



STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
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June 10, 2015

Parents

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**In re: Seattle School District**  
**OSPI Cause No. 2014-SE-0096**  
**OAH Docket No. 12-2014-OSPI-00035**

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,

A handwritten signature in blue ink, appearing to read "Michelle C. Mentzer".

Michelle C. Mentzer  
Administrative Law Judge

cc: Administrative Resource Services, OSPI  
Michelle C. Mentzer, Acting Senior ALJ, OAH/OSPI Caseload Coordinator

MAILED

JUN 10 2015

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE SUPERINTENDENT OF PUBLIC INSTRUCTION **SEATTLE-OAH**

IN THE MATTER OF:

OSPI CAUSE NO. 2014-SE-0096

SEATTLE SCHOOL DISTRICT

OAH DOCKET NO. 12-2014-OSPI-00035

**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 March 30, 31, and April 1, 2, 6, 7 and 8, 2015. The Parents of the Student whose education is at issue<sup>1</sup> appeared and were represented by Howard Powers, attorney 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 Parents filed a due process hearing request (complaint) on December 9, 2014. A prehearing conference was held on January 5, 2015. Prehearing orders were issued on January 8, and March 18, 2015.

The due date for the written decision was continued to 30 days after the close of the hearing record, pursuant to a joint request for continuance. See First Prehearing Order of January 8, 2015. The hearing record closed with the filing of supplemental post-hearing briefs on May 11, 2015. Thirty days thereafter is June 10, 2015. The due date for the written decision is therefore June 10, 2015.

**EVIDENCE RELIED UPON**

The following exhibits were admitted into evidence: Parents' Exhibits P-1 through P-34; and District's Exhibits D-1 through D-24.

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

Amy Jackson, private occupational therapist;  
The Father of the Student;  
Nicolle Simon, Board Certified Behavior Analyst (BCBA), Academy for Precision Learning (APL);  
Susan Malmquist, PhD;  
Alison Moors, clinical director, APL;<sup>2</sup>

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

<sup>2</sup> Alison Moors' name is now Alison Moors Lipshin, but she is referred to herein as Alison Moors.

Bridget Sachse, private occupational therapist;  
Sherry Studley, EdD, District special education supervisor;  
Teresa Swanson, District special education program specialist;  
Sara Celms, District special education teacher and BCBA;  
Carissa Cook, District special education teacher;  
Kathleen Prosch-Jensen, PhD;

## ISSUES

1. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
  - a. Conducting reevaluations of the Student in June 2013 and Spring 2014 that were inappropriate for the reasons stated in the Parents' due process hearing request (Complaint);
  - b. Adopting individualized education programs (IEPs) in September 2014 and October 2014 that were inappropriate for the reasons stated in the Parents' Complaint;
  - c. Adopting a placement for the Student at Thornton Creek Elementary School for the 2014-2015 school year that was predetermined by the District and was inappropriate for the reasons stated in the Parents' Complaint;
  - d. Failing to provide the Student with needed speech-language pathology (SLP) and occupational therapy (OT) services beginning March 15, 2014;
2. Whether the Academy for Precision Learning (APL) is an appropriate placement for the Student;
3. Whether the Parents are entitled to the following requested remedies, or other equitable relief as appropriate:
  - a. As a remedy for a denial of FAPE beginning March 15, 2014, reimbursement for the following costs incurred through the date the District begins to assume responsibility for them:
    - (1) Tuition and fees for the Student's education at APL for the 2014-2015 school year in the amount exceeding the \$21,500 already paid by the District;
    - (2) Transportation of the Student to and from APL for the entire 2014-2015 school year;
    - (3) Private OT services by Bridget Sachse, MS, OT/L and MOSAIC Center for Therapy Services beginning March 15, 2014;
    - (4) Transportation of the Student to and from private OT services beginning March 15, 2014;
  - b. Provision of SLP services to compensate the Student for lost benefit beginning March 15, 2014, and continuing through the date the District begins to provide or pay for SLP services;
  - c. An order that the District develop an IEP that remedies the deficiencies alleged in the Parents' Complaint, including deficiencies in the area of SLP and OT services;

- d. Prospective placement of the Student at APL; and
- e. Prospective provision of transportation to and from APL and to and from the Student's SLP and OT services.

See First Prehearing Order of January 8, 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 11 years old and is presently in the fourth grade in the 2014-2015 school year. The Student was diagnosed with Autism in late 2006, and found eligible for special education in 2007, when he was three years old. Testimony of Father; D-3:1.<sup>3</sup>

3. The Student attended District schools through the first grade. The Parents believed the Student did not receive a FAPE in his District placements in first grade, so they moved him to the Academy for Precision Learning (APL), a private school in Seattle. There he repeated first grade in the 2011-2012 school year, and has continued attending APL since that time. During the Student's four years at APL, the District has declined to place him there and has developed a series IEPs placing him in public school settings.

4. For the Student's third grade year (2013-2014), the District's IEP placed him in an "inclusion" program at John Rogers Elementary School. The choice of an inclusion program was based on the Parents informing the District that the Student was being served in a general education environment at APL. Testimony of Swanson. The John Rogers model is different than the APL model, but it has a higher degree of general education participation than the placement the IEP team selected for the Student the following year – which placement is at issue in the present case. *Id.*

5. In all prior years, the parties' disputes about placement were settled without a due process hearing. D-23.

6. For the Student's fourth grade year (2014-2015), the District attempted to complete an IEP before school started, but it was not finalized until October 3, 2014. It provided for a more restrictive placement than the previous year. The District acknowledged its tardiness in adopting the IEP and proposed that the Student transition to public school after winter break, on January 5, 2015. The District paid his APL tuition through that date pursuant to a settlement

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<sup>3</sup> Citations to the exhibits are in the following format: "D-3:1" refers to Exhibit D-3, page 1.

agreement. The agreement also settled all claims through March 14, 2014, except that the Parents' release covered the entire 2013-2014 school year in relation to the cost of the Student's education at APL. *Id.*

#### **June 2013 Evaluation<sup>4</sup>**

7. The Parents seek to challenge the appropriateness of the District's June 2013 evaluation of the Student. However, there is no need to make Findings of Fact regarding this evaluation. For the reasons set forth in the Conclusions of Law, below, it is concluded that any claims the Parents may have had concerning the June 2013 evaluation were settled and released. See D-23.

#### **Spring 2014 Evaluation<sup>5</sup>**

##### Procedural facts regarding Spring 2014 evaluation

8. In the spring of 2014, the District proposed to conduct an "educational evaluation for IEP development." P-11:2. The consent form notified the Parents as follows:

The re-evaluation will include assessment in the following areas: General Background; General Education; Pre-Acad./Functional Acad.; Special Education; Written Language; Reading; Study-Organizational Skills; Adaptive/Self Help/Life Skills; Cognitive; Math; Social/Behavior.

*Id.*

9. The Father signed consent for the evaluation on March 26, 2014. His email conveying the consent form alerted the District that he had added comments above his signature. Those comments were as follows:

I want to provide input and participate in decisions about what, if any, data is needed, in addition to what is already available, to determine [the Student's] current performance levels and service needs. Please notify me in writing of any evaluation activity other than the observations for the FBA that the district proposes to conduct and who will conduct it so I have the opportunity to participate in the reevaluation team's decision about its necessity beforehand.

P-11:3.

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<sup>4</sup> While technically an "evaluation" under the IDEA refers to an *initial* evaluation, and all evaluations thereafter are technically "reevaluations," for ease of reference the term "evaluation" is used herein to refer to reevaluations. (The Student's initial evaluation occurred in 2007.)

<sup>5</sup> Evaluations are usually referred to by the month and year in which the evaluation report was completed, e.g., the "June 2013 evaluation." Here, however, no evaluation report was produced. The evaluation is therefore referred to by the period of time in which the assessments were conducted, and is called the "Spring 2014 evaluation."

10. Four District staff visited APL to observe and assess the Student. A special education supervisor, Dr. Sherry Studley<sup>6</sup> conducted academic assessments in reading, math, and written expression. P-14; D-13:7-10; Testimony of Studley. A District special education teacher, Sara Celms, who is a Board Certified Behavior Analyst (BCBA), conducted a classroom observation and drafted a functional behavioral assessment (FBA). P-14:9-12; Testimony of Celms. A District speech-language pathologist (SLP) conducted a communications evaluation. P-14:5-8; D-13:4-6. A District occupational therapist (OT) conducted a fine motor evaluation. D-13:6-7. In late July 2014, the documents from the academic, FBA, and SLP assessments were provided to the Parents. P-14. The cover letter enclosing these documents stated the OT was currently unavailable, but her records would be sent as soon as possible. *Id.*<sup>7</sup>

11. The District did not conduct assessments in some of the areas listed on the consent form, namely: Study/Organizational Skills; Adaptive/Self Help/Life Skills; and Cognitive. Dr. Studley explained that more areas of assessment were included in the consent form than were conducted by the District because the District obtained information from APL on the additional areas. Dr. Studley did not know whether APL had conducted any cognitive assessments (it had not), but she included that area on the consent form in case APL had done so. Dr. Studley further explained that the evaluation consent form was needed in order to conduct an FBA, and also to show APL that the District had parental permission to observe and test the Student. Testimony of Studley.

12. Less than a year earlier, in June 2013, when the District produced a draft evaluation report, the Parents submitted extensive written comments on the draft before it was finalized at an evaluation review meeting. P-1. They also submitted extensive written comments and objections after the report was finalized. P-2; D-3. The Parents did not have these opportunities with the Spring 2014 evaluation. No evaluation report was written and no meeting was held with the Parents to review it. Instead, the District sent documents created by the three District assessors to the Parents in late July 2014 (P-14), and drafted the results of the evaluation directly into the Present Levels of Performance (PLOP) section of the IEP developed in September and early October 2014. D-12; D-13.

13. The Parents had the opportunity to submit written comments on the IEP, including the PLOP section, and they did so several times. P-3; P-18; P-20. The assessment results that were incorporated into the PLOP were discussed at the September 2014 IEP meeting,<sup>8</sup> but the

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<sup>6</sup> Sherry Studley, EdD, NBCT, received her doctorate in education from the University of San Francisco in 2002. She received national board certification as an exceptional needs specialist in 2008. Dr. Studley spent many years as a special education teacher and has been a special education co-teacher in general education classrooms. She has served as a lecturer in the Special Education Department at the University of San Francisco, adjunct faculty in the Teacher Education Department at the University of San Francisco, and adjunct faculty at the Albright School of Education in Bellevue, Washington. D-17; Testimony of Studley.

<sup>7</sup> The Parents' post-hearing brief, at p. 15, asserts the Parents made repeated requests for evaluation results/reports before receiving these documents in July 2014. However, the ALJ has been unable to locate any evidence of such requests in the record.

<sup>8</sup> The PWN issued after the September 2, 2014 IEP meeting states that evaluation data was considered: "The team considered data and input from APL staff, from special education teachers and related service

invitation for the meeting did not state that it would also serve as an evaluation review meeting. D-13:1, 27. Neither the absence of an evaluation report nor the absence of an evaluation review meeting were mentioned in the Parents' September 4, September 16, or October 29, 2014 comments to the District, despite many other alleged IDEA violations being mentioned. P-18; P-20; P-24. The Parents' 28-page due process hearing request devotes six words to the claim. See P-33:6.

#### Findings of Spring 2014 evaluation

14. As mentioned above, no evaluation report was written, but the results of the Spring 2014 evaluation were set forth in the PLOP of the October 2014 IEP.

15. The PLOP contains detailed sections on the Student's general background, his general education participation, and the adverse impact of his disability on his learning. Much of the information in these sections was provided by the Parents and APL staff. D-13:4.

