naming how characters felt, and the SLP would continue to work on this area. J-13:18. The February 2014 progress report stated the Student was not working at the auditory-only (decontextualized) level yet, but making progress in his use of emotional vocabulary. Again, there was no statement about where the Student fell in the range of 0% to 80% that was supposed to be used to measure his progress. *Id.*

122. The March 2014 progress report (produced after the end of the IEP year, but during development of the new IEP) was the first one to contain a measurement of the Student's progress on the goal. At that time he was consistently describing characters (in 100% of trials), settings (in 80% of trials), and feelings (in 50% of trials). He was unable to put together the language of cause and effect, i.e., how an initiating event affects the character's feelings (in 0% of trials). *Id.* He was again rated as making "some" but not "significant" progress. J-13:17.

123. The present levels of performance in the successor IEP described the development of the Student's narratives over time, and included one example of the Student using "because" as a cohesive tie. There is no indication this narrative was a *retelling* of a narrative he heard (either with or without visual supports), so it is unclear that it relates to this goal. However, because it describes his progress and includes an instance of the Student using "because" as a cohesive tie, it is included here:

[The Student] has made great progress on his IEP objectives over the past year, which focused on developing his narrative skills with the use of written/verbal prompts and graphic organizers if necessary. A year ago [the Student's] personal narratives were characterized by short or incomplete sentences that were poorly linked sequentially. A recent sample is as follows:

"There was people setting couches on fire, and people like destroying glass and partying on the streets, and yelling and screaming and stuff. (Verbal Prompt – Why?) Because the Seahawks won. And they were partying for a long time until midnight. And then they left. And then it was morning." Independently, this narrative includes the story grammar elements of character, setting, and events in sequence. With a verbal prompt, [the Student] includes the "kick off" information, i.e. [sic] "because the Seahawks won."

J-11:5.

124. Ms. Tierney criticized the SLP's rating of "some" progress on the prior goals because the new goals had the same baseline performance of 0% as the old goals – indicating the Student had made zero progress in the preceding year on the second and third Communication goals, not "some". Testimony of Tierney. The progress reports (and the SLP's testimony) make clear that she rated the Student as making "some" progress on the two goals in question *with the use of visual supports*. She believed the Student needed visual supports to produce narratives that met the goals' requirements and that is what the February 2013 IEP goals provided for. However, the IEP team agreed to amend the goals at Ms. Tierney's request to remove visual supports. The Student did not make progress at producing the narratives in question without them, hence the new baseline of 0%. Ms. Tierney is correct that no progress was made on the prior goal as amended. However, the new baseline of 0% was correct, contrary to the Parent's assertion. Parent's Closing Brief at 40.

125. The Parent also criticized the SLP for not answering an email inquiry from Ms. Tierney in the fashion that Ms. Tierney wanted it answered. This occurred in March 2014, during development of the new IEP, so it is relevant here. Ms. Tierney sent the SLP an email containing 21 questions about the Student's communication goals,<sup>25</sup> five of which asked the SLP to provide three to six examples. P-24:2.

126. The SLP responded, sharing with Ms. Tierney a verbatim transcript of eight recent narrative language samples the Student had produced in her work with him, each of the samples fairly lengthy. She explained her notations on the samples showing where she provided verbal prompts. She explained that she used Visualizing and Vocalizing cue words and Story Grammar Markers, both of which she knew were familiar to Ms. Tierney. She stated that she believed the samples would answer most of Ms. Tierney's questions. Regarding Ms. Tierney's questions about what was meant by "cohesive tie," "so," and "because," the SLP provided Ms. Tierney with a link to a Wikipedia page that explained cohesive ties in language accessible to a lay person. P-24:1; Testimony of McCormick.

127. Ms. Tierney replied the same day, asking for an answer to each of the specific questions she had posed in her previous email. P-24:1. The SLP replied that she must balance the Parent's right to receive a reasonable amount of information with her right to do her job and her duty to serve all the children she works with. She stated she was unable to provide individual detailed responses to every question Ms. Tierney sent, but she believed the information she provided in her email, and on previous occasions, sufficiently informed Ms. Tierney and the Parent about the Student's program and its implementation. *Id.*

128. This email exchange occurred after the SLP had discussed the Student's present level of performance in Communication at the March 3, 2014 IEP meeting, and before she discussed the successor IEP's Communication goals at the March 28<sup>th</sup> meeting. J-29. Neither Ms. Tierney nor the Parent asked any questions about the Communication goals at the March

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<sup>25</sup> This includes five questions in the introductory paragraph of the email, plus 16 numbered questions below the introductory paragraph. P-24:2.

28<sup>th</sup> meeting (which was recorded; the March 3<sup>rd</sup> meeting was not), nor raised any objection to them. J-29.<sup>26</sup>

129. The successor IEP of March 2014 discontinued the first communication goal described above, because it had been met. It continued the second and third communication goals because the SLP believed the Student had made enough progress in his narrative skills to move on to producing narratives in response to auditory-only information, without visual supports, in the coming year. J-11:5, 11-12; J-13:17-18; Testimony of McCormick. The content of the Communication goals is found appropriate based on the information provided by the SLP concerning the Student's past performance and his needs going forward. It was appropriate to continue the same goals, but in the coming year have the Student rely solely on auditory information without visual supports. However, the almost total failure to measure his prior performance on the scale of 0% to 80% -- either with or without visual supports -- or to measure his use of "so" and "because," which were central to the goals, makes it impossible to know whether the baseline and target numbers in the next year's goals are appropriate.

#### Motor Goals

130. The Student's February/May 2013 IEP had four goals in motor skills.

131. *Typing (Motor #1)*. The Student was to type from a visual model using both hands, improving from one or two words per minute to six words per minute in 75% of opportunities. J-9:6; J-9:12.

132. By April 2013, the Student was using two hands to type from a visual model at a rate of four words per minute, but did not recognize his errors in spacing, capitalization, and punctuation. During instruction at the weekly keyboarding club he used two hands, but did not generalize this to other environments. By May 2013, the Student was averaging three words per minute, and required maximum cueing to use correct spacing and capitalization. However, he now required only minimal cueing to use both hands when typing. By November 2013, his speed had slowed slightly to two or three words per minute, but he was more independent, needing less verbal prompting for spacing and the use of Spell Check. He was enjoying an online typing instruction program. By the end of the IEP year in February 2014, his speed was three or four words per minute on a keyboard, and four or five on an iPad. He still needed prompting for accuracy. The OT advocated that they move to iPad typing since the Student was better at that and had made minimal progress at keyboarding with two years of instruction. The Student was rated as making "some" but not "significant" progress on this goal through February 2014. J-13:1; P-11.

133. *Shooting basketballs (Motor #2)*. The Student was to improve his ability to make baskets on a nine foot hoop from one out of eight shots, to five out of eight, in 75% of opportunities. J-9:12.

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<sup>26</sup> The only question they asked concerned why SLP services were listed in two different ways on the service matrix. The SLP explained that one entry was for her consultative services, and the other entry was for her direct services with the Student. J-11:20; J-29.

134. The Student's shooting ability increased to two and then three successful shots out of eight, but remained at that level (not meeting the goal of five out of eight) from November 2013 through February 2014, the end of the IEP year. He was rated as making "little or no progress" at the beginning and end of the IEP year, and "some" progress in the middle. J-13:2. As to why this occurred, the therapist noted the Student was afraid of getting hit by the ball after shooting, even when he was the only student playing. By the end of the IEP year, the therapist noted the Student was agreeable to shooting baskets, but it did not appear to be a preferred activity. *Id.*

135. *Sit ups (Motor #3)*. The Student was to improve from doing seven sit-ups in one minute to doing 15 sit-ups in one minute, in 75% of opportunities. J-9:13.

136. The Student, who has a degenerative muscular disease, declined in core body strength and endurance over the course of the IEP year. J-11:6-7. He decreased from doing seven sit-ups in a minute, to three, and finally to none. Early in the IEP year, the therapist shifted to core-strengthening activities and games that the Student preferred over sit-ups. He was rated as making "little or no progress" on the sit-up goal throughout the year. As to why this occurred, the therapist noted it was a challenging and non-preferred task for the Student, in addition to his declining strength. J-13:2-3.

137. *Catching ball (Motor #4)*. The Student was to catch a small ball without trapping it against his body, improving from 20% success to 80% success in 75% of trials. J-9:5, 13.