16. In the academic areas, Dr. Studley set forth the results of standardized academic testing conducted by APL in 2013 and 2014 using the Woodcock-Johnson Test of Academic Achievement-III (WJ-III). Dr. Studley also assessed the Student herself in reading, math, and written expression. She administered the Qualitative Reading Inventory-II to assess the Student's decoding skills and comprehension skills. The Student scored at a preschool level in both of these areas of reading. She used the Brigance Comprehensive Inventory of Basic Skills-Revised to assess the Student's skills in math and written expression. His scores in math were at a first grade level, while his scores in written expression were at a preschool level. Dr. Studley wrote about the Student's particular component skills in math and written expression in the PLOP. D-13:7-10.

17. Dr. Studley cautioned that the testing conditions were not optimum for the Student because he was unfamiliar with her, and because testing occurred in the APL school hallway. D-13:8. However, the APL hallway is less busy than the Student's APL classroom and is regularly used by children who need a less distracting space in which to work. Testimony of Moors. Despite these factors, Dr. Studley noted that the Student appeared relaxed and friendly during testing, and returned very cooperatively to the testing activities after each break she gave him. D-13:8. The IEP team found the Student needed specially designed instruction in reading for 350 minutes per week, in math for 225 minutes per week, and in written language for 225 minute per week. D-13:24.

18. The communication evaluation reviewed 2013 test results from District and private SLPs, recent classroom observation data by a District SLP from Spring 2014, and the results of the Social Communications Skills Rubrics completed by the Student's teacher and the Parents in Spring 2014. P-14:5-8; D-13:4-6. The Student was found to need specially designed instruction

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providers from the District who came to APL to observe and/or test him, and from [the Student's] parent. The team examined and discussed data, both quantitative and anecdotal, for every area of disability for which [the Student] qualifies for special education or related services. The team agreed to the content of the Present Levels of Educational Performance . . . ." D-13:27.

in the areas of receptive language (understanding language that is heard) and pragmatic language (social communication), for a total of 70 minutes per week with an SLP. D-13:6, 24.

19. The social/behavioral evaluation was conducted by Ms. Celms, the District special education teacher who is a BCBA. Ms. Celms observed the student at APL twice in April 2014, two hours in the morning on one day, and two hours in the afternoon on another day. Testimony of Celms. She also reviewed the following: the current APL education plan, treatment plan, behavior plan and associated raw data, charts, plan checklist, and interventions. She considered data on academic, social and adaptive skills, her FBA data, and clinical notes from APL staff. She also interviewed four APL staff members. P-14:9-12; D-13:8-9, 11-15.

20. Regarding 1:1 versus group activities, Ms. Celms observed that the Student was allowed to spend very little time with a small group, though he really wanted to. The only time he was with a small group was for playing computer games. All of the instruction she saw him receive was from a 1:1 aide. The whole-class activities the Student participated in were a 10-minute morning meeting, snack, recess, and P.E. Testimony of Celms.

21. Some of the changes from current APL systems that Ms. Celms recommended were as follows. She believed the Velcro token board the Student used was less age-appropriate than it could be, and was difficult to manage in multiple environments. It looked very different from the materials most typically-developing peers use. Her FBA recommended a printed or laminated display for the token system rather than pieces attached with Velcro. Instructors could circle or check token images on the paper. This would look like an instructor writing on the Student's paper, something that instructors do with typically-developing peers. This kind of token system would also be more portable to different environments. Regarding how the Student receives instruction, the FBA recommended that he be allowed to work more in small groups rather than with his 1:1 aide. The Student showed interest in doing this, and regularly misbehaved when being instructed by the 1:1 aide. The 1:1 aide attended to him very closely, giving constant praise and being physically close most of the time. Testimony of Celms. Ms. Celms believes that given his current skills, the Student would not be able to access general education academic work at his grade level even with accommodations and modifications. She recommended he work with small groups in a special education environment, and participate in general education activities with less challenging or more flexible academic content, such as music, library, silent reading, PE, lunch, recess, snacks, and special class activities. The FBA recommended that these general education activities be modified for the Student's needs, and that he receive added staff support so he can participate in them. P-14:9-12; Testimony of Celms. The Student was found in need of specially designed instruction in the social/behavioral area for 300 minutes per week. D-13:24.

22. Alison Moors,<sup>9</sup> Clinical Director of APL, believes it is inappropriate to conduct an FBA in one setting (APL) that may be used in another setting (public school), since a student's

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<sup>9</sup> Alison Moors (Alison Moors Lipshin) was certified as a general education teacher in 1993 and received her master's degree in educational psychology from West Virginia University in 2001. She became a BCBA in 2002. Ms. Moors has been a master teacher at Morningside Academy in Seattle and the curriculum director at Families for Effective Autism Treatment in Seattle. She has been a partner in Fabrizio/Moors Consulting and Moors and Associates Consulting, Inc., both of which provide individualized educational programming consultation for persons with autism and related disorders. She was a founder and executive director of APL in Seattle for its first three years, and has been APL's clinical



behaviors are context-driven. Dr. Kathleen Prosch-Jensen<sup>10</sup> testified on behalf of the District. In Dr. Prosch-Jensen's experience, it is very common to conduct an FBA before a transition to a new environment, and an FBA can always be repeated later. She believes the best practice is to have a BIP in place before transitioning, then modify the BIP as necessary after the transition. Testimony of Prosch-Jensen. Dr. Studley believes that the function of behavior is not necessarily specific to a setting, but if changes in do function occur the student can be reassessed. Testimony of Studley. These differences of opinion are discussed and resolved in the Conclusions of Law, below.

23. The fine motor evaluation was conducted by a District OT and consisted of chart review, Parent telephone interview, teacher interview, and a classroom observation of the Student in June 2014. No assessments were administered by the District OT. The PLOP discussed the Student's handwriting difficulties and recommended the use of a keyboarding program. D-13:6-7. The Student was found in need of OT for 60 minutes per month, either as direct or consultative services, and delivered on either a monthly, bi-weekly, or weekly basis. D-13:24.

24. The study/organizational skills portion of the evaluation was based on information gathered from APL staff. No assessments were administered by the District. The PLOP stated as follows: The Student used a visual schedule for his day, with frequent breaks and rewards for participation. He was currently able to do up to five consecutive tasks independently as part of a whole-class activity, and could work independently on his computer-based reading program for up to 15 minutes. The Student was displaying skills in following simple instructions but needed to improve on following multiple-step instructions, correcting assignments, and working independently on tasks. D-13:9. The Student was found in need of specially designed instruction in study/organizational skills for 150 minutes per week, delivered in 15-minute intervals 10 times per week. D-13:24.

#### October 2014 IEP<sup>11</sup>

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director for over five years. Ms. Moors has served as a consultant for public schools in the Seattle area and in other states. P-30; Testimony of Moors.

<sup>10</sup> Kathleen Prosch-Jensen, PhD, BCBA-D, LMHC (formerly Kathleen Zanolli) received her doctorate in psychology in 1991 from the University of Tennessee, Knoxville. She became a BCBA in 2002, and a doctoral-level BCBA in 2009. Dr. Prosch-Jensen is currently a behavioral consultant in private practice for children with autism and severe behavioral disorders, and also provides training and consultation for schools and mental health agencies. She has served as director of professional training at the University of Washington Autism Center, associate professor at the University of Kansas, and has taught graduate courses in such areas as early intervention and behavioral assessment. Dr. Prosch-Jensen is currently teaching a graduate course at the University of Washington for BCBA's on working with difficult students. She has served on the Behavior Analyst Certification Board and as a reviewer for the *Journal of Autism and Developmental Disorders* and the *Journal of Applied Behavior Analysis*. D-16; Testimony of Prosch-Jensen.

<sup>11</sup> Issue 1(b) includes a challenge to both the "September 2014" and the October 2014 IEPs. However, since the time the Issues statement was adopted, it has become clear that the September 2014 IEPs were drafts. See D-12; D-14. The IEP was not finalized and adopted until October 3, 2014. See D-13. This decision will not adjudicate the legality of a draft document. Only the legality of the final IEP, adopted in October 2014, will be adjudicated. The contents of the draft documents may be relevant to the

## Procedural facts regarding development of October 2014 IEP

25. The District attempted to convene an IEP meeting in August 2014. The Parents were available, but one District team member was not. P-15. The meeting was ultimately held on September 2, 2014, but the IEP was not completed on that date. The District's school year began on September 3, 2014. Testimony of Studley. APL's school year had started the week before that. Testimony of Father.

26. In attendance at the September 2, 2014 IEP meeting were the Parents, two APL staff members, Ms. Moors and Nicolle Simon<sup>12</sup> (the Student's BCBA at APL for his fourth grade year, 2014-2015), and the following District staff: Dr. Studley, program specialists Teresa Swanson and Alex LaRosa, and an SLP and OT. D-13:2. After the meeting, on September 4, 2014, the Parents provided written comments on the draft IEP (P-18; P-19), and the District produced a second draft on September 16<sup>th</sup>. D-14. The Parents then submitted additional written comments (P-20), and the District distributed its final IEP on October 3, 2014. D-13.

27. During this period of back-and-forth comments and drafts, the District did not reconvene the IEP team. Nothing in the Parents' extensive written comments requested that it be reconvened. See P-18, P-19, P-20. The District incorporated some of the Parents' proposed changes, as the Parents acknowledge. P-24:1. The Parents fault the District for adopting changes to the IEP after the September 2, 2014 meeting without convening another IEP meeting. Parents' post-hearing brief at 16.<sup>13</sup> The changes made in the IEP drafts after the September 2, 2014 meeting were ones that had either been discussed at the meeting or were requested by the Parents in writing. See Testimony of Studley; D-12; D-13; D-14; P-18; P-19; P-20; P-21.

28. Because the District did not adopt an IEP by the beginning of the school year, it proposed that the Student begin attending school in the District on January 5, 2015, immediately following winter break. The District paid the Student's APL tuition through that date. D-15; P-33:27. On October 16, 2014, the District proposed a plan for the Student to gradually transition to Thornton Creek Elementary School (Thornton Creek) before beginning to attend on January 5, 2015, immediately after winter break. D-15.

29. The Parents assert there was no offer of placement at the September 2, 2014 IEP meeting or thereafter, because a particular school is not named in the IEP. The draft IEP discussed at

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Parents' procedural claims regarding how the IEP was developed, but whether the drafts in and of themselves were appropriate under the IDEA will not be adjudicated.

<sup>12</sup> Nicolle Simon received her master's degree in special education - applied behavior analysis in 2013. She became a BCBA in the same year. Ms. Simon worked as a paraeducator at APL for five years before becoming a BCBA. She has worked as a BCBA at APL for the past two years. P-31; Testimony of Simon.

<sup>13</sup> The Parents' complaint did not include a claim that the District changed the IEP after the September 2, 2014 meeting without convening another IEP meeting. However, this claim is sufficiently encompassed within the Parents' claim of predetermination to be adjudicated herein.

the September 2, 2014 meeting stated that the placement option selected on the continuum of placements was 0 – 39% in regular education class, specifically 19%. It further stated the Student would be placed in a special education setting for most academics, OT, study skills, and part of his social skills instruction. It stated he would participate with typically-developing peers during science, recess, lunch, assemblies, school activities, and field trips. It further stated that the proposed program is not offered at his neighborhood school. D-12:18-19. The District members of the IEP team advocated for such a placement, and the Parents advocated for a placement like APL: an inclusion classroom with a BCBA and a 1:1 aide. The prior written notice (PWN) issued a few days after the meeting stated the District was offering a special education placement “at one of the schools near the family’s home, in which [the Student] would be served in a mostly self-contained classroom (SCC) with eight students, one teacher, and two instructional assistants.” D-13:21. The PWN discussed the reasons the District decided against the Parents’ preferred placement. *Id.* The Parents are correct that neither the September 2, 2014 draft nor the final IEP named a particular school. However, as discussed in the Conclusions of Law, both of them described the Student’s “educational placement,” which is a distinct concept from a particular school.

30. At the September 2, 2014 IEP meeting, District members of the team indicated the Student would likely be assigned to Thornton Creek. See P-33:10. The Parents had the opportunity to observe the educational placement in effect at Thornton Creek before they rejected the placement. On October 7, 2014, the Father visited Thornton Creek and observed the class in question for 1.5 to 2 hours, before attending a meeting with District staff later that day.<sup>14</sup> The Parents’ expert witness, Dr. Susan Malmquist,<sup>15</sup> had already conducted an observation at the Thornton Creek SCC prior to that date. At the October 7, 2014 meeting, the Father informed the District that the Parents were rejecting the District’s placement. Testimony of Father; D-15:1.

31. The Parents also argue that the District predetermined the Student would have a public school placement. At the September 2014 IEP meeting, the District OT was praising aspects of APL’s program, and Dr. Studley interrupted to say that they were not here to extoll the benefits of APL. Testimony of Father. Dr. Studley testified she was put on the Student’s IEP team in 2014 to see *if* the team could propose a school district placement. Testimony of Studley. The District considered the inclusion-type model with a BCBA and 1:1 aide advocated for by the

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<sup>14</sup> The Father did not wait until the last minute for his observation at Thornton Creek. He tried to arrange for it to occur earlier, but the District staff-person who was going to accompany him was not available. Testimony of Father.

<sup>15</sup> Susan Malmquist, PhD, BCBA, received her PhD in school psychology in 1998 from the University of Oregon. She is currently a special education consultant and trainer for families, schools and agencies. Dr. Malmquist has served as an associate professor and associate department chair of the Department of Applied Behavior Analysis at the Chicago School of Professional Psychology, and an adjunct professor at Central Washington University’s Lynnwood/Seatac branch. She has served on APL’s advisory board and is currently completing a contract with APL to evaluate outcomes data for APL students. Dr. Malmquist has held leadership positions with Families for Effective Autism Treatment of Washington, Educational Diagnostics Consulting Services of Shoreline, Washington, the Autism Spectrum Treatment and Research Center (ASTAR) of Seattle, and Morningside Academy of Seattle. P-29; Testimony of Malmquist.

Parents, and considered the Parents' reasons for wanting such a placement at APL. What was considered, and the reasons the Parents' preference was rejected, are set forth in the PWN. D-12:21-22. The District's consideration of APL is also shown by the fact that it sent two BCBA's to observe at APL before the IEP was drafted: Dr. Prosch-Jensen in January 2014, and Ms. Celms in April 2014. D-20; P-14:9-12.

32. The Parents also assert that mistakes in the IEP drafts made it impossible for them to understand what programming the District was proposing and when. Parents' closing brief at 16-17. The mistakes were pointed out by the Parents to the District at the time (see P-19; P-20; P-21) and were as follows: (1) The first draft IEP listed John Rogers Elementary School as the Student's attending school instead of APL, and the second draft listed Thornton Creek Elementary School as his attending school instead of APL. D-12:2; D-14:2. John Rogers was the school the District had proposed for the Student the previous time it developed an IEP for him, and Thornton Creek was the school the District proposed for him to attend instead of APL. In the final IEP of October 3, 2014, the attending school was listed correctly as APL. D-13:2. (2) The matrix section of the IEP, also known as the "Special Education and Related Services" section, was included in the first draft IEP but mistakenly omitted from the second draft of September 16, 2014. D-12:18-20; D-14. The District acknowledged the omission and added it back into the final IEP. P-21; D-13:24-26. (3) The proposed IEP start date of September 3, 2014 was retained from the first draft through the final draft, even though the IEP was not finalized until October 3, 2014. P-21; D-12:2; D-13:2; D-14:2.<sup>16</sup>

#### Substantive aspects of October 2014 IEP

33. The IEP's term runs until August 31, 2015. D-13. The PLOP section of the IEP has been described above. The FBA that is included in the IEP has also been described above. The other pertinent sections of the IEP are as follows.

#### *Behavior Intervention Plan*

34. The BIP was developed by Dr. Studley based on the FBA. Testimony of Studley. The BIP includes the following: It lists a cluster of behaviors that appear linked to task avoidance, and states that task avoidance occurs regularly when the Student is working with his 1:1 aide on academics. The behaviors function to delay or avoid the work task or non-preferred activity. Few negative behaviors occur during group activities, choice time, lunch or recess. The Student sometimes arrives at school in a highly anxious state, so behaviors may be linked to dysregulation rather than work avoidance. When this occurs, staff will immediately adapt to his

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<sup>16</sup> The Sept 16, 2014 IEP draft may have originally been intended as a final, but changes were made when it was redistributed on October 3, 2014, including the addition of the matrix section. See P-21. Nor can the September 16<sup>th</sup> version be viewed as a final, adopted IEP, with the October 3<sup>rd</sup> version being an IEP amendment. The October 3<sup>rd</sup> IEP does not say it is an amendment. Also, the dates on the PWNs in all three drafts remained the same and were never updated. The date of the PWN in each draft remained September 7<sup>th</sup>, and the date the PWNs stated the action would be initiated (meaning the IEP would be implemented) remained September 15<sup>th</sup>. Also, the one-year term of the goals, services and accommodations in all three versions was stated as beginning September 3<sup>rd</sup>. None of these dates were updated during the one-month period it took for the IEP to be revised from first draft to final. D-12; D-13; D-14. For these reasons, the October 3, 2014 version is referred to herein as the final, adopted IEP.

needs and adjust the behavior programming as necessary. When the Student exhibits a new negative behavior, the team needs to implement behavioral support strategies that fade the behavior within five school days to prevent the behavior from taking hold. D-13:13-15.

35. The BIP states that there are visual aids concerning behavior that the Student may be using in a rote fashion instead of thoughtfully determining barriers to his learning at the time. Explicit teaching of each part of the behavior plan should be done so the Student can develop greater self-awareness of what is bothering him and take appropriate steps to alter his behavior. Role playing with classmates, social stories containing favorite cartoon characters who make good choices, and drawing comic strips of successful social interactions would be good ways to help the Student practice. *Id.*

36. The BIP further states that the Student shows interest in working with his peers instead of working with a 1:1 aide for his reading, writing, and math instruction. He will therefore have a change of setting to be included in group work in his special education subjects, and participate in general education activities with less challenging or more flexible academic content, such as PE, music, library, silent reading, lunch, recess, snacks, art and assemblies. These activities should be modified for the Student's needs, with additional staff support to access them with typical peers. *Id.*

37. The BIP states that reinforcers will continue to be video games earned by a token system to be used throughout work sessions and visible to the Student. The BIP recommends increasing the number of tokens to allow for more frequent visual feedback by token reinforcement, which is less disruptive to group activities than frequent verbal praise. The token board should be changed in the ways recommended in the FBA (described above), so it looks more like what typical peers experience, and so it is more portable. *Id.*

38. Consequences for target behavior are the following. When the Student bolts from the instructional space, stand between him and the exit, or him and potential peer targets. Redirect him to the assigned work and say nothing about the behavior. Provide physical escort back to the assigned work space only as needed for safety. When he is safely seated, remove all tokens earned, show him the rules, and redirect him to the task. When the Student displaces or destroys materials, he will be required to clean them up before returning to his assigned task and beginning to earn more points. When the Student curses, provide no attention or reaction. Monitor the frequency of cursing, which has been decreasing at APL using this approach. If cursing does not continue to decrease, this tactic should be revisited. *Id.*

39. Finally, the BIP provides that data will be taken on the Student's behavioral progress using daily point sheets based on the Student's IEP goals in the social, behavioral, and study skills areas. *Id.* The special education teacher in the Student's proposed program at Thornton Creek, Carissa Cook, explained the data collection and analysis method she uses. Social/behavioral data is collected daily. Using worksheets that are very quick to mark, data is taken on behavior frequency, duration, and the level of prompts given. The teacher is the one who takes most of the data in the classroom, but when an aide provides academic instruction, the aide records data on a sheet with the IEP goal at the top, followed by the objectives being worked on. Ms. Cook meets with her aides each week to analyze the data and develop strategies for behavior based on Applied Behavior Analysis (ABA). For each student, they analyze where the child is on their goals and objectives and whether they are able to spend

increased time in the general education setting. Ms. Cook has vast quantities of data sheets and records on her computer concerning her data collection and analysis. Testimony of Cook.

40. Dr. Malmquist spent 90 minutes at Thornton Creek. Part of that time was recess (approximately 20 minutes) and snack time. Testimony of Malmquist; Testimony of Cook. Dr. Malmquist saw what she considered to be minimal note-taking by the teacher. She did not see data collection sheets, so she asked Ms. Cook to show her examples and Ms. Cook did so. Dr. Malmquist criticized the data she saw as not detailed enough and not graphed, and therefore inappropriate for the Student's needs. Dr. Malmquist believes the skills being targeted in instruction were at a lower cognitive level than the Student is currently receiving, and instruction was not delivered using a mastery-based method like precision teaching (defined below). During recess, Dr. Malmquist did not observe coaching or prompting of the special education students to interact with typically-developing students. The recess period she saw combined the fourth and fifth graders from Ms. Cook's class with much younger typically-developing students (kindergarten and first grade). She believes the District's proposed placement is inappropriate and would cause the Student to severely regress. Testimony of Malmquist.

41. Ms. Cook explained that her students are involved in three recess periods per day: Morning recess involves the whole school. Lunch recess involves third, fourth and fifth graders. Afternoon recess involves mostly kindergarten through second graders, with some fourth and fifth grade classes. At recess, Ms. Cook and the aids will intervene to help any of the special education students who want to play with typically-developing peers. Testimony of Cook. Teresa Swanson, District program specialist, has observed recess at Thornton Creek approximately fifty times in the last three years, and she previously taught one of the SCCs at the school. Ms. Swanson explained that some students' programs call for decreasing dependence on adults, but she sees active intervention by teachers and aids with other special education students most of the time she is there. Testimony of Swanson.

### *Annual Goals*

42. The October 2014 IEP has annual goals in math, reading, study/organizational skills, written expression, communication, social/behavior, and motor skills. D-13:16-20. The Parents' complaint did not challenge the appropriateness of the IEP goals, except in the area of motor skills. P-33:13-14, 16. Therefore, no further findings are made about the remaining goals.

43. The October 2014 IEP has one motor skills goal, concerning keyboarding: When given text to copy on a computer, the Student will type a passage with correct finger placement, improving his keyboarding skills from 0 words per minute to 15 words per minute. D-13:20.

44. The Parents argue the Student's OT needs are broader than keyboarding, and that the IEP should have included goals in handwriting. Evidence from the Student's two private OTs supports this claim. P-12; P-22; P-23; Testimony of Jackson; Testimony of Sachse.<sup>17</sup> The District did not offer evidence to the contrary.

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<sup>17</sup> The Parents did not use two OTs at once. Ms. Sachse served the Student first. After she terminated her private practice in June 2014, the Parents switched to Ms. Jackson, who is employed by MOSAIC Children's Therapy Clinic. Testimony of Father; Testimony of Jackson.

### *Accommodations/Modifications*

45. The October 2014 IEP provides the following accommodations/modifications for the Student, to be provided in both his general education and special education settings. They are summarized here as follows:

- Clear expectations for behavior and follow-up procedures, consistently applied school-wide;
- Extra time to process information;
- Break down goals to the Student's academic needs and abilities;
- Provide access to and use of headphones;
- Preferential seating to reduce visual stimulation;
- Provide a pencil grip;
- Provide two shared classroom Instructional Assistants (IAs);
- Provide sensory objects and activities, including weighted vest or blanket if the Student finds them helpful;
- Frequent opportunities to interact with peers with typically-developing social and communication skills;
- Staff will review the Student's knowledge of his friends before sending him to recess;
- Give advance notice of any changes in schedule or daily routine;
- Provide a 1:1 IA [instructional assistant], initially for 30 days to assess the level of support needed. IA will be continued if data indicate there is a need;
- Token economy for short term and long term goals;
- Provide an area for sensory breaks to calm down and refocus;
- Provide access to a scribe for writing;
- Provide frequent checks for understanding;
- Provide access to computer/word processor for written work;
- Social skills instruction available throughout the day to facilitate the Student's social interactions with peers, including during lunch time; and
- Ongoing analysis of the Student's skills and specific targeting of missing component skills to a high level of fluency and mastery before moving on to more complex learning tasks;

See D-13:21-22.