138. The Student did much better on this goal. By April 2013 he was able to catch the ball 80% of the time in 50% of the trials. By May 2013, the Student had met the goal. Ms. Tierney correctly criticized this goal report for not selecting a revised or new goal when the Student met the goal only three months into the IEP's term. Testimony of Tierney. The progress report does state that the therapist would work on generalizing the skill from the therapy room to the playground and P.E. However, that was written in April 2013, only two months into the IEP's term. J-13:24. There is no indication whether this extension of the goal needed to be worked on for the remainder of the IEP's term, or whether the Student had quickly generalized the skill.

139. In February 2014, a District physical therapist (PT) conducted a gross motor assessment of the Student for the present levels of performance in the new IEP. She found the Student had full range of motion in all major muscle groups, including the ability to assume a kneeling position with full knee, hip, and ankle flexion. He had full shoulder flexion when playing basketball, and full shoulder extension on a therapy swing reaching backwards. Regarding muscle strength, a formal manual muscle test was not done, but the Student could hold a hands-and-knees position, raising one arm at a time for four seconds. He was also able to bounce-pass a basketball with enough force to pass to a partner at least 10 feet away. He was able to run with a smooth arm swing, and with appropriate trunk lean and knee flexion. Although he had a slightly wide base of support in his run, it was functional and adequate to participate in P.E. and classroom activities with peers. Regarding mobility and safety at school, the PT found the Student able to access his school environment, including getting in and out of his classroom chair, moving in the hallways, walking up and down stairs, and opening and closing doors. J-10:4-6; J-11:5-7.

140. It was an OT, not a PT, who delivered the Student's motor skills services under the February/May 2013 IEP. J-6:20; J-9:20. The OT provided a report for the present levels of performance in the new IEP, as follows: The Student has a diagnosis of Becker Muscular

Dystrophy and a decrease in functional strength was noted since his last IEP. His endurance for physical activities had decreased and he was often unable to participate in P.E., recess, occupational therapy, and other physical school activities. He seemed to tire more rapidly when running. However, the more he preferred an activity, the longer he was able to sustain participation, such as a Red Light Green Light game vs. simply running laps. The Student always had the option to take breaks during physical activities. In January 2014, the Student's pediatrician reported he was generally well, though he had episodic knee and hip pain unrelated to excessive activity. The Father requested that the Student work on his standing posture. J-10:5; J-11:6.

141. The IEP team decided that because the Student's motor skills appeared to have plateaued or were decreasing, the OT would provide primarily consultative services to other school staff, rather than direct services to the Student. Her consultation would support his other IEP goals and functional performance in the school environment, instead of trying to build more strength by practicing motor skills. The OT would instead focus on maintaining the Student's physical activity by providing opportunities to participate in enjoyable physical activities. Exercises developed by the OT and PT (and attached to the IEP) would be integrated into the Student's morning routine in the special education classroom.<sup>27</sup> These exercises could assist with the Student's standing posture (as the Parent had requested). The OT and PT would monitor the Student's progress on these exercises and would be available for consultation. The PT would consult once a month regarding implementing daily routines that would allow the Student continued access to his school environment. J-10:5-6; J-11:6-7.

142. For these reasons, the three gross motor goals were not carried forward to the new IEP. Instead of a goal focused on typing speed, the OT would collaborate with the special education teacher on two written language goals where the Student had the option of typing his work (these are discussed in the section on Written Language Goals, above). Concerning assistive technology, the new IEP stated the Student did not use assistive technology (AT) at this time, but would benefit from the use of word prediction software. J-11:3. That software was installed by a District AT consultant during development of the new IEP. J-10:8; J-11:9. Also during development of the new IEP, the IEP team conducted a web-based speech-to-text trial to determine whether the Student needed voice-recognition software to produce written work. The trial would also be used to develop a baseline for measuring progress. J-10:8-9; J-11:9-10.

143. Ms. Tierney testified she did not know why the Student's motor skill goals were discontinued in the new IEP. Testimony of Tierney. However, the reasons for this were set forth in the draft IEP of February 2014 and the final IEP of March 2014. J-10:4-6; J-11:5-7. Ms. Tierney also participated in the meeting at which the reasons for discontinuing these goals were discussed. P-17:16. There is no evidence the Parent or Ms. Tierney requested that motor skills goals be added back into the new IEP, or that one of his medical providers be invited to an IEP meeting. The PWNs that resulted from the spring 2014 IEP meetings listed numerous

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<sup>27</sup> The IEP states that a copy of the document setting forth these exercises is attached to the IEP. J-11:7. However, there is no such document attached to the copy of the IEP that is in the record. J-11. The Parent has not challenged the absence of such a document. It will therefore be assumed the Parent received it at the time, and that its absence here was the result of a copying error in compiling the exhibits.



proposals from the Parent and Ms. Tierney and stated whether they were accepted or rejected. None of these proposals concerned motor skills. J-10:23-24; J-11:22-23. At the hearing, the Parent offered no evidence from a medical doctor, PT, or OT about the student's motor skills needs. Instead, he criticized the District for not having someone with expertise about BMD on the IEP team (Parent's Closing Brief at 2, 38-39) and cross-examined District staff on their knowledge about the disease. In spring 2015, the Parent declined permission for the District to evaluate the Student in the area of Adaptive P.E., which the District had proposed as part of his triennial reevaluation. D-66:15.

#### **Other provisions of the March 2014 IEP**

144. While the Issues statement in this case generally challenged the appropriateness of the March 2014 IEP, the Parent's Closing Brief addressed only the present levels of performance, the annual goals, and assistive technology, all of which have been discussed above.

145. The Parent also challenged the educational placement of the March 2014 IEP as inappropriate. The Student's educational placement changed somewhat in the March 2014 IEP. His time in the general education setting decreased slightly from 21.5% to 17.3%, and his special education time increased proportionately. The increases in his special education time came in Reading and Written Language. They each increased from the previous 300 minutes per week to 375 minutes per week. There was a decrease in his Social/Behavior instruction time, from 200 minutes per week to 150 minutes per week. As discussed above, he no longer received the direct motor skills services he had previously received. J-9:20; J-11:20.

146. The Parent's Closing Brief did not mention any of these changes in the Student's educational placement, and did not challenge any particular aspect of his placement. Rather, the Parent argued generally that because the District did not know why the Student failed to make progress, there was no way for the District to know if it was selecting an appropriate placement. Parent's Closing Brief at 43.

#### **ESY for summer 2014**

147. The District knew the Student spent his summers in San Diego. Testimony of Parent, Hanson. The Parent did not request ESY for summer 2014, and had not requested it for summer 2013, either. In March 2013, a PWN following an IEP meeting stated that summer school was suggested for 2013, "but not an option for the family as they are in San Diego for the summer". P-4:2.

148. The next year, emails in March 2014 between the Parent and Ms. Tierney show they were fully intent on the Student spending his summer in San Diego. They were already planning his tutoring schedule with Ms. Tierney. D-39; D-40:2. The Parent never requested an ESY proposal nor gave any indication to the District that he was interested in one.

149. In 2012, the Parent did request an ESY proposal in an email to a special education teacher. P-23:2. He alleges he received no response. Testimony of Parent. That year, he and

the Student spent the summer in San Diego, as usual. Testimony of Parent. The 2012 request was made two years before the summer at issue here.<sup>28</sup>

### **Creation of Emerald City School: Credibility Determinations**

150. The Parent and Ms. Tierney together created a new private school for special education students that opened in September 2014. The Student began attending at that time. The school is called Emerald City School (ECS). It is wholly owned by the Parent. The Parent seeks tuition reimbursement in this proceeding for the Student's attendance at ECS.

151. The Parent testified that until the final IEP meeting on March 28, 2014, ECS was only a back-up plan in case things with the District went south. If things had improved at the District at that meeting, which he did not expect would happen, he would not have gone forward with opening ECS, he stated. He would not have rejected the March 28, 2014 IEP if it had been a good IEP. Testimony of Parent. His closing brief alleges he went to the March 28<sup>th</sup> meeting "in good faith with the intent to give [the District] one more chance to propose a program for [the Student]" that was appropriate, and he "had not decided to finally go forward with an alternative placement for [the Student] until after the results from that meeting were considered." Parent's Closing Brief at 17. Ms. Tierney testified to similar effect. D-59; Testimony of Tierney.