46. One of the accommodation listed above is providing access to computer/word processor for written work. In the past, the Student learned primarily through computer-based instruction. More recently, he has been able to learn by other modalities as well. Testimony of Moors. The District classroom to which the Student was assigned at Thornton Creek has either two or four desktop computers, and either two or four iPads for the eight students. (The record is unclear on these numbers.) The teacher, Carissa Cook, has felt no need for more computers. Numerous instructional software programs are available, and others may be ordered for a student. Ms. Cook has never had a request for instructional software denied by the District. Testimony of Cook; Testimony of Studley.

## *Educational Placement*

47. The educational placement offered in the October 2014 IEP is as follows:

[The] Student will participate in most academics, occupational therapy, study skills instruction and part of his social skills instruction in the special education setting. He will participate with his typical peers during recess and lunch, for science, at assemblies and school activities, and on field trips.

Neighborhood School Explanation:

The proposed program is not offered at neighborhood school.

D-13:25. The section on P.E. states the Student will participate in general education P.E. Totalling his weekly minutes in each setting, the IEP provides that he will be in a general education setting 19% of the time, and in special education 81% of the time. D-13:24-25.

48. The PWN accompanying the IEP provides that the Student will be served in a mostly self-contained class with eight students, one teacher, and two instructional assistants. It states the District offered this placement at one of the schools near the family's home. D-13:27.

49. The PWN goes on to state as follows: The proposed placement would allow the Student to become more independent by reducing his reliance on adults to control his behavior throughout the day. The IEP team considered and rejected the Parents' proposal to have the Student educated in a general education environment as he is at APL. The PWN states that what APL staff label as "general education" has 10 to 15 special needs students out of 17. In that setting, the Student requires direct and substantial support from one to two adults for most of the day, and works independently for only short periods. The PWN also states the IEP team considered and rejected the Parents' proposal for an on-site BCBA, because the staff in the District's proposed program has sufficient expertise and is supported by behavior specialists and a program from the University of Washington special education staff (discussed below). D-13:27

50. Thornton Creek also has a "reverse inclusion" program. Testimony of Swanson; Testimony of Cook. In the SCC to which the Student was assigned, 10 typically-developing peers come to the SCC to play games and socialize on Fridays for 30 minutes. The social interactions are closely monitored by SCC staff, who look for their students to generalize skills worked on in class, such as social turn-taking. Also once a week, three typically-developing third-graders from a girl's group have breakfast in the SCC. Testimony of Cook. These activities are in addition to the 19% of the Student's time spent in the general education setting under the October 2014 IEP. They take place within the SCC, not the general education setting, but they give the students social time with typically-developing peers that has the benefit of being closely monitored by classroom staff. The Parents argue these activities are not in the Student's IEP and should not be considered part of his placement. However, the placement provision of his IEP states he will participate with typically-developing peers in a number of settings, including "school activities." D-13:25. Reverse inclusion is a school program, not just a program in the Student's class. It comes within the school activities category in the Student's IEP.

51. If the Parents had accepted the District's placement, the other children in his program would have been in fourth and fifth grade this year (2014-2015, when the Student was in fourth



grade, but was the age of a fifth-grader). Their profiles are quite diverse, and are grouped here as the teacher grouped them in her testimony: All of them are on the autism spectrum. (1) One student does a morning check-in in the SCC that helps the teacher decide how much support he will need that day. He takes all of his academics in general education classes, and spends only about 30 minutes per week in the SCC working on behavioral support, e.g. processing social situations that did not go as well as they could have. He has three outside classes that tend to trigger him, so an aide or the teacher from the SCC accompanies him to those classes if needed that day. (2) Two other students attend general education math class accompanied by an aide from the SCC. The aide reviews their math lesson with them in the SCC later that day. They also attend general education P.E., library and art classes. They receive general education reading and writing instruction in the SCC from an aide. (3) Two other students participate in no academic classes in general education, but participate in general education P.E., library and art classes, as well as recess, lunch, assemblies and extra-curricular activities. They receive their academics in the SCC. (4) Finally, three students do not attend any general education classes, but do participate in general education recess, lunch, assemblies and extra-curricular activities. One of them is more severely impacted and has a 1:1 aide, who is in addition to the two classroom aides. The Student's placement appears to fall between groups (2) and (3) in the paragraph above.

52. Except for the student with the 1:1 aide, none of the students in the SCC is taught primarily 1:1. They are generally taught in groups of two or three, though sometimes individually. The teacher tries to give one whole-group academic lesson per week. For those who attend general education classes, SCC staff work on pre-teaching the material before they are exposed to it in general education class. Testimony of Cook.

53. The teacher in the SCC to which the Student was assigned for the 2014-2015 school year was Carissa Cook. She is in her fifth year as a special education teacher, the first year of which was as a substitute. All of her 18 students in her four full-time years have been on the autism spectrum. During two years in college she also taught children with autism under supervision. She was recognized in the top 10% of teachers in a smaller school district where she taught previously, and in the top 20% in the Seattle District, where she has taught for two years. The aides in Ms. Cook's classroom have the following experience: One has a degree in special education and was a special education resource room teacher for four years. The other has more than 20 years' experience working with special education students in the general education setting. Testimony of Cook.

#### *Support for School Personnel*

54. The October 2014 IEP provides that school personnel will be given the following support as needed: "Training and ongoing support/communication with behavior specialist knowledgeable about autism." The prior written notice adds more detail:

[T]he District has a program created and run by special education staff from the University of Washington in place for teachers who want additional support in working with students on the autism spectrum, and has several trained behavior specialists who an [sic] provide training and support to classroom staff.

D-13:27.

55. There are two programs referred to in the quote above. The one using University of Washington (UW) staff is called the Technical Assistance Team (TAT). TAT assists District teachers in handling issues with students on the autism spectrum. The TAT includes both UW staff and District staff. The TAT mostly works on behavioral issues, observing and offering teachers help upon request. The other program referred to above is the District's behavioral specialists. In the geographic area of the District that is under Dr. Studley's supervision, there are two behavioral specialists, Teresa Swanson and Alex LaRosa (their titles are special education program specialist). Dr. Studley considers both of them experts in autism. Ms. LaRosa is one month from receiving her BCBA certification. She visits Thornton Creek Elementary School usually every other week, sometimes weekly, to support the five special education teachers there. Program specialists work with teachers on improving their data collection, data analysis, and making adjustments to programs based on that analysis. The Program Specialists also coach teachers on providing differentiated instruction (teaching at different levels to children in the same classroom). Dr. Studley also visits Thornton Creek three to four times a month to supervise the special education teachers. Testimony of Studley; Testimony of Swanson. Ms. Cook, the special education teacher in the program at Thornton Creek to which the Student was assigned, does not feel the need for a BCBA to support her, given the assistance already available through her supervisors. Testimony of Cook.

#### *Extended School Year (ESY) Services*

56. The October 2014 IEP does not provide for ESY services in Summer 2015. The PWN states the District has not had an opportunity to serve the Student and therefore has no evidence he qualifies for ESY. It further states that if he enrolls in the District and exhibits a need for ESY, an IEP meeting will be held to create and ESY IEP. D-13:26, 28.

#### **Contention of the Parties Regarding the October 2014 IEP**

57. The Parents' criticisms of the October 2014 IEP are grouped into the following areas.

#### Participation with Typically-Developing Peers

58. The Parents contend the Student should be in the same classroom with some typically-developing peers throughout the day, as he is at APL. The IEP, by contrast, proposes that most of the Student's schooling take place in a special education setting, with only 19% of his time being spent among typically-developing peers. The Student prefers the company of peers he perceives as typical or high-functioning. He models his behavior on theirs and responds to social feedback from them better than he responds to social feedback from adults or from peers he perceives as lower-functioning. Testimony of Father; Testimony of Moors; Testimony of Simon. Although he cannot read grade-level texts himself, he benefits from participating in lessons in which they are discussed. Testimony of Simon.

59. The District counters by casting doubt on whether the Student is making meaningful progress in the environment with typical peers advocated for by the Parents. The District contracted with Dr. Kathleen Prosch-Jensen to analyze that environment. Her analysis of his progress is discussed below. Dr. Prosch-Jensen and another District witness, Sara Celms, observed the Student at APL. They noted that he received most of his academic instruction in a 1:1 situation from an aide, and also received almost constant behavioral reinforcement or prompting from the 1:1 aide. Ms. Celms and Dr. Studley of the District believe the Student

could receive more academic and social benefit working in groups of two or three children receiving specially designed instruction at a similar level, instead of receiving 1:1 instruction in a classroom where others are working significantly above his instructional level. Testimony of Celms; Testimony of Studley; P-14:12. Ms. Celms believes the Student does not have any greater participation with non-disabled peers at APL than he would have in the District's proposed placement. Testimony of Celms.

60. In the current school year, 2014-2015 – after the District observers visited APL and after the IEP was adopted -- the Student has spent more time in groups and less time being instructed 1:1 than in previous years at APL. Testimony of Simon; Testimony of Moors. However, for the reasons discussed in the Conclusions of Law, the District's choice of placement must be judged principally by what was known at the time the placement was adopted, rather than by changes that occurred thereafter. The testimony in question would be highly relevant if a prospective placement at APL were being considered. It has little relevance to deciding the appropriateness of the District's placement choice that was made before this change occurred.<sup>18</sup>

61. In the SCC proposed by the District, all eight of the students have disabilities. However, three of them are higher-functioning and take most of their academic subjects either in general education classes, or in the general educational curriculum delivered by an aide in the SCC. The Student would have an opportunity to develop relationships with them, both in the SCC and when they participate together in the general education setting (i.e., for P.E., library, art, lunch, recess, and school activities). He would also be among typically-developing peers almost 20% of his time in the general education setting.

62. What the Student expresses about his classmates is not a judgment about whether they are disabled vs. non-disabled. Rather, he makes statements about lower-functioning peers such as: "He's being a baby" and "He can't do this work," and makes statements about higher-functioning peers such as: "I want to be like him [a student who is on his own]" and "I don't need a paraeducator, I'm a big boy." Testimony of Simon. In the District's placement, the Student would benefit from exposure to classmates who are higher functioning than himself, despite their having disabilities, as well as exposure to typically-developing peers when he is in the general education setting. At APL, the Student is friends with both typically-developing peers and those who have disabilities but are higher functioning than him. It is his perception of their functioning that matters to him. Testimony of Simon. The Student is close friends with a boy who has an IEP, but is less impacted by disability than the Student is. Testimony of Father.

63. The Parents contend the IEP misstates the number of disabled vs. typically-developing peers in the Student's APL class. The PWN for the IEP states that APL staff gave the District varying numbers of disabled students in the class, ranging from 10 to 15. D-13:27. Varying numbers were also given at the hearing. Ms. Moors explained that each APL class has four

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<sup>18</sup> By contrast, findings are made about the current school year (2014-2015) in the Thornton Creek SCC program because there is no claim that anything new or different has occurred there since the IEP was adopted and since the Father and Dr. Malmquist viewed the program, all of which occurred in early October 2014.

levels of students: Level 4 students are disabled and require a 1:1 aide. Level 3 students are less impacted by their disabilities and require a 2:1 aide. Level 2 students typically have attention deficit disorder or specific learning disabilities (SLDs). Level 1 students are typically-developing. Levels 4 and 3 are always supervised by a BCBA, and level 2 students are supervised by a BCBA if their health insurance requires it. Testimony of Moors. Ms. Simon, the BCBA who works in the Student's class, testified she does not know how many of the 16 children in the class are disabled. Twelve of the 16 are on her caseload. Of the 12 on her caseload, eight have APL treatment plans (which serve some of the same functions as an IEP does in public school; see P-16). Ms. Simon spends very little time on the remaining four students on her caseload, only consulting with the teachers on behavioral and environmental strategies for them, and occasionally providing training and materials. Testimony of Simon.