152. The weight of the evidence strongly contradicts the Parent's and Ms. Tierney's assertions on these matters. Their credibility as witnesses is diminished as a result. Because negative findings on credibility should not be made lightly, the evidence is reviewed in detail. The evidence will also be used in weighing the equities to determine what, if any, remedy will be awarded.

153. Creation of the private school was well underway before the 2014 IEP process began. In fact, it was underway before the 2013 IEP process was completed the previous year. The District knew none of this.

154. In 2013, four meetings were held to develop the IEP, on February 11, March 11, April 22, and May 6, 2013. J-6; J-7; J-8; J-9; Testimony of Spencer. Before the March 11, 2013 IEP meeting, the Parent and Ms. Tierney were already viewing properties for the new school. On that date, Ms. Tierney wrote to the Parent that she "strongly advocate[d]" going forward with a new school, stating: "I would say that if you can get a green lite [sic] on that property as soon as possible [sic]. We should move forward with hiring a director." D-4. The Parent explained that in spring 2013, he and Ms. Tierney had met with an individual in Sacramento who had founded two special education schools in San Diego. That individual advised him that finding a location for a new school is what takes the longest. Therefore, the Parent had already retained a commercial real estate broker and started looking for property in Seattle. The phrase "that property" in Ms. Tierney's March 11, 2013 email referred to a property located two blocks from

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<sup>28</sup> Also in 2012, a private educational consultant wrote that the Student should receive ESY. P-1:3. There is no evidence the consultant's report was ever provided to the District. The Student's school principal, Kari Hanson, has been on his IEP team from that time to the present (though she has a different title now). Ms. Hanson never saw the consultant's report until it was provided in discovery for this due process hearing. Testimony of Hanson.

the District's headquarters (in the SODO area of Seattle). The Parent ultimately chose a different property, in the South Lake Union area of Seattle. Testimony of Parent.

155. Later in March 2013, the Parent's education-law attorney wrote to his paralegal that the Parent was exploring private schools in Seattle. He further wrote: "He [the Parent] would like to work with us on making the District responsible for funding [the Student's] placement." D-5:1.<sup>29</sup>

156. By September 2013, Ms. Tierney informed an educational "headhunter" in Boston named John Faubert, with whom she had previously discussed the matter, that she and the Parent were moving ahead to start the school in September 2014. She asked to meet with Mr. Faubert in Boston to discuss candidates for the school's administrator position. D-7; Testimony of Tierney.

157. By October 2013, an architect had been hired and floor plans were being made. Ms. Tierney suggested that they hire the school's director to start in January 2014. The director could home-school the Student in the morning and work on the new school in the afternoon, prior to the school opening its doors in September 2014. D-8. Also in October 2013, Ms. Tierney worked with a consultant on figures for start-up costs, operational costs, and an organizational flow chart. D-9.

158. In December 2013, the Parent directed Ms. Tierney to broaden their efforts to recruit an executive director, since no suitable candidate had yet been found. D-10. Also in December 2013, Ms. Tierney reported to the Parent about her discussions with OSPI's Office of Private Education concerning the early-May 2014 deadline to submit the school's application, and the July 2014 deadline for inspections of the school building. D-11; D-52:21.

159. In December 2013 or January 2014, Ms. Tierney conducted a telephone interview of Jeremy Turner, who was ultimately hired as head of school (earlier called the "director" or "executive director" position). Mr. Turner recalls Ms. Tierney saying that she and the Parent had been talking "for a couple years of him creating a school to meet the needs of his son and other students within the Seattle area." D-58:9. She told Mr. Turner they had been discussing creating such a school for "two or three years". *Id.* Shortly thereafter, sometime in January 2014, Mr. Turner had a telephone interview with the Parent. Mr. Turner recalls the Parent saying the building for the school was already under construction, and that he wanted to "give something back to Seattle" by opening the school. D-58:11.

160. In early-January 2014, Ms. Tierney reminded the Parent to talk with his education-law attorney about getting reimbursement from the District for the Student's private school tuition next year (the 2014-2015 school year). D-13.

161. In mid-January 2014, Ms. Tierney sent the Parent draft documents criticizing the Student's alleged lack of progress for the Parent to review before she sent them to the District. She wrote to the Parent: "I am pretty strident here about the lack of progress. . . . If you are

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<sup>29</sup> This and other attorney communications cited herein were not claimed as privileged, perhaps because the Parent forwarded them to Ms. Tierney.

considering asking for funding, I am thinking that we need to be very clear about what is wrong with his program." D-14.

162. Also in mid-January 2014, the Parent reported to Ms. Tierney that he had a letter of intent on a lease for the school property that he thought was workable. He stated they should assume the lease will be consummated. He asked what impact there would be on the school's licensure if construction was completed by June 30<sup>th</sup> instead of late-August 2014. He stated they should immediately start vetting candidates for executive director to start work in May or June 2014. D-15.

163. Later in January 2014, Ms. Tierney reported that the pool of potential executive director candidates had been narrowed to four people. She asked the Parent if they should contact the potential candidates now, or wait until the lease was finalized. The Parent replied that she should begin contacting the candidates now. He said they would be finalizing the letter of intent the next week. (In testimony he explained that the "letter of intent" in this email was for the lease.) This email exchange also discussed writing the school's handbook, setting up its website, and the engagement of two University of Washington students (from the Masters in Business Administration program) to develop the school's marketing plan. D-16; D-28; Testimony of Parent.

164. In late-January or early-February 2014, Mr. Turner, who lived in Connecticut, met Ms. Tierney in Boston for an in-person interview for the head of school position. D-58:11.

165. All of this happened before the first meeting was held to develop what became the March 2014 IEP. That first meeting occurred on February 12, 2014. J-10:1. Before the next IEP meeting on March 3, 2014, email communication shows the Parent and Ms. Tierney discussing who would serve as the Student's reading, writing, and math tutors for the remainder of the current school year after the Parent withdrew the Student from the District part-time. D-20; D-23 They also received advice via email from one of those potential tutors about reading the section of the IDEA on parents obtaining reimbursement from school districts for private school. D-19.

166. The Parent cites an email from Ms. Tierney to a potential tutor as showing that plans were still uncertain as of February 2014. Parent's Closing Brief at 16. The potential tutor mentioned that she had another employment option besides the possibility of tutoring the Student in spring 2014. Ms. Tierney wrote: "The plans for [the Student] are very much in a state of flux and may move in a different direction than our original thoughts yesterday. We would not want you to turn down employment." D-20:1. This email had nothing to do with creation of the new school. The full email chain shows this. The email concerned *who* would tutor the Student for the remainder of the school year *before* the new school opened. D-20. That is what was in flux, not the creation of the new school.

167. The following events occurred between the second IEP meeting of March 3<sup>rd</sup>, and the final IEP meeting of March 28, 2014.

168. The evening after the March 3, 2014 IEP meeting, the Parent wrote to Ms. Tierney and his education-law attorney about a new strategy to get the District "on the hook" for payment of ECS tuition. The District had indicated that fatigue from the Student's degenerative disease might be impacting his school performance. The Parent wrote as follows: If the District

attributes lack of learning to the Student's fatigue and not to the District's own efforts, it "might be quite bad for them and good for us." If the doctors agree that his fatigue is the factor and it will get worse (which the Parent hoped was not the case), then maybe a traditional school and school day does not meet the Student's educational needs. Perhaps he needs three hours of instruction in the morning, two hours of down time from 12:00 to 2:00 p.m., then three hours of instruction from 2:00 to 5:00 p.m. ECS could provide that schedule. The District could not. "Shazam – SPS [the District] is on the hook for payment of private education." The Parent asked his attorney to comment on the idea, and stated: "they [the District] may be less than clever unless I am missing some trap door in the law." D-25. Ms. Tierney responded: "I completely agree! They have started down a very slippery slope!" *Id.*

169. On March 4, 2014, the Parent and Ms. Tierney exchanged emails about the search for tutors for the remainder of the current school year, because they planned to withdraw the Student part-time from the District soon. The Parent expressed urgency to get this set up, and suggested a start date of April 1<sup>st</sup> for the tutoring. D-26. Later that day, Ms. Tierney wrote to a potential math tutor, with a copy to the Parent, as follows: "we are moving forward with plans to remove [the Student] from part of his school day for individual work, with a likely start date around April 1<sup>st</sup>. . . . He will be attending the new school that we are setting up in the fall. With that in mind, we would like to start him in the curriculums that he will use next fall for this one-to-one work." D-27.