64. According to Ms. Moors, about half the class has disabilities, and about half the class is above grade level in reading and/or math. It is unclear how half of the Student's class could be typically-developing when 12 of the 16 (three-quarters) must be Level 4, 3, or 2 students because they are served by a BCBA. Based on the evidence presented, it is found that there are four typically-developing children and 12 children with disabilities in the Student's class this year. Thus, the District did not misstate the number of children with disabilities when it estimated, based on the varying information it received, that there were between 10 and 15 children with disabilities in the class. The same ratio may have been in the Student's class the previous year. Dr. Prosch-Jensen wrote that when she conducted her observation in the Student's third grade year (2013-2014), APL's Executive Director, Jennifer Anable, told her that four of the students in the class were typically-developing. D-20:1.

#### BCBA to Perform Various Functions

65. The Parents argue the IEP is inappropriate because it does not include the participation of a BCBA. Their witnesses believe an on-site (though not necessarily in-class) BCBA is necessary to perform several functions: make adjustments to the Student's programming and BIP within five school days based on recent behavior and needs; promptly assist classroom staff to deal with the Student's sometimes unpredictable behaviors so new behaviors do not become ingrained; and provide ongoing supervision and training of classroom staff, especially because the Student has an unusual mixture of high and low skill levels: He has a lot of difficulty learning and retaining component skills, but he can understand some higher level concepts. Testimony of Malmquist; Testimony of Moors.

66. Unpredictable behaviors are characteristic of children with autism. Testimony of Simon. They are behaviors that cannot be attributed to a function already identified in a student's behavior plan. Testimony of Moors. Examples of the Student's unpredictable behaviors are: hitting a homeless man in a park; hitting a baby in a baby music class (in the building where APL is located); and writing on a student's neck with a marker. Testimony of Simon; Testimony of Moors. The District counters that the SCC classroom staff take detailed data on student behavior and performance, and meet weekly to make adjustments to programs accordingly. Testimony of Cook. The SCC teacher also receives supervision and support from Program Specialist Alex LaRosa, and can call for support from the TAT. The Parents object that there is

no training plan, and no specified number of hours of training and support included in the IEP; the training and support is only "as needed" (D-13:22) and is not from a BCBA.<sup>19</sup>

#### 1:1 aide

67. The Parents object that the IEP does not guarantee a dedicated 1:1 aide for the Student beyond the first 30 days. The IEP states the 1:1 aide will be continued if data indicates there is a need for it. D-13:21. The Parents and their witnesses believe the Student would need a 1:1 aide in the District's SCC placement no matter how well it is run, due to his unpredictable behavior, difficulty with emotional regulation, and need for 1:1 academic instruction. Testimony of Moors; Testimony of Simon; Testimony of Malmquist; Testimony of Father.

68. The District counters that the 1:1 aide will continue if it is necessary. Also, the Student has shown he desires to participate with other students for instruction, rather than being taught 1:1. The District proposes very small groups, i.e., two or three students, working together in the SCC. District witnesses believe the high ratio of adults to students in the classroom would provide ample adult attention for the Student, and that his ability to function more independently will be enhanced if he is able to move away from a 1:1 aide. According to the Father, the Student prefers to be independent, and works best when his aide is on the periphery and steps in as needed. Testimony of Father.

69. District witnesses also note that the APL classroom is very loud and distracting. Testimony of Prosch-Jensen; Testimony of Celms. (It has 26 people: 10 staff and 16 students.) The Parents wrote that the Student "experiences sensory overload when he is in an environment with too much activity or noise." P-33:7-8. The Student's private OT, Ms. Jackson, noted that the Student is easily distracted and over-aroused. Testimony of Jackson. The District believes that in a classroom with fewer people and less noise, the Student would have less need for a 1:1 aide to redirect him. Testimony of Studley; P-14:12; D-20:2-3.

#### Size of General Education Classes

70. The Parents object to the size of the general education classes in which the Student would participate under the District's IEP (science, art, music, PE). The Student has demonstrated that he can participate well in a 17-person class at APL (his classes in some prior years have had 17 students). However, he does not do as well in a theater activity at APL at times when it combines two class, for a total of 32 children. Ms. Simon has observed that he is less able to focus and participate in that setting, though no data has been taken on this. Testimony of Simon.

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<sup>19</sup> The Parents cite the District's June 2013 evaluation, which stated the Student may benefit from training and ongoing supervision of his instructors on data collection and analysis, and on interventions specific to individuals with autism. D-3:7. This statement does not include the phrase "as needed" when referring to training and supervision. However, it also does not include any minimum or even suggested number of hours. It simply says "training and ongoing supervision". *Id.* That is not significantly different from the October 2014 IEP, which provides for "[t]raining and ongoing support/communication with behavior specialist knowledgeable about autism." D-13:22.

71. Ms. Moors based her testimony on this matter on an assumption that public school general education classes are approximately twice the size of APL classes. APL classes have a maximum of 17 students, so double that is 34 students. Testimony of Moors. However, the general education science class that the Student would have attended had he enrolled at Thornton Creek had 24 to 26 students. Testimony of Studley. The science class is also an expeditionary program that breaks up into small groups after a whole-class introduction. Testimony of Swanson. The Parents offered no evidence about the size of Thornton Creek's general education P.E., library and art classes.

72. The Parents presented no evidence that the Student is unable to participate in settings with more than 17 but fewer than 32 students. He would be accompanied in his general education classes by an aide from his special education class. Testimony of Swanson; Testimony of Cook. Also, he would be provided with the accommodations and modifications required by his IEP when he is in general education classes. D-13:21-22.

### Accommodations

73. The Parents believe that certain items should have been among the accommodations/modifications included in the Student's IEP. See Complaint, pp. 16-17; Parents' closing brief at 20. They are as follows: (1) Fidget tool; (2) Repeat/paraphrase/clarify/simplify directions; (3) Frequent monitoring and adjustment of instructional strategies and general education curricula based on analysis of data on Student's performance; (4) Pre-teaching of challenging material to help the Student engage in and learn the general education curriculum; and (5) Exclusively use a teacher qualified and trained to work with the Student as a substitute when his regular teacher is unavailable. Whether these accommodations were required for the Student to have an appropriate IEP is discussed in the Conclusions of Law, below.<sup>20</sup>

### Computer-Based Instruction

74. The Parents claim that the computer-based instruction and assistive technology provisions of the IEP are inappropriate. P-33:11, 23. The IEP provides the Student will have "[a]ccess to computer/word processor for written work . . . during all instructional periods" and access to "a computer and computer-based instruction in reading, writing, and mathematics." D-13:3, 22. It also provides: "Should he enroll in Seattle Public Schools, a consultation will be provided with the Assistive Technology team to assess what type(s) of assistive technology might be appropriate for [the Student]." D-13:3. The Parents argue that, given the importance of computer-based instruction for the Student, his IEP should state he will have:

Regular access to a computer and computer-based instruction for his instruction in the core content areas of Reading, Written Language and Mathematics, and an [a]ssistive technology evaluation to address difficulty with writing.

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<sup>20</sup> Additional accommodations/modifications are advocated in the Parents' complaint, but they have already been discussed separately, such as the use of a BCBA and a 1:1 aide.

P-33:11 (internal quotation marks omitted). The Parents object that the IEP fails to require that computer access be given on a "regular" basis." P-33:23. There is very little difference between the Parents' wording and the IEP's, the main difference being the word "regular" in the Parents' wording. The District's provision is arguably stronger. It has no modifier like "regular" before the word "access," implying the Student will have such access at *all* times. This implication is reinforced by the statement that he will have such access "during *all* instructional periods." D-13:22 (*italics added*). The number of computers and iPads in the SCC, and the availability of a full range of instructional software, reinforces the finding that the Student will have more than ample access to computer-based instruction.

### Transition to New Placement

75. The Parents claim that, even if the IEP and proposed placement were otherwise appropriate, it would be unduly harmful to transition the Student to a new placement during a school year. P-33:23-24. On October 16, 2014, the District proposed a transition plan for the Student to begin attending his new school on January 5, 2015. D-15. The District sought input from the Parents and others to help develop the plan further, but proposed at a minimum that the plan include: discussion with the Student about the new school, the teacher, and the students; showing him images of the school; having him visit on several occasions during non-school hours to familiarize him with the building, grounds, and classroom; having him meet the teacher and the 1:1 aide who would be working with him; then a second round of visits while school is in session, including visiting his classroom, and perhaps participating in recess or other selected activities; and having the 1:1 aide meet with the Student elsewhere, in places comfortable to the Student and during activities where a bond might be established before he makes the transition. *Id.*; Testimony of Studley. When the Student transitioned to a new class at APL in the 2014-2015 school year, it took four to six weeks before he was sufficiently accustomed to it to receive a meaningful educational benefit from the new environment. Transition to a new school would be much more difficult. Testimony of Simon. It would best be done with the Student being accompanied by trusted APL staff. Testimony of Moors.

76. Dr. Studley believes a transition after winter break would be better for the Student than a transition after summer break. This is because the Student would be able to visit his new school and classroom while they are in session. The Student suffers from a great deal of anxiety. P-33:14. The duration of his anxiety would be shortened if, after visiting the classroom, he could start attending sooner rather than waiting the whole summer to make the transition. Testimony of Studley. Although Ms. Moors of APL believes a transition to a new school should not occur and would be very difficult, she also believes that if such a transition took place, it should not involve a period of overlapping attendance and should not be stretched out over time. Testimony of Moors.

### **Related Services Since March 15, 2014**

77. The period from March 15, 2014 until the adoption of the October 2014 IEP was governed by the September 2013 IEP.<sup>21</sup> Its provisions on SLP and OT services will therefore be examined, in addition to the provisions of the October 2014 IEP.

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<sup>21</sup> The copy of the September 2013 IEP in the record bears a meeting date of June 25, 2013. However, its term began September 4, 2013. D-4.

### SLP services

78. The September 2013 IEP offered 60 minutes per week of SLP service as specially designed instruction, to be provided in two 30-minute sessions. That IEP expired on September 3, 2014. D-4:27. A new IEP was adopted on October 3, 2014. It offered 70 minutes per week of SLP services, consisting of the same service as in the prior IEP, plus an additional 45 minutes per month as a related service. D-13:24. The PLOP sections of both IEPs reviewed the Student's communication skills and needs in detail. D-4:7-8; D-13:4-6.

79. The Parents offered no evidence that the 60 minutes per week of SLP services provided in the September 2013 IEP, or the 70 minutes per week provided in the October 2014 IEP, were inappropriate. No SLP testified on behalf of the Parents. The evaluation report from a private SLP does not recommend how much SLP service the Student needs, only the areas that should be addressed. P-9.

80. The areas the private SLP evaluation recommended be addressed are the ones targeted in the October 2014 IEP communication goals: social communication and comprehension of language (receptive language), with a focus on antonyms and synonyms. P-9:3; D-13:19. The September 2013 IEP targeted social communication. D-4:13-14.

81. The Parents did not dual-enroll the Student in the District so he could receive the SLP services provided in his IEPs while enrolled at APL for other subjects.<sup>22</sup>

### OT services

82. The Parents offered testimony from two of the Student's private OTs, who described his significant deficits in this area. They testified he requires 50 - 55 minutes per week of individual OT service (Testimony of Jackson; P-22) or 60 minutes per week of the same (Testimony of Sachse; P-20:4). All of the deficits that are worked on in OT therapy affect the Student at school. Testimony of Jackson. No OT testified on behalf of the District.

83. The September 2013 IEP governed one of the periods at issue: March 15, 2014 through the end of the school year in June 2014. (The Parents have not made a claim for failure to provide extended school year (ESY) services.) The September 2013 IEP contained one annual goal in the motor area: dribbling a ball, improving from 4 - 5 repetitions to 10 - 15 repetitions. D-4:14. There is no other information in the record about what the Student would be doing, other than dribbling a ball, during his 40-minute weekly session with an OT. His 20-minute weekly session was to address written language, presumably handwriting. D-4:9, 27. Forty minutes appears to be an excessive period to devote to dribbling. Neither of the Student's OTs who testified at the hearing mentioned dribbling, nor is that skill among any of the goals they adopted for him. See P-12; P-23.

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<sup>22</sup> Nor did the Parents request a "service plan" from the District to receive SLP services, as some other APL families have done. Testimony of Studley. "Service plans" for private school students are distinct from IEPs, and are described in WAC 392-172-04010 through -04070; see also 34 CFR §300.132 - §300.144.



84. The successor IEP of October 2014 significantly reduced the Student's OT services from 60 minutes per week to 60 minutes *per month* of either direct or consultative service. D-13:6-7, 24. Dr. Studley acknowledged that the OT provisions of the October 2014 IEP may have been an error. Testimony of Studley. It was not a scrivener's error in the matrix; the PLOP discussed this level of service in detail. Also, the Parents pointed out the reduction in service and criticized it in a September 16, 2014 letter to the District. P-20:3-4, 8. However, it was not changed in the final IEP of October 2014. The only motor skill goal in this IEP concerns keyboarding. D-13:20. The private OTs who testified at the hearing established that the Student required OT in other areas not addressed in this IEP. All of the goals they targeted for him involved skills other than keyboarding. See P-12; P-23 The OTs also established that he required many more minutes of service than 60 per month, and required direct, not consultative service. Testimony of Sachse; Testimony of Jackson.

85. The Parents did not dual-enroll the Student in the District so he could receive the OT services provided in his IEPs while enrolled at APL for other subjects.<sup>23</sup>

86. The Parents seek payment of their unreimbursed OT costs from March 15, 2014 through the date of the hearing. Their unreimbursed costs were \$1,320 for Ms. Sachse and \$1,365 for Ms. Jackson. Ms. Jackson uses delayed billing, so there were additional services rendered, but not yet billed, at the time the Father testified about these costs. Testimony of Father. The Parents also seek reimbursement for having transported the Student to these OT sessions. However, they did not offer evidence on the mileage involved. The Father testified only about the mileage to APL.

### **Academy for Precision Learning**

87. It is concluded below that the District's October 2014 IEP offered the Student a FAPE, except in the area of OT, which APL does not offer. In this situation, findings of fact on the Parents' unilateral private placement would not normally be made. However, the Parents' criticism of the District's program and placement cannot be understood without considering APL's program and placement. This is because the Parents' criticism of the District's IEP is largely that it lacks certain features of APL, which features are required for the Student to receive a FAPE, according to the Parents. The evidence concerning APL is therefore relevant to evaluating the Parents' argument that the District's program and placement are inappropriate for lacking those features.

88. APL has approximately 97 students who are a mix of disabled and typically-developing children, ranging from kindergarten to twelfth grade. Testimony of Moors. "Precision teaching" focusses on establishing skills with fluency, which is a combination of accuracy and speed. It also focusses on making data-based decisions, and practicing critical skills to promote their retention and then generalizing them to reach fluency. Testimony of Simon; Testimony of Malmquist. Students are assessed on three levels: daily data collection, monthly or weekly curriculum-based assessments, and annual standardized achievement testing. Their progress

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<sup>23</sup> Nor did the Parents request a "service plan" from the District to receive OT services. See footnote above.

is graphed so changes can be more easily seen and adjustments made. Testimony of Moors; Testimony of Malmquist.

89. The Student's classroom this year (2014-2015) has 10 staff and 16 students. The staff consist of a BCBA, two teachers, and seven aides. Six of the seven aides are assigned 1:1 to individual students. The 1:1 aides rotate periodically so that they are assigned to different students within the class. Twelve of the 16 students are on the BCBA's caseload, though a few of them require almost none of her time. As mentioned above, eight of the 12 on her caseload have APL Treatment Plans. The Student requires more of the BCBA's time than any of the other seven children who have Treatment Plans. The classroom uses a grade-level curriculum that is modified for the individual students as needed. Testimony of Simon; Testimony of Moors.

90. Witnesses from APL conclude the Student has made very good progress during his years at the school. Testimony of Moors; Testimony of Simon. Dr. Malmquist has observed the Student five times at APL, from Fall 2012 to Spring 2015, and she concurs, calling his progress outstanding. Testimony of Malmquist. The documentary evidence from APL concerning the Student's progress prior to adoption of the October 2013 IEP is not specific and does not contain actual scores or data, except for his WJ-III Math Calculation score (this is discussed below). See P-16:1-2; D-10. The remaining documents in the record from APL concerning the Student's performance are from the current school year (2014-2015), after the IEP was finalized on October 3, 2014. P-16:3-16; P-25; P-26;<sup>24</sup> P-27. For the reasons discussed above, these current-year exhibits would be highly relevant if a prospective placement at APL were being considered. But they have little relevance when deciding the appropriateness of the District's placement choice adopted on October 3, 2014.

#### Dr. Prosch-Jensen's Analyses of the Student's Program at APL

91. The District contracted with Dr. Prosch-Jensen in January 2014 to advise the District on an appropriate program for the Student. Testimony of Prosch-Jensen. She conducted two types of analysis of the Student's APL program during the 2013-2014 school year (his third grade year). First, she performed an observation of the Student at APL on January 23, 2014. Testimony of Prosch-Jensen.

92. Dr. Prosch-Jensen documented the Student's activities in one-minute intervals for 66 minutes beginning at 9:36 a.m. D-20. The Student received several breaks and candies as positive reinforcements during this time. For 27 of the 66 minutes (41% of the time) he was engaged in a group activity or individual work time. For 37 of the 66 minutes (56% of the time), the Student was either on break (30 minutes) or off-task (7 minutes). During each break he played a Mario game on a computer, except for a short water break. *Id.*<sup>25</sup>

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<sup>24</sup> Ms. Simon testified that P-26 is mistakenly dated in the 2013-2014 school year, but the data it contains is actually from the 2014-2015 school year. Testimony of Simon.

<sup>25</sup> The final two minutes of the 66-minute observation were a transition to recess. D-20.

93. The Student earned positive reinforcements of tokens, verbal praise, and stickers. When he earned a certain number of tokens he received candy. During the 66-minute observation, the Student received eight candies, seven of them small Reese's peanut butter cups. He also ate three snacks unrelated to reinforcement (Oreo cookies and other unnamed snacks). D-20; Testimony of Prosch-Jensen.

94. Dr. Prosch-Jensen observed a very intense level of noise that is not typical for classrooms in her experience, and a lot of distracting activity: multiple children crying, running, talking, and all of the adults talking. A high level of noise is generally not helpful for children with autism. Testimony of Prosch-Jensen. (Evidence discussed above indicates this is quite true for the Student.) Dr. Prosch-Jensen also noted that the Student had a very rich schedule of reinforcements and very low work requirements, although he seemed behaviorally stable. She saw signs that he was satiated with reinforcements, e.g., when he received a candy and a computer game break, these were not enough and he wanted a sticker. She wondered if the Student would need this level of reinforcement in a quieter, group-focused environment (as opposed to 1:1 teaching). Two-thirds to 80% of a student's time should be spent engaged in instructional activity, in her opinion, especially during intensive, individualized instruction. The Student here was engaged only 41% of the time. D-20; Testimony of Prosch-Jensen.

95. After the timed observation, Dr. Prosch-Jensen observed the Student throughout recess. After recess, he played on the computer again for eight to nine minutes of choice time. D-20:4. Dr. Prosch-Jensen's visit ended at that point.

96. The second type of analysis Dr. Prosch-Jensen performed was a review of the Student's progress on his APL goals over the course of the 2013-2014 school year. His 17 goals covered behavioral, adaptive, social, academic, and social communication skills. Dr. Prosch-Jensen analyzed solely APL's own data on his progress. She found the Student made progress on 6 of his 17 goals by the end of the school year. On the remaining 11 goals, she found he made no meaningful progress. D-19; Testimony of Prosch-Jensen.

97. APL's treatment plan cites progress the Student made in math calculation during the school year that Dr. Prosch-Jensen reviewed, 2013-2014. The improvement was seen in his year-over-year score in math calculation on the WJ-III test. APL wrote in August 2014: "Overall areas of strength as demonstrated by assessment results included math calculation, showing an improvement from K.8 to 2.2 grade equivalent from last year!" P-16:1. (This means an improvement in grade-equivalent level skills from the eight month of kindergarten to the second month of second grade.) Dr. Prosch-Jensen pointed out that the two tests could not be validly compared. The first WJ-III was age-normed, meaning the Student was compared with other children his age. The second WJ-III was grade-normed, meaning the Student was compared with other children in his grade. Since he repeated one year of school, the Student is older than his same-grade peers, so he was being compared with children generally a year younger than himself the second time. The scores from the two years were thus invalidly compared, appearing to show more progress than the Student actually achieved. Testimony of Prosch-Jensen.

98. Dr. Prosch-Jensen corrected the error and recalculated all of the Student's WJ-III math scores for the two years in question. His Broad Math score increased from standard score (SS) 40 to SS 45 between the two years. Broad Math includes Applied Problems, where his score decreased from SS 59 to SS 49, and Math Calculation, where his score increased from SS 27

to SS 51 (late first-grade level). Testimony of Prosch-Jensen. Dr. Malmquist also recalculated the Student's Math Calculation scores and arrived at different numbers for the two years in question: SS 31 and SS 62. Both of these expert witnesses are highly qualified to calculate standardized test scores, and there is no evidence in the record to indicate which of them is correct. However, both of them found a significant increase in the Student's Math Calculation score. Dr. Prosch-Jensen questions whether the Student used a calculator during WJ-III testing, because his APL treatment plan for the following year included the use of a calculator. *Id.*; see P-16:10. If his Math Calculation score showed as much improvement as APL staff believed without the use of a calculator, there would be little reason to provide a calculator for his use the following year. Testimony of Prosch-Jensen. There was no evidence about calculator use during testing from APL or the Parents.

99. The District also conducted an observation by Sara Celms, the special education teacher and BCBA, who wrote an FBA for the Student. Her observations about APL's program for the Student are set forth in the section on the District's Spring 2014 evaluation, above, and will not be repeated here.

#### Parents' Contentions Regarding Dr. Prosch-Jensen's Analyses

100. Regarding satiation of reinforcements, Ms. Moors responded that candy and computer games are the only things that currently motivate the Student. She does not believe the Student is satiated with food reinforcements, contrary to what Dr. Prosch-Jensen observed. Regarding noise levels and distraction, Ms. Moors testified that the noise level and busyness of the classroom are like the real world. If the Student had a problem with it, he could ask to go into the hallway, which is quieter. He is in the acquisition phase of being able to make such requests. Testimony of Moors. Dr. Malmquist has never observed the noise level at APL to be problematic. Testimony of Malmquist.

101. Regarding the 41% percent engagement level that Dr. Prosch-Jensen observed, APL's Ms. Moors countered that break time is part of the Student's instructional activity because he must behave appropriately during breaks, and must decide whether to ask for a one-minute extension of his break (which he did for each break that Dr. Prosch-Jensen observed). Testimony of Moors; Testimony of Prosch-Jensen.