170. On March 5, 6, and 7, 2014, Mr. Turner came to Seattle for an extended job interview and to tour the city. He visited the new building under construction in which ECS would be located. He saw the interior of the school laid out inside the building, but the sheetrock had not yet been installed. Mr. Turner was told that the school was under a lease for eight years, so Mr. Turner felt secure that his employment would not be short-term. Testimony of Turner; D-58:13-14.

171. On March 9, 2014, the Parent offered a consulting position with ECS to an educational consultant, and accepted the pay rate proposed by that consultant for 40-plus hours to be delivered over three to five months. The Parent wrote: "Each week, this ambitious effort gets closer to opening day." He instructed the consultant to work on marketing, building awareness of ECS in the community, public relations, making connections with professionals, creating a tuition schedule, website, logo, collateral materials, a mission statement, and recruiting students. D-28.

172. On March 10, 2014, the Parent offered the job of head of school to Mr. Turner in a telephone conversation. The Parent then sent Mr. Turner an employment contract to sign. Testimony of Turner.

173. Also on March 10, 2014, the Parent and Ms. Tierney celebrated Mr. Turner's selection by email. Ms. Tierney wrote: "Jeremy is onboard. He will lead your school and make such a difference for [the Student] and so many other kids." The Parent responded that they had an agreement in principle subject to checking references, and "Jeremy will be great fit for our School . . . I trust you have shared with Jeremy that once we deliver in Seattle that San Diego might be the next horizon." D-29. On the same day, the Parent contacted numerous people by email, asking for a standard letter for at-will employment that he needed to get out by March 12, 2014. (It appears he may have gotten it out that same day, March 10<sup>th</sup>, because that is the date on the original draft of the contract he sent to Mr. Turner. D-51:1.) The Parent also asked for a

referral for a health insurance broker to formulate a group plan for the school employees. D-30. By March 12, 2014, power and plumbing were going into the ECS space in the new building. Testimony of Parent.

174. On March 12, 2014, Mr. Turner signed the employment contract. D-51. The Parent did not include a contingency in the contract that it would be voided if the District offered an appropriate IEP for the Student later that month. When Mr. Turner signed the contract, he withdrew his candidacy from another private school for which he was the finalist, and to which he thought he would be going until the ECS offer. D-58:14. Mr. Turner's wife would have to leave her job in Connecticut for Mr. Turner to accept the ECS position, and she did so. Mr. Turner's formal employment was not to begin until May 1, 2014, but his work began immediately. Testimony of Turner; D-58:14. On March 12, 2014, the Parent wrote to Ms. Tierney: "I am talking with Jeremy [Turner] to make sure he understands that despite the distance presently he has a leadership role and that [the ECS consultant hired on March 9<sup>th</sup>] will essentially report to him on start up activity." D-31. Mr. Turner spent the month of April 2014 in Connecticut preparing the ECS licensure application, which was submitted to OSPI on May 5, 2014. D-52; D-58:14.

175. On March 14, 2014, Ms. Tierney proposed to the Parent that they now formalize her role with ECS. She requested the title of Director of Curriculum. D-32. The title she was ultimately given was Director of Curriculum and Instruction, working 25% time. D-58:16. Ms. Tierney began her employment August 25, 2014. Prior to that time, she was paid as an hourly consultant for her work in creating ECS. D-58:16.

176. On March 15, 2014, the Parent and Ms. Tierney emailed about using Dartmoor School for the Student's part-day instruction beginning the next month, instead of hiring individual tutors as previously planned. D-33. Dartmoor provides 1:1 instruction for its students. J-22.

177. On March 20, 2014, Mr. Turner wrote to the Parent advocating that Ms. Tierney be hired as Director of Curriculum at 25% time, plus additional day-rates to provide faculty development and training approximately once a month. Mr. Turner also provided his recommendations on changing certain school budget items, and he attached a revised budget. D-35; Testimony of Parent.

178. Also on March 20, 2014, the Parent dramatically reversed his prior insistence that new goals could not be discussed before completing discussion on prior goal progress. The Parent had insisted on this sequence at the February 12<sup>th</sup> IEP meeting, walking out of the meeting over the point. He reiterated his insistence on this sequence in a February 27<sup>th</sup> email to the District. P-24:3. However, despite the fact that the team had not yet begun discussing prior-goal progress in Reading, Written Language, Math, or Social/Behavior Skills, the Parent wrote on March 20<sup>th</sup> that he wanted to move on to discuss the new IEP goals at the March 28<sup>th</sup> IEP meeting: "Based on the meeting of March 3 and subsequent dialogue, we believe that it is best to move forward with a discussion of the new proposed IEP goals. Please advise your team and Bonnie [Tierney] and I will be prepared to discuss with you on Friday, March 28." D-36. The Parent candidly explained at the hearing why he needed the IEP to be completed at the March 28, 2014 meeting. His counsel had advised that he could not object to the new IEP and request a different placement until after the new IEP was adopted and the stay-put order from his previous due process hearing request was lifted (by him withdrawing that request). Only

then would the new IEP be put into effect and the Parent have standing to take legal action against it. Testimony of Parent; Parent's Closing Brief at 46.

179. On March 21, 2014, Ms. Tierney wrote to the Parent asking about her role at the March 28<sup>th</sup> IEP meeting, and listing several questions she could raise at that meeting about the IEP. She asked if she should bring up her concerns, or let the IEP be "incorrect." She ended the email with this question: "At the end of the meeting, are you going to refuse to sign saying you want to think about it, or are you going to suggest the alternative we are developing?" The Parent responded that her questions about the IEP were good ones. He instructed as follows: "We need to go on record of expressing our concerns but not the [sic] belabor the point." D-37. On March 23<sup>rd</sup>, he reiterated this and concluded:

The point is we do not at this point want to persuade, we simple [sic] accept that we disagree and move forward crisply.

What is KEY, is that we complete all aspects of the IEP on March 28. We will then take it under advisement. Monday morning we will reject proposed IEP and request alternate program.

D-38.

180. On March 26, 2014, Ms. Tierney wrote to Dartmoor School: "I just want to make sure we are on the same page here with your being willing to do specific curriculum with [the Student] that will provide continuity with his summer and his new school program in the fall." D-40:2.

181. Also on March 26, 2014, Ms. Tierney wrote asking the Parent: "Are we waiting to finalize with them [Dartmoor] until after the IEP meeting Friday, or do you want to go ahead and finalized now when we get the curriculum and hours nailed down?" *Id.* The Parent replied "I think we need to finalize now, timing is issue [sic]." D-40:1. They then decided that starting at Dartmoor after spring break would be better for the Student than starting April 1<sup>st</sup>. *Id.*

182. On March 27, 2014, Ms. Tierney sent the Parent the words she proposed to say at the next day's IEP meeting to get the District to skip over discussing the Student's present levels of performance on his prior goals and skip over discussing his new goals, in the interest of time, to make sure they completed the IEP in the time allotted. The Parent replied: "Need to move quickly through this and wrap up IEP by tomorrow[.] I will let you lead." D-41.

183. The March 28, 2014 IEP meeting went as scripted by the Parent and Ms. Tierney, except that the District members of the team insisted on discussing the present levels of performance and the new goals. During the meeting, the Parent and Ms. Tierney made 15 references to needing to complete the IEP at that day's meeting and/or their wish to move on from a topic and not discuss it. The District members of the team made no references of this nature. J-29. The Parent did this because he had a strategic interest in having the IEP finalized that day so he could reject the IEP and place the Student at Dartmoor shortly thereafter.

184. The Parent made allegations about what happened at the March 28, 2014 IEP meeting that are untrue and that further undermine his credibility. He testified that at that meeting, the District integrated discussion of old and new goals, as was their practice. Testimony of Parent. The recording of the meeting shows this is not true. Discussion of the Student's present levels

of performance on his prior IEP goals was completed in all service areas before any discussion of new goals began. J-29. Moreover, at the prior IEP meeting on March 3, 2014, prior-goal progress had been discussed exclusively, in compliance with the Parent's wishes. Testimony of Hanson, Spencer.

185. Another untrue allegation the Parent made about the March 28, 2014 meeting was as follows. He alleged, in an April 2014 letter from his counsel to the District, that at that meeting the District stated the IEP they had proposed was *not* appropriate for the Student, and acknowledged that the Parent had sought alternative placements within the District with "no success." Therefore, "[a]s a result of the District's recommendations," the Parent had chosen an alternative placement, Dartmoor School. J-17 (italics added).

186. As set forth above, the move to Dartmoor had everything to do with placing the Student in the curricula he would be using at ECS in the fall, to provide continuity, and nothing to do with the District's March 28<sup>th</sup> recommendations.<sup>30</sup> The move to Dartmoor (or other private tutoring) was planned long before the March 28<sup>th</sup> meeting. Elsewhere, the Parent stated that at the March 28<sup>th</sup> meeting, "the District representatives indicated they did not have a placement that would meet the Student's needs" and that "all agreed" the alternative placements within the District were inappropriate. J-20:4. He went further in his closing brief, asserting that at the March 28<sup>th</sup> meeting, District representatives stated "*[the Student's] lack of progress was such a concern*" that they recommended a change of placement. Parent's Closing Brief at 12, 38 (italics added). None of these allegations about the March 28<sup>th</sup> meeting is true, as shown in the recording of the meeting, which was summarized in an earlier section of this decision. During that meeting Ms. Nakamura and other team members pleaded with the Parent to reconsider his 2013 rejection of placements in which the Student could receive his IEP services not in 1:1 isolation with adults, but in a community of students with similar needs. J-29.

187. After the March 28<sup>th</sup> IEP meeting, later on that same day, the Parent signed the employment contract that Mr. Turner had signed on March 12<sup>th</sup>. D-51; Testimony of Parent. The Parent testified that the lease for the school property was also not signed until after the March 28, 2014 meeting. Testimony of Parent. (He did not place the lease or the letter of intent for the lease in evidence.) The Parent further testified as follows: He was not committed to ECS until the documents for these two major financial obligations were signed. He did not sign them until after the March 28<sup>th</sup> IEP meeting because he wanted to see if things could work out with the District. Through that date, he had spent only \$20,000 to \$30,000 on ECS, which is not a lot compared with his net worth of over \$50 million. *Id.* Ms. Tierney likewise alleged she did not know whether the new school would move forward until the Parent had signed Mr. Turner's contract and the lease. Testimony of Tierney.

188. It is found more likely than not that the Parent deliberately delayed signing the Turner employment agreement until after the March 28, 2014 IEP meeting because the Parent knew the employment agreement was an important document that was likely to be discoverable. (By contrast, it is evident from the content of his emails with Ms. Tierney that he did not think about

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<sup>30</sup> The untruthfulness of this allegation is highlighted by the fact that at Dartmoor School (and at ECS), the Student was taught 1:1 – the very setting that District team members wanted to change by proposing a change in the Student's placement.



the fact that the emails would be discoverable as well.) There is no credible reason for the Parent's delay in signing; all prior communications from the Parent indicated he was anxious to have the executive director (later called head of school) hired as soon as possible. Mr. Turner received such assurances on or before the date he signed the contract (March 12<sup>th</sup>) that he withdrew his candidacy from another private school at that time. Payment of Mr. Turner's salary would begin on the same date (May 1<sup>st</sup>), whether the employment contract was signed March 12 or March 28, so that was not a reason for the delay. It is found that the Parent delayed signing the employment contract not because he had any degree of an open mind about the March 28<sup>th</sup> IEP meeting, but because he wanted to make it appear that he did. His emails show he was 100% committed to rejecting the IEP prior to the meeting.

189. On or about April 3, 2014, the Parent and Ms. Tierney gave oral notice to a District representative that the Parent would be removing the Student to a different placement for the majority of each school day. Testimony of Hanson; District's Prehearing Brief at 4. On April 9<sup>th</sup> this notice was given in writing. Ms. Tierney wrote to the District that effective April 21, 2014 (the day after spring break), the Student's attendance at his District school would be reduced to 2:00 to 3:30 p.m., Monday through Thursday, and he would otherwise attend Dartmoor School. J-16. The reason the Parent chose to continue some attendance at the elementary school was for socialization, since the Student would be instructed 1:1 at Dartmoor. Testimony of Parent.

190. On April 17, 2014, the Parent withdrew his prior due process hearing request, which had the effect of lifting the stay-put order that had prevented the new IEP from going into effect. His due process hearing request was dismissed that day.<sup>31</sup>

191. Also on April 17, 2014, the Parent's attorney wrote to the District confirming the earlier notification of the Parent's intent to place the Student at Dartmoor effective April 21<sup>st</sup>. The letter asserted the District's IEP was inappropriate and requested reimbursement for Dartmoor's tuition. J-17. The Student received instruction at Dartmoor from April 22 through June 18, 2014. During this period, he attended his District elementary school for part of the afternoon, four days a week.

192. On May 5, 2014, ECS submitted its licensing application to OSPI, stating ECS "is currently in the final construction phase and is slated for completion by the middle of June 2014." D-52:21. The application included teacher credentials, the school's daily schedule, the school handbook, and the school's curriculum statement. D-52.

193. On June 3, 2014, the Parent's attorney mailed the due process hearing request in the present case. J-20. (It was received by the District on June 6, and by OSPI on June 9, 2014).

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<sup>31</sup> The dismissal order in the prior due process hearing proceeding, OSPI cause no. 2014-SE-0007, was not in evidence and the parties did not have information at the hearing to stipulate to the date of dismissal. The parties agreed to allow the ALJ to take official notice pursuant to RCW 34.05.452(5) of the date of the dismissal order based on OAH records. The dismissal order in that cause number was entered on April 17, 2014.

194. On August 22, 2014, the Parent, in a letter from his counsel, informed the District that the Student would be placed at ECS in the fall and requested that the District pay the Student's ECS tuition. J-19.

195. On September 3, 2014, ECS opened as scheduled, with the Student as the school's only student. Another child enrolled in approximately January 2015,<sup>32</sup> and a third child in March 2015. D-58:17; D-60:11. If ECS reaches its full capacity of 40 students within five to six years, the Parent could reach the break-even point on his investment on a long-term basis. He does not know how long it will take to reach the break-even point on an operating basis; he testified that he was going to have a meeting about this matter soon. Testimony of Parent.

196. One of the alleged reasons the Parent rejected the March 2014 IEP was that it was developed without input from medical personnel with expertise in BMD. Parent's Closing Brief at 2, 38-39. This allegation is not credible as a reason for the Parent's rejection of the IEP. When the Parent created his own school, with the Student as the only initial student, he took no steps whatsoever to provide information on BMD to the staff. The sole teacher at the school was given no information about BMD despite the fact that she taught the Student P.E. every day for the first half of the school year (as well as academics), and continued teaching him P.E. some days of the week in the second half of the school year (as well as academics). D-60:12, 14-15, 22. At her deposition near the end of a full year of teaching him, she did not know whether the Student had Duchenne Muscular Dystrophy or the other type, whose name she did not know. The only guidance she was given on addressing the Student's muscular dystrophy in his schooling was to let the Student be the leader when doing physical activity, because he knows his limits. D-60:22.<sup>33</sup> The only records about the Student that she read were the March 2014 IEP and Ms. Tierney's evaluation of July 2014, neither of which contains information from

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<sup>32</sup> The ECS teacher testified the second student arrived after New Year in January 2015. D-60:11. The ECS head of school testified it was in December 2014. D-58:17.

<sup>33</sup> The ECS teacher testified at her deposition as follows regarding her knowledge about the Student's muscular dystrophy (she did not testify at the hearing):

Q. What about his medical disabilities?

A. Muscular dystrophy.

Q. Any particular type of muscular dystrophy?

A. Yes. I think it's – there are two types, and he's Duchenne or the other one. I can't remember the exact type.

Q. Have you been provided any information about his muscular dystrophy?

A. To let [the Student] be the leader when doing physical activity, he knows his limits.

Q. Beyond that, do you know anything about how his muscular dystrophy might manifest itself in regard to his education?

A. I know that his dad as well as other former educators – Bonnie [Tierney], for example – they don't know if his disabilities stemmed from MD or if they're affected more by his MD or what.

Q. And how do you know that?

A. I've spoken with them about it.

Q. Beyond that, have you been provided any other information or training in regard to [the Student's] muscular dystrophy?

A. No.

D-60:22.

a medical doctor. D-60:17; J-4; J-11. There is no evidence any medical personnel met with the school staff to help them develop the Student's Personal Learning Plan (the school's equivalent of an IEP), which contains all of his annual goals. The teacher testified that only three people were involved in developing the Personal Learning Plan: herself, Ms. Tierney, and Mr. Turner. D-60:17. For these reasons, the Parent's allegation that he rejected the March 2014 IEP in part because it was developed without input from medical personnel with expertise in BMD is not credible.