102. Regarding a 1:1 aide, witnesses for the Parents believe the Student will need this in any classroom, even one with the ratio of adult support proposed by the District, due to his unpredictable behavior, difficulty with emotional regulation, and need for 1:1 academic instruction. Testimony of Moors; Testimony of Malmquist; Testimony of Simon.

103. Regarding progress on goals, Ms. Moors faults Dr. Prosch-Jensen for not talking with APL staff about the context in which their data was taken, since Dr. Prosch-Jensen saw only some of the environments in which it was taken. Ms. Moors also criticized Dr. Prosch-Jensen's end-of-the-year assessment of progress based on August 2014 data (as opposed to June 2014 data), because it did not take into account any regression that may have occurred over the summer. However, Dr. Prosch-Jensen also evaluated progress in February 2014 (unaffected by summer regression), and found no meaningful progress on 12 of the 17 goals. D-19:2; Testimony of Prosch-Jensen. Ms. Moors and Dr. Malmquist testified they had not seen Dr. Prosch-Jensen's rubric for measuring levels of progress used elsewhere than by Dr. Prosch-Jensen, and that Dr.

Prosch-Jensen's analysis of the complexity of skills should have been done in the context of what is complex for this Student.

104. Finally, Ms. Moors believes the Student's progress in third grade should be viewed in the context of his progress in prior years. In his first year at APL, the Student did not perform any work in class. In his second year, he worked on acquiring some learning skills and on peer relations. In his third year, the one Dr. Prosch-Jenson reviewed, he had some learning skills, but was by now very behind in academics. Viewed in the context of his prior years, Ms. Moors believes the Student made very good progress at APL, and Dr. Malmquist concurs. Testimony of Moors; Testimony of Malmquist. In his fourth year at APL -- after the IEP was finalized on October 3, 2014 -- the Student has made more progress on his goals than he did last year. Testimony of Moors; Testimony of Simon.

105. On the disputed contentions set forth in the Findings of Fact above, it is concluded that the Parents have not carried their burden of proof. Their evidence is not more persuasive than the District's. This is further explained in the Conclusions of Law.

## CONCLUSIONS OF LAW

### The IDEA

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

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

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

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

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

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

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

4. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.*, 458 U.S. at 207. "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 Parents. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

#### **Appropriateness of June 2013 Evaluation**

6. The Parents' complaint alleged the District's June 2013 evaluation was inappropriate. As a result, that issue was placed in the Issues statement. See First Prehearing Order of January 8, 2015, and Issues statement, above. However, at the hearing, the parties placed in evidence a stipulation stating that the Parents had settled and released the District "of all claims related to the Student's education through March 14, 2014, except that the release covered the entire 2013-2014 school year in relation to the cost of the Student's education at APL." D-23. The June 2013 evaluation was completed *prior* to March 14, 2014. The parties' stipulation therefore excludes it from adjudication.

7. The Parents argue that deficiencies in the June 2013 evaluation caused deficiencies in the October 2014 IEP, so the evaluation remains at issue. That argument is misplaced. The Parents are free to challenge any and all deficiencies they find in the later IEP, whatever the root cause of those deficiencies may have been. The June 2013 evaluation is in evidence, and it is cited a number of times in this decision. But its appropriateness under the IDEA, in and of itself, will not be adjudicated, pursuant to the parties' stipulation.<sup>26</sup>

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<sup>26</sup> The ALJ is interpreting the parties' stipulation concerning what is at issue in the present case. The parties' settlement agreement is not in evidence and the ALJ does not have the authority to enforce private settlement agreements. They are matters of contract law and are outside the ALJ's jurisdiction under the IDEA. See *Lake Washington School Dist.*, 2012-SE-0101 and -0102 (Order Granting District's Motion for Partial Summary Judgment, 3/19/13) (a copy of this order may be obtained from the OSPI Public Records Officer).

## Appropriateness of Spring 2014 Evaluation

8. When a school district conducts a special education evaluation, a group of qualified professionals selected by the district must use a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent . . ." The group must not use "any single measure or assessment as the sole criterion" for determining eligibility or educational programming. The group must use technically sound instruments that may assess the relative contribution of cognitive, behavioral, physical and developmental factors. Students must be assessed "in all areas related to the suspected disability" and the evaluation must be "sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified." WAC 392-172A-03020; see also 34 CFR §300.304.

9. The Parents have not established any violation of these requirements. It was reasonable for the District not to conduct new assessments in all areas, but to rely in part on information from its previous evaluation (which was less than a year old), together with updated information from APL and some new assessments. The regulations allow evaluations to be based in part, and sometimes in whole, on a review of existing evaluation data. See discussion of WAC 392-172A-03025, below. The Father's comments on the consent form indicate he understood this: "I want to provide input and participate in decisions about what, if any, data is needed, *in addition to what is already available*, to determine [the Student's] current performance levels and service needs." P-11:3 (*italics added*).

10. WAC 392-172A-03025 concerns the review of existing data for evaluations. It provides that existing evaluation data on the student must be reviewed and, with parental input, the team must identify what additional data, if any, is needed to determine whether the student is eligible under the IDEA and what his educational needs are. This review may be conducted without a meeting. *Id.*; see also 34 CFR §300.305. In Spring 2014, the District sent the Parents a consent form listing 11 areas it proposed to cover in the evaluation, and stating above the Parent's signature: "I understand that I have the opportunity to participate in the consideration of the areas to be assessed." P-11:3. In Summer 2014, the District sent the Parents the results of the assessments conducted by its staff in Spring 2014, prior their being used to determine the IEP's Present Levels of Performance in Fall 2014. Although the cover letter sending these documents did not request parental input, sending them did provide the Parents an opportunity to state whether they thought additional evaluation data should be obtained. There is no requirement that a meeting be held with parents for this purpose. WAC 392-172A-03025(3). Thus, no violation of this regulation is found.

11. The Parents argue that the FBA conducted in the Spring 2014 evaluation was inappropriate because it was conducted in one setting (APL) for use in another setting (public school). This argument is not accepted. First, at the time the FBA was conducted, the IEP team had not yet met to determine the Student's IEP services, let alone his placement, which must be determined last. See *K.D. v. Hawaii Dept. of Educ.*, 665 F.3d 1110, 1123 (9<sup>th</sup> Cir. 2011). Second, the District's witnesses were persuasive that it is very common to conduct an FBA, and draft a BIP based on it, if there is the possibility of a student changing placements. He can be reassessed if needed in a new placement. That way, staff at any new placement will have a guide to work from as a starting point, rather than none at all. It is concluded that there

was nothing inappropriate in the District conducting an FBA in the environment where the Student was attending school at the time. If the Student changes placement in the future, the Parents or the District may request that another FBA be conducted.

12. The District did commit a violation of the IDEA, however, in another respect. Upon completion of its assessments, the District did not comply with WAC 392-172A-03040, which requires in pertinent part:

(1) Upon completion of the administration of assessments and other evaluation measure:

(a) *A group of qualified professionals and the parent of the student* determine whether the student is eligible for special education and the educational needs of the student; and

(b) The school district must provide *a copy of the evaluation report* and the documentation of determination of eligibility at no cost to the parent.

WAC 392-172A-03040 (italics added); see also 34 CFR §300.306. The text of the IDEA makes clear that the determinations referred to in (1)(a) of the regulation quoted above are to be made together by the evaluators and the parents: "The determination of [eligibility] and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child". 20 U.S.C. §1414(b)(4)(A).

13. Upon completion of the assessments, the evaluation team did not offer the Parents an opportunity to confer with them to make the required determinations. No evaluation review meeting was held. Evaluation review meetings may be held in conjunction with IEP meetings, and this is actually encouraged by the regulations. See WAC 392-172A-03110(2)(e); see also 34 CFR §300.324. However, the invitation to the September 2014 IEP meeting did not state the meeting would include reviewing the evaluation results. It stated that the meeting would include reviewing the IEP, BIP and placement. D-13:1.

14. Another regulation specifies the required contents of an evaluation report:

(1) The evaluation report shall be sufficient in scope to develop an IEP, and at a minimum, must include:

(a) A statement of whether the student has a disability that meets the eligibility criteria in this chapter;

(b) A discussion of the assessments and review of data that supports the conclusion regarding eligibility . . . ;

(c) How the student's disability affects the student's involvement and progress in the general education curriculum . . . ;

(d) The recommended special education and related services needed by the student;

(e) Other information, as determined through the evaluation process and parental input, needed to develop an IEP;

(f) The date and signature of each professional member of the group certifying that the valuation report represents his or her conclusion. If the evaluation report does not reflect his or her conclusion, the professional member of the group must include a separate statement representing his or her conclusions.



- (2) Individuals contributing to the report must document the results of their individual assessments or observations.

WAC 392-172A-03035; see also 34 CFR §300.304-.306. When school districts conduct an evaluation outside of the triennial cycle (see WAC 392-172A-03015(2)(b); 34 CFR §300.303), or conduct less than a full evaluation, the resulting report is sometimes titled an "assessment revision". See P-8. The District here did not produce an "assessment revision," or any kind of written report of the evaluation.

15. The District cites WAC 392-172A-03010 and appears to argue from that regulation that an evaluation report was unnecessary. District's post-hearing brief at 9. WAC 392-172A-03010 provides:

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

WAC 392-172A-03010. See also 34 CFR §300.302.

16. There are two problems with this argument. First, the District's assessments were not undertaken for the purpose stated in that regulation, which is "to determine appropriate instructional strategies for curriculum implementation." *Id.* (italics added). Rather, as stated in the consent form, the purpose was to conduct an "educational evaluation for IEP development." P-11:2 (italics added). That is, in fact, how the evaluation results were used. They were incorporated into the PLOP section of the IEP and used to develop the Student's goals and services. They could not have been used "for curriculum implementation" because the Student was not attending school in the District. The second problem with the District's argument is that the Parents would have no way to know, looking at a consent form that identified a comprehensive evaluation, that this was *not* actually an evaluation and they would not be receiving an evaluation report. It is concluded that this was an evaluation and that the District violated the IDEA by failing to hold an evaluation review meeting and failing to produce an evaluation report.<sup>27</sup>

17. 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.

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<sup>27</sup> The Parents did not raise an issue in their complaint as to whether the Spring 2014 evaluation was completed within the time period required by WAC 392-172A-03015(3), see also 34 CFR §300.303. The complaint only states the District failed to conduct the evaluation within the 30-day time period provided by the parties' settlement agreement. This tribunal has no jurisdiction to adjudicate compliance with the parties' settlement agreement, as discussed in a footnote above. Likewise, the Parents did not raise an issue in their complaint about whether an assistive technology assessment or a cognitive assessment should have been conducted.

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

18. We turn to the question whether these two procedural violations significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE. On the one hand, the Parents received the District's new assessment results in late July 2014, and met with the District team in early September 2014, where they were able to discuss the evaluation results in the context of the PLOP. The PLOP set forth the evaluation results in a similar fashion to how such results are set forth in evaluation reports. In fact, PLOPs often repeat verbatim the information from an evaluation report, adding current updates if the evaluation report is not recent. This is what occurred the previous year. (Compare the June 2013 evaluation report with the September 2013 PLOP. D-3:1-7 and D-4:6-12.) The draft September 2014 IEP discussed not only the results of the evaluation, but how the student's disability affected his involvement in the general education curriculum, and the special education and related services recommended for him based on that evaluation. These are elements required in an evaluation report, but they are present in the IEP as well. After having an opportunity to discuss these matters at the September 2014 IEP meeting, the Parents provided extensive written comments on two drafts of the IEP, including the PLOP.