197. Another reason the Parent gives for rejecting the March 2014 IEP is an alleged lack of appropriate baseline measurements in the goals. Parent's Closing Brief at 39. However, the ECS goals written by Ms. Tierney and two ECS staff members (D-60:17), *and signed by the Parent*, contain no baselines whatsoever. J-25.<sup>34</sup> For this reason, a lack of goal baselines is not credible as a reason the Parent rejected the District's March 2014 IEP.

198. The Parent argues he is wealthy enough so that obtaining a mere \$25,000 per year in tuition reimbursement (the cost of ECS tuition) was not his motivation in finding fault with the District's IEP process. Parent's Closing Brief at 47. The Parent fails to mention the benefit to his business project, ECS, that would flow from an ALJ decision awarding ECS tuition. A decision in the Parent's favor would allow ECS to publicize to potential students that a State ALJ had determined ECS an appropriate placement for a special education student, and ordered the Seattle School District (where ECS is located) to fund the student's ECS tuition. All ALJ decisions in special education cases are also published on OSPI's website.<sup>35</sup> For this reason, the Parent's argument that he lacked a financial motivation for seeking an award of ECS tuition is rejected.

199. Turning to Ms. Tierney, when she was confronted with her emails about the creation of ECS, her responses were evasive and disingenuous, both in her deposition and at the hearing. D-59; Testimony of Tierney. Like the Parent, she alleged there was no commitment to go forward with ECS until after the March 28, 2014 IEP meeting. The emails are found to be credible and contemporaneous expressions of her intent; her testimony about them is not found to be so.

200. Ms. Tierney also testified that at every IEP meeting prior to March 28, 2014, "we were never allowed to talk about progress toward goals. They simply wanted to move forward with new goals." Testimony of Tierney, p. 343. This is not true, because *only* prior goal progress was discussed at the March 3, 2014 IEP meeting. Ms. Tierney's testimony about the March 28<sup>th</sup> IEP meeting was likewise not credible. She testified that the District did not spend time on the old goals, and talked only about the new goals.<sup>36</sup> This is demonstrably untrue, as reflected in

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<sup>34</sup> None of the Student's ECS goals contains a baseline measurement. Here are some examples of his ECS goals: "Improve answers of [sic] written reading questions to 70% overall average on curriculum tests." "Complete within word pattern spelling with 70% mastery." "Follows Directions at an average of 80% weekly." "Completes task [sic] independently/timely manner at an average of 80% weekly." J-25.

<sup>35</sup> See <http://www.k12.wa.us/ProfPractices/adminresources/SpecEdFindings.aspx>.

<sup>36</sup> Ms. Tierney testified as follows:

Q. And when you went to the March 28<sup>th</sup> IEP meeting, was there any change in approach by the school district?

the recording of that meeting (during which the District discussed progress on prior goals *despite* Ms. Tierney's effort to skip over that discussion.) J-29. Ms. Tierney also testified about the March 28<sup>th</sup> IEP meeting that "the district was saying we don't think this program is working for the Student, and we think we need to rethink in total the Student's program at [his elementary school]." Testimony of Tierney, pp. 288-289. This, too, is demonstrably untrue based on the recording of the March 28<sup>th</sup> meeting. J-29.

201. Also impacting Ms. Tierney's credibility is the tension between her multiple roles in this case. She was the chief critic of the District's education of the Student, but she was also seeking employment with the school that would be created if her criticism of the District convinced the Parent to create it. She and the Parent were already talking about opening a second school in San Diego, where Ms. Tierney lives, and in which she could have an even greater opportunity for employment than the 25% employment she obtained with ECS in Seattle. D-29. In March 2015, Ms. Tierney terminated her employment with ECS for personal reasons that she declined to disclose. Testimony of Tierney. The resignation of her ECS position shortly before the due process hearing began lessened the conflict of interest. No finding is made that this motivated her resignation, only that it had the effect of lessening the conflict between her roles. However, that conflict was present throughout her dealings with the District for an extended period up to that time.<sup>37</sup>

202. Another credibility issue is raised between Ms. Tierney and one of the Parent's witnesses. Ms. Tierney testified in deposition that she did not raise the idea of creating a new school until the Student's third grade year. D-59:7. She testified similarly at the hearing. Testimony of Tierney, pp. 198-199. However, she told Mr. Turner in January of the Student's fourth grade year that she had been discussing creating a new school with the Parent *for two or three years*. D-58:9. Mr. Turner's testimony on this matter is found to be credible because there is no motivation for it not to be so, and because Mr. Turner had strong and specific recollection of details that occurred during his interview and hiring process.<sup>38</sup>

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A. No.

Q. Was it the same approach, let's do the new goals –

A. Correct.

Q. – and I'm not going to spend time on the old?

A. Exactly.

Q. So in fact it confirmed your suspicions of what would happen, didn't it?

A. Mm-hmm.

Testimony of Tierney, pages 178-179.

<sup>37</sup> The ALJ is aware that other witnesses, who have only single roles, have potential biases built into those roles. Teachers may have a self-interest in testifying that children made progress under their teaching. District administrators may have a self-interest in testifying that proper IEP procedures were followed. It is when other evidence conflicts with a witness's testimony, as occurred here, that potential biases are examined more closely.

<sup>38</sup> The fact that the Parent was pleased with the Student's education in the District during second grade would not prevent Ms. Tierney from talking with him that year about creating a private school. The Parent had looked at several Seattle private school options even before the Student arrived in Seattle in second grade, and he applied to a private school twice thereafter, so it was an ongoing consideration for him.

203. In summary, the Parent's and Ms. Tierney's disingenuous explanations of what is written in their emails and manifest in their actions during the creation of ECS undermines their credibility as witnesses. It is also found that the Parent's alleged reasons for rejecting the March 2014 IEP were not his actual reasons. The Parent clearly predetermined to reject what became the March 2014 IEP before its first draft was even written. He was shopping for real estate for ECS a full year earlier. It is found that the Parent sincerely believed (guided by Ms. Tierney) that the Student's education was inadequate beginning in third grade. The sincerity of this belief is highlighted by the fact that he was pleased with the District's education of the Student in second grade. However, the reasons he *alleges* in this proceeding for why he rejected the March 2014 IEP are demonstrably not credible, as set forth above.

#### **Other matters**

204. The Parent put on extensive evidence regarding alleged deficiencies in the Student's education during third and fourth grade, including Ms. Tierney's belief that only direct instruction curricula should be used with the Student. The District countered with extensive evidence to the contrary. Each party administered its own assessments during these years and found that the results of the other party's assessments could not be replicated. The parties also put on conflicting testimony about why a functional behavioral assessment and behavior intervention plan were developed but not adopted during third grade. If the Parent wanted to have these matters adjudicated (i.e., whether the Student's third grade and fourth grade education was appropriate) he could have done so. Those school years fell within the two-year statute of limitations in this case. However, the Parent's complaint makes claims only regarding the IEP developed near the end of fourth grade, the process used to develop that IEP, and the lack of ESY in that IEP. The Parent's justification for rejecting the March 2014 IEP and privately placing the Student must stand or fall on proving these three claims. To the extent he seeks to explain his motivation for rejecting the March 2014 IEP by pointing to earlier deficiencies, it tends to diminish the credibility of the very different reasons he formally alleges for rejecting that IEP. In any event, if it were necessary to determine whether the Parent proved the Student's third and fourth grade education was inappropriate, it would be found that the Parent has not proven this. The District's witnesses and evidence were more persuasive than the Parent's.

205. It is determined in the Conclusions of Law, below, that the Parent is not entitled to relief on any of his claims. Therefore, the appropriateness of the Student's education and placement at ECS need not be determined. For this reason no findings of fact are made concerning the Student's education at ECS.

### **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

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Testimony of Parent. Ms. Tierney was the originator of the idea to create a new school, and the Parent's enthusiasm about the idea did not match Ms. Tierney's at first. Testimony of Tierney, Parent.

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.

*Id.*, 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. 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.

*Id.*, 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 rather a "basic floor of opportunity." *Id.*, 458 U.S. at 200 - 201. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.*, 458 U.S. at 207. "Under the 1997 amendments to the IDEA, a school must provide a student with a 'meaningful benefit' in order to satisfy the substantive [FAPE] requirement[.]" *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9<sup>th</sup> Cir. 2014) (internal citation and quotation marks omitted).

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).

### **Alleged Procedural Violation of the IDEA**

6. Procedural safeguards are essential under the IDEA:

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

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

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

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

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

Did the District violate the IDEA by failing to determine why the Student did not meet the annual goals of one IEP before adopting the successor IEP?

8. The factual premise of this issue statement – the broad assertion that the Student did not meet the goals of his February/May 2013 IEP -- has not been established. The following summation of the Student's progress is based on the Findings of Fact, above. It is made independently by the ALJ; it is not a repetition of the teachers' ratings.

9. Of the 25 annual goals in the February/May 2013 IEP, the Student met 10 of them (40%);<sup>39</sup> made significant progress on four of them (16%);<sup>40</sup> made some progress on three of them (12%);<sup>41</sup> made significant progress followed by regression in the last two months of the IEP year (to a level at or near his baseline) on three of them (12%);<sup>42</sup> made some progress followed by regression in the last two months of the IEP year (to a level at or near his baseline)

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<sup>39</sup> The Student met the following goals: Reading #1, #2, #3, #4, #5; Adaptive #2, #3, #4; Communication #1; and Motor #4.

<sup>40</sup> The Student made significant progress on the following goals: Written Language #1, #2; Adaptive #5; and Social/Behavior #2.

<sup>41</sup> The Student made some progress on the following goals: Math #1; Adaptive #1; and Motor #2.

<sup>42</sup> The Student made significant progress followed by regression in the last two months of the IEP year (to a level at or near his baseline) on the following goals: Math #3, #4; and Social/Behavior #1.

on one of them (4%);<sup>43</sup> and made little or no progress throughout the year on four of them (16%).<sup>44</sup>

10. Thus overall, the Student met or made significant progress on 56% of his goals. Regarding the 12% of the goals on which the Student made significant progress for most of the IEP year, then regressed in the last two months, the learning that occurred may be able to be recouped later. The Student's learning is characterized by inconsistent performance and periods of regression, according to Ms. Tierney.

11. Turning to the law, the IDEA does not require IEP teams to conclude "why" a student has not met an IEP goal. Rather, it requires them to determine "whether" the annual goals are being achieved, and to revise the IEP "to address," among other things, "any lack of expected progress toward the annual goals" and the student's "anticipated needs." 20 USC §1414(d)(4)(A); see WAC 392-172A-03110(3); 34 CFR §300.324. See *South Kitsap Sch. Dist.*, 2012-SE-0011, 112 LRP 49375 (SEA WA 2012).<sup>45</sup> A discussion about *why* a student did not meet a goal is likely to occur during this process, and the evidence shows that it did occur here. However, there is no requirement to reach an ultimate determination as to why a student did not meet a goal. That can be a deep question involving many different factors, known and unknown. As the District argued, the IDEA does not require IEP teams to achieve an omniscient understanding of the causality of a student's performance. District's Closing Brief at 8. The inquiry here will therefore focus on what the IDEA *does* require: In revising the Student's IEP in March 2014, did the IEP team address any lack of expected progress toward his annual goals, and did it address his anticipated needs?<sup>46</sup>

12. The answer to both of these questions is yes, for six of the seven service areas in the Student's IEP. The extensive discussion in the Findings of Fact concerning the Student's progress reports, his present levels of performance, and how these guided the development of his new goals, shows that the IEP team fulfilled these IDEA mandates except in one service area, discussed below. Ms. Tierney opined that the Student's progress reports were inadequate to guide development of the new IEP because, *inter alia*, they lacked details such as: (1) his verbatim responses to reading comprehension questions; (2) the frequency and duration of time spent on one particular Adaptive Skills goal (as opposed to the frequency and duration of time spent collectively on Adaptive Skills goals, which is stated in the IEP); and (3) a list of the specific cleaning tasks the Student did when he cleaned up his desk and the surrounding area for an Adaptive Skills goal. The Parent cites no authority for requiring such a level of specificity.

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<sup>43</sup> The Student made some progress followed by regression in the last two months of the IEP year (to a level at or near his baseline) on the following goal: Math #2.

<sup>44</sup> The Student made little or no progress on the following goals: Communication #2, #3; and Motor #1, #3.

<sup>45</sup> In *South Kitsap Sch. Dist.*, the ALJ classified this matter as an inquiry into *substantive* compliance with the IDEA. It is concluded here that the matter is more properly classified as an issue of *procedural* compliance: Did the IEP team employ proper procedures in reviewing the Student's IEP?

<sup>46</sup> There are other matters that the IDEA requires an IEP team to address when revising an IEP, but they are not at issue here. See 20 USC §1414(d)(4)(A); WAC 392-172A-03110(3); 34 CFR §300.324.



*Cf. J.K. v. Hudson City Sch. Dist. Bd. of Educ.*, 115 LRP 46916 (N.D. Ohio 2015) (IEP goals need not identify the 75 new sight words the student will decode, nor the number sets she will add and subtract).

13. In the area of Communication, the progress reports contained only narrative descriptions, with no measurements of where the Student fell in the range of 0% to 80% that was supposed to be used to measure his progress. The Parent's complaint does not raise the more common claims about this, such as failure to properly report progress to the Parent, or failure to implement the measurement provisions of the IEP. Rather, as stated above, the Parent's claim is cognizable under the IDEA as follows: In revising the Student's IEP in March 2014, did the IEP team address any lack of expected progress toward his annual goals, and did it address his anticipated needs? The SLP provided narrative comments on the Student's progress and written examples of his narrative language that she and the IEP team used in addressing his lack of expected progress on two of the three Communication goals. However, the failure to measure his progress, as explicitly required by both the goal and the IDEA, cannot be overlooked. It deprived the IEP team of the measurements that were necessary to properly determine the next year's "*measurable* annual goals." 20 USC §1414(d)(1)(A)(i)(II) (*italics added*).<sup>47</sup>

14. A procedural violation of the IDEA is therefore established regarding how the new Communication goals were developed.<sup>48</sup> The next question is whether that violation caused a denial of FAPE. The discussion of the new Communication goals occurred at the March 28, 2014 IEP meeting, where Ms. Tierney (as planned with the Parent) attempted to derail the discussion of new goals entirely, resulting in it being limited to "highlights". She and the Parent then disrupted the discussion by 15 times either noting that little time remained for the meeting or asking the team to move on and not spend more time on an issue (including several issues they noted for the record but declined to discuss at all). Because the Parent undermined the March 28, 2014 IEP meeting for his own strategic purposes, it cannot be found that the District significantly impeded his right to participate in decision-making regarding the Communication goals discussed at that meeting.<sup>49</sup>

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<sup>47</sup> Concerning the SLP not answering Ms. Tierney's 21 written questions calling for multi-part responses, but providing extensive information in a different way, it is noted that: "The law assures only that Parents have reasonable opportunities to participate in IEP development." It does not afford parents "pervasive control, unlimited meetings, or unlimited communications." *In re: Student with a Disability*, 109 LRP 67788 (SEA VT 2009).

<sup>48</sup> A corresponding *substantive* violation of the IDEA regarding the new Communication goals is also established. See below.

<sup>49</sup> Another alleged procedural violation was discussed in the Parent's closing brief but was not encompassed in any of the issues of his complaint: whether the IEP team's composition was unlawful for failing to include someone with expertise on BMD. Issues not raised in a complaint may not be adjudicated without agreement of the opposing party, which has not been given here. 20 USC §1415(f)(3)(B); WAC 392-172A-05100(3); 34 CFR §300.512. This issue was discussed in the Findings of Fact only because it bore on a credibility determination. If it had been raised in the complaint as an IDEA violation, no violation would have been found. See *B.D. v. Puyallup Sch. Dist.*, 456 Fed. Appx. 644, 645 (9<sup>th</sup> Cir. 2011, unpublished) (in case where student had rare disease, court held that the IDEA "provides a list of those individuals who must participate in designing an IEP; an expert on the child's specific disability is not required.") The Parent was nevertheless free to invite a medical provider to participate in

## Alleged Substantive Violations of the IDEA

### Did the District violate the IDEA by adopting an inappropriate IEP in March 2014?

15. Except as set forth below, the Parent has not carried his burden of proving that the March 2014 IEP was inappropriate, i.e., that it was not reasonably calculated to confer meaningful educational benefit on the Student. The analysis in the Findings of Fact, above, establishes that the annual goals of the March 2014 IEP (except as set forth below) were based on the Student's individual needs, past performance, and present levels of performance, and that they were reasonably calculated to confer meaningful benefit on the Student.

16. Concerning whether the March 2014 IEP should have specified that direct instruction methodology would be used for Reading and Math, "[t]he IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit." *R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1122 (9<sup>th</sup> Cir. 2011). See also *R.B. v. New York City Dept. of Educ.*, 589 Fed. Appx. 572, 576 (2<sup>nd</sup> Cir. 2014, unpublished) (parents' preferred methodology did not have to be provided for in IEP because the evidence did not establish that the student could only receive educational benefit through exclusive use of that methodology); *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 278-279 (3<sup>rd</sup> Cir. 2012) (parents' preferred methodology is not required because the school district's methodology was reasonably calculated to confer educational benefit); *Petersen v. Hastings Public Schs.*, 31 F.3d 705, 707-708 (8<sup>th</sup> Cir. 1994) (parents' preferred methodology is not required because the school district's methodology conferred educational benefits on the students). The evidence establishes that direct instruction was not the only effective methodology for the Student, and that other methodologies were also effective. In fact, the evidence establishes that the direct instruction curricula advocated by Ms. Tierney became counterproductive for the Student over time.

17. Concerning whether the March 2014 IEP denied the Student appropriate AT, the Parent has not established this. The IEP provided him with word prediction software and another trial of speech-to-text (voice recognition) software. The Parent had already supplied the Student with an iPad that he used at school. If the Parent believed it was the District's responsibility to pay for that iPad, he could have requested reimbursement for it. The Parent offered no evidence from anyone with expertise in AT concerning what devices or software the Student should have received, but did not. This claim has therefore not been proven.

18. The exceptions to the ALJ's conclusion that the IEP is appropriate are as follows. Because the Student's progress on his prior Communication goals was not measured, it cannot be concluded that the baseline measurements in the successor goals are appropriate. Likewise, the baseline measurements in the math goals of the March 2014 IEP cannot be found appropriate. The Student's baseline was set at 0% on his new math goals, without assessments to determine his actual baseline, on the ground that the skills had not yet been introduced. However, the skills were component skills of the ones he had already been working

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any IEP meeting, or bring a statement from a medical provider for the team to consider, but he chose to do neither of these things. See 20 USC §1414(d)(1)(B)(vi); WAC 392-172A-03095(1)(f) and (3); 34 CFR §300.321.

on under the previous IEP, so it was not reasonable to assume his baseline was 0%. Without an accurate baseline measurement, the target measure is arbitrary. If a student actually starts at 0%, then 40% may be the appropriate target, depending on the skill. But if a student starts at 40%, then 80, 90 or 100% may be the appropriate target, depending on the skill.

19. Substantive violations of the IDEA are therefore established because the baseline levels of performance in the Communication and Math goals of the March 2014 IEP were not based on actual measurement, making the target levels inappropriate as well. The content of these goals was appropriate, but the scale on which progress would be measured was not. The next question is what relief the Parent may be entitled to.

20. The equities on both sides must be balanced in deciding on equitable relief. See *Reid v. District of Columbia*, 401 F.3d 516, 523-524 (D.C. Cir. 2005). Turning first to the District's side, the District made errors in the measurement scales for progress on the Communication and Math goals, but the District did not engage in inequitable conduct. On the contrary, the District went to great lengths to include the Parent in decision-making, holding nine IEP meetings in the course of little more than a year, and changing the Student's goals and much of the methodology used to teach them to suit the Parent's wishes. The District did not accede to all of the Parent's wishes, but it is only required to consider them, not to adopt them. See *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131-1132 (9<sup>th</sup> Cir. 2003), *cert. denied*, 544 U.S. 928, 125 S. Ct. 1662 (2005) (school districts have no obligation to grant parents a veto over IEP provisions).

21. Turning to the Parent's side of the equities, the IDEA provides that reimbursement may be reduced or denied upon a finding of "unreasonableness with respect to actions taken by the parents." 20 USC §1412(a)(10)(C)(iii)(III). See *Sch. Committee of Burlington v. Dep't of Educ.*, 471 U.S. 359, 374, 105 S. Ct. 1996 (1985) (equitable considerations are relevant in fashioning relief); *C.G. v. Five Town Community Sch. Dist.*, 513 F.3d 279, 288 (1<sup>st</sup> Cir. 2008) ("Congress deliberately fashioned an interactive process for the development of IEPs. In so doing, it expressly declared that if parents act unreasonably in the course of that process, they may be barred from reimbursement under the IDEA.") *Dept. of Educ. v. S.C.*, 938 F. Supp. 2d 1023, 1033 (D.Haw. 2013) (parental predetermination to disapprove of any placement but a private placement is unreasonable).

22. The District argues persuasively as follows: The evidence shows that the Parent's primary purpose at the March 28, 2014 IEP meeting was to ensure that the Student's new IEP was finalized by the meeting's end so the Parent could reject it. This was driven by his predetermined decision to have the Student start attending Dartmoor very shortly thereafter. It was also driven by his predetermined decision to have the Student attend a new school in the fall, the school the Parent had been developing since spring 2013. The Parent's parallel purpose at the March 28, 2014 IEP meeting was to try to walk a fine line between creating a legally sufficient record of his participation at the meeting to support his planned unilateral private placement claim, while at the same time depriving the IEP team of sufficient information to understand his concerns with the new IEP and make any changes to address them. These attempts to subvert the IEP process are an anathema to the IDEA, inherently unreasonable, and fatal to the attempt to achieve public reimbursement. In short, the Parent carried out a predetermined private placement plan in a deceptive manner designed to create the appearance that his decision was based on the March 2014 IEP. See District's Closing Brief at 24, 29.

23. For these reasons, the Parent is not entitled to equitable relief for the substantive IDEA violations found above.

Did the District violate the IDEA by adopting an inappropriate educational placement in the March 2014 IEP?

24. In addition to claiming the March 2014 IEP was inappropriate, the Parent claims the educational placement provided for in that IEP was inappropriate. As mentioned above, the only argument made regarding the Student's placement was a general one: Because the District did not know why the Student failed to make progress, there was no way for the District to know if it was selecting an appropriate placement. Parent's Closing Brief at 43. The factual premise of this argument has not been proven. Nevertheless, the evidence concerning placement that emerges from the record is discussed below.

25. The Student's placement in the March 2014 IEP is slightly more restrictive than his previous placement. He went from 21.5% participation in the general education environment in the prior IEP to 17.3% in this one. Neither party presented evidence on why this change occurred. The Parent raised no objection to it, either at the time it was made or in this hearing. Therefore, there is nothing to consider concerning this slight change in placement.

26. The District urged the Parent to consider a change in placement to a self-contained program where the Student would be able to receive instruction in a peer group instead of in isolation with adults. The Parent rejected this, and so the change in placement was not made. The Parent does not argue the District's proposed change should have been made over his opposition, so again, there is no issue to consider here.

27. The Parent has not established that the educational placement in the March 2014 IEP was inappropriate.

Did the District violate the IDEA by failing to offer the Student ESY for summer 2014?

28. The Parent and the Student spent their summers out of state, and the District knew this. By March of 2014, the Parent and Ms. Tierney were already scheduling the Student's summer tutoring services in San Diego. The Parent never requested an offer of ESY for summer 2014, just as he had not for summer 2013. He did make a request for summer 2012, but that was two years before the year at issue in this case.

29. The Parent hints that the District should have provided ESY services for the Student in far-away San Diego. Parent's Closing Brief at 14. The Parent cites no authority supporting such an obligation. The only case cited by either party on this question was cited by the District. *See Boyertown Area Sch. Dist.*, 110 LRP 26532 (SEA PA 2010). In that case, the student was found entitled to ESY, but was denied compensatory education for ESY because he had traveled abroad for the summer in question.

30. Because the Parent had long-established plans to remove the Student from the District during the period he claims the Student should have received ESY, no determination is made whether the evidence would establish entitlement to ESY services absent such removal. See WAC 392-172A-02020; 34 CFR §300.106.

31. The Parent has not established that the District violated the IDEA by failing to offer the Student ESY for summer 2014.

32. 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

The Parent is not entitled to relief on any of the claims of his due process hearing request.

Signed at Seattle, Washington on October 27, 2015.



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. *mcn*

Parent

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