19. However, there are two factors indicating the District's violations were not merely harmless error. First, one element absent from IEPs, but included in evaluation reports, is the signature of each professional member of the team certifying they agree with the evaluation's conclusions, and attaching a dissenting opinion if they do not. Such certification is required in evaluation reports (see 392-172A-03035(1)(f); see also 34 CFR §300.305), but is not required in IEPs.<sup>28</sup> One of the three District evaluators, Sara Celms (the BCBA who observed the Student at APL and drafted the FBA) would have attended an evaluation review meeting<sup>29</sup> but did not attend the IEP meeting. Since the Student's behavior is arguably his greatest educational challenge, and since the Parents place great store in the expertise of BCBA's, missing the opportunity for back-and-forth discussion with Ms. Celms was a significant loss. Ms. Celms' classroom observation report and FBA contained recommendations on the central questions of whether the Student should have a 1:1 aide, and what type of setting he should be taught in. Because Ms. Celms is a BCBA, the Parents could have sought acknowledgements from her during the meeting about the special expertise of BCBA's that might have lent support to their argument that a BCBA is required in the Student's program.

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<sup>28</sup> Signatures on IEPs typically denote that the individual participated in the meeting, not that he or she agrees with the results. Thus, the IEP signature page here stated: "The list below indicates that the individual participated in the development of this Plan and the placement decision; it does not authorize consent." D-13:2.

<sup>29</sup> Ms. Celms was one of "the group of qualified professionals selected by the school district" to conduct its assessments. WAC 392-172A-03020(2); see also 34 CFR §300.304. Another regulation requires that after the assessments are completed, "a group of qualified professionals and the parent of the student determine" whether the student is eligible and what his educational needs are. WAC 392-17A-03040(1)(a); see also 34 CFR §300.306. While it is arguable that the first regulation says "the group" and the second regulation says "a group," meaning the persons in the two groups do not have to be the same, the Parents could have requested that the FBA's author attend the evaluation review meeting in the event her name did not appear on the invitation.

20. Second, in the prior year, the Parents provided extensive comments on the draft evaluation report before it was finalized in June 2013. These two factors lead to the conclusion that the procedural violations in question passed the threshold of significantly impeding the Parents' participation rights. For these reasons, it is concluded that the District's procedural violations in the Spring 2014 evaluation process constituted a denial of FAPE.

21. The Parents' assertion that the entire October 2014 IEP is substantively inappropriate because of these procedural violations in the evaluation process is without merit. The violations barely passed the threshold for a denial of FAPE, and did not have enough of an impact on the IEP process to render the IEP inappropriate. The Parents had ample opportunity for input on the IEP, and they exercised that opportunity, including challenging the evaluative material in the PLOP and FBA that were included in the IEP.

### **Procedural Claims Regarding Development of the October 2014 IEP**

#### No IEP in effect at the beginning of the 2014-2015 school year<sup>30</sup>

22. The Parents are correct that no IEP was in effect for the Student at the beginning of the 2014-2015 school year. The prior IEP expired on September 3, 2014. The new school year began that same day. The new IEP was not finalized until October 3, 2014.

At the beginning of each school year, each school district must have an IEP in effect for each student eligible for special education that it is serving through enrollment in the district.

WAC 392-172A-03105(1); *see also* 34 CFR §300.323.

23. The District conceded its violation and paid the Parents \$21,500 of APL tuition in compensation for the late adoption of the IEP. This amount represents tuition for the first half of the school year at APL. Whether an additional remedy should be awarded for this violation is discussed in the section on Remedies, below.

#### Offer of Educational Placement

24. The Parents allege the District did not offer an educational placement at the September 2, 2014 IEP meeting or thereafter, because the IEP does not name Thornton Creek Elementary School as the Student's placement. The Parents confuse the concept of a particular school building with the concept of an "educational placement" under the IDEA. They are distinct concepts. *See N.D. v. Hawaii Dept. of Educ.*, 600 F.3d 1104, 1116 (9<sup>th</sup> Cir. 2010) ("educational placement" means the general educational program of the student, i.e., regular class vs. home instruction); *T.Y. v. New York City Dept. of Educ.*, 584 F.3d 412, 419 (2<sup>nd</sup> Cir. 2009), *cert. denied*, 560 U.S. 904, 130 S. Ct. 3277 (2010) ("Educational placement" refers to the general educational program—such as the classes, individualized attention and additional

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<sup>30</sup> This claim is not explicitly stated in the Issues statement, above, but was stated in the Parents' complaint as a claim for relief. P-35:26. It is therefore adjudicated herein.

services a child will receive—rather than the ‘bricks and mortar’ of the specific school. Further, the requirement that an IEP specify the ‘location’ does not mean that the IEP must specify a specific school site.”). *Accord, M.A. v. Jersey City Bd. of Ed.*, 592 Fed. Appx. 124 (3<sup>rd</sup> Cir. 2014, unpublished); *Deer Valley Unif’d School Dist.*, 942 F. Supp. 2d 880, 887-889 (D. Ariz. 2013); *Marcus I. v. Hawaii Dept. of Educ.*, 2011 U.S. Dist. LEXIS 49671, 56 IDELR 219 (D. Haw. 2011). See also, U.S. Dept. of Educ. comments on IDEA regulations, 64 Fed. Reg. 12406, 12594 (March 12, 1999).

25. Both the September 2, 2014 draft and the final IEP described the Student’s educational placement in detail. The Parents and their expert witness, Dr. Malmquist, were able to observe the placement in effect at Thornton Creek a few days after the October 2014 was finalized, before the Parents rejected it and filed their due process hearing request. This allowed them to ascertain whether Thornton Creek could provide the educational placement and services described in the IEP.

26. The Parents have not established that the District failed to offer an educational placement at the September 2, 2014 IEP meeting and thereafter.

#### Predetermination

27. A school district is required to come to the IEP table with an “open mind,” but not a “blank mind”. A district may come to an IEP meeting with a draft IEP for discussion and having given thought to a placement. However, it must not finalize its placement decision prior to the IEP meeting. *Doyle v. Arlington County School Bd.*, 806 F. Supp. 1253, 1262 (E.D. Va. 1992) cited with approval in *K.D. v. Hawaii Dept. of Educ.*, *supra*, 665 F.3d at 1123. In *K.D.*, the department of education had visited a particular school before the first IEP meeting, but considered other options, reasonably rejected them, and therefore did not predetermine the student’s placement. Despite the department’s visit to the school in question, “a review of the prior written notices of placement . . . indicates that other options were considered”. *K.D. v. Hawaii Dept. of Educ.*, 665 F.3d at 1123. In the present case, a review of the PWN shows that the Parents’ preferred option of APL was extensively considered.

“[S]chool evaluators may prepare reports and come with pre-formed opinions regarding the best course of action for the child as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.”

*Nack v. Orange City School Dist.*, 454 F.3d 604, 610 (6<sup>th</sup> Cir. 2006) (internal citation omitted). Likewise in *M.C.E. v. Bd. of Educ. of Frederick County*, 2011 U.S. Dist. LEXIS 74266, 57 IDELR 44 (D. Md. 2011), the court found the parents were given meaningful input regarding the student’s placement and no predetermination was found:

Though the school board may have come to the meeting with the idea that the Pyramid Program was the best place for M.C.E., that is not a violation of the IDEA. . . . [The board] came prepared to recommend placing M.C.E. at the Pyramid Program, but had not predetermined where she would go.

*Id.*

28. The selection of the appropriate placement shall be based upon the student's IEP. WAC 392-172A-02060(2); *see also* 34 CFR §300.116. This means the final choice of an educational placement must be made after the IEP is completed in other respects. "[T]he Act requires that the placement be based on the IEP, and not vice versa." *K.D. v. Hawaii Dept. of Educ., supra*, 665 F.3d at 1123 (internal citation omitted). Dr. Studley's statement at the September 2, 2014 IEP meeting about not extolling APL may reflect her preference for a different placement, but it also may reflect the fact that choosing an educational placement and the school where it will be located must await the end of the IEP process. The IEP was not completed at the September 2, 2014 meeting.

29. For these reasons, the Parents have not established that the District violated the IDEA by predetermining the Student's placement.

#### Mistakes in draft IEPs

30. The Parents argue that mistakes in the September 2, and September 16, 2014 IEP drafts made it impossible to understand what programming the District was proposing and when. Regarding the first two mistakes, the Parents clearly understood at the time that they were errors (naming the wrong school as the school the Student was currently attending, and omitting the service matrix from the second of three IEP drafts). The Parents pointed out these errors at the time and the District promptly corrected them.

31. The third error was retaining the September 3, 2014 start date for the IEP's one-year term in later drafts, and not changing that date despite the fact that the final draft was not issued until a month later, October 3, 2014. The Parents have provided no evidence that their rejection of the IEP was based in any part on not being certain whether its term would end on August 31, 2015 (as stated therein) or would extend to October 2, 2015 (one year from the date it was finalized). That is the only possible confusion they could have experienced. There is no evidence they asked anyone this question, and no evidence it played any part in their decision to reject the IEP.

32. For these reasons, the Parents have not established any IDEA violation based on mistakes made in draft IEPs.

#### **Substantive Appropriateness of October 2014 IEP and Placement**

33. As a preliminary matter, the appropriateness of draft IEPs that were not adopted by the District will not be adjudicated. The Parents challenged the appropriateness of both the September 2014 and the October 2014 IEPs. *See* Issues statement, above. However, it became clear at the hearing that IEPs issued in September 2014 were drafts that were *not* ultimately adopted. Only the final IEP sent to the Parents on October 3, 2014 became effective.

#### Participation with Typically-Developing Peers

34. The Student is attracted to, and models himself on, higher-functioning peers. However, there is no evidence that this salutary effect comes only from contact with typically-developing peers, as opposed to peers who may have a disability but are noticeably (to him) higher functioning than himself. A least-restrictive environment (LRE) analysis is based in large part on the degree of participation with typically-developing peers, not with higher-functioning disabled

peers. However, the Parents seem to argue that the Student models himself *only* on typically-developing peers, when the evidence does not support that this is the distinction he draws.

35. Because of his attraction to higher-functioning peers, and for other reasons, the Parents contend the Student should be educated in the same classroom with typically-developing students throughout the day. This is a contention about the Student's LRE. Under the IDEA, states must assure that:

To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A). See also WAC 392-172A-02050; 34 CFR §300.114.

36. "[M]ainstreaming is a policy which must be balanced with the primary objective of providing handicapped children with an 'appropriate' education." *B.S. v. Placentia-Yorba Linda Unif'd School Dist.*, 306 Fed. Appx. 397, 400 (9<sup>th</sup> Cir. 2009, unpublished) (internal quotation marks and citations omitted).

It has been recognized that the mainstreaming provision creates a tension between the two purposes of the Act because "[s]chool districts must both seek to mainstream handicapped children and, at the same time, must tailor each child's educational placement and program to his special needs."

*Id.* An educational placement must be selected based upon: the student's IEP; the least restrictive environment requirements; the placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and consideration of any potential harmful effect on the student or on the quality of services he or she needs. WAC 392-172A-02060(2); see also 34 CFR §300.116.

37. The IEP team had before it for consideration at least two less-restrictive environments than the one it ultimately chose: the inclusion model selected the previous year (located at John Rogers Elementary School) and the APL model.<sup>31</sup> After considering the Student's IEP, classroom observations by two BCBA's on behalf of the District, the Student's evaluation data, APL's records, and input from the Parents and APL staff, the IEP team determined that the appropriate placement for the Student was an 8:1:2 SCC program with general education participation for science, P.E., library, art, lunch, recess, assemblies, and school activities.

38. The District relied on an outside, expert evaluator, Dr. Prosch-Jensen, who found the Student engaged in class activity or instruction only 41% of the time during her observation, despite a very rich diet of reinforcements, low work expectations, and intensive 1:1 intervention.

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<sup>31</sup> The District has a number of other service models that Dr. Studley and Ms. Swanson testified about, but there is no evidence any of them were considered as potentially appropriate for the Student.

In her opinion, the Student should have been engaged two-thirds of the time at a minimum. The District also relied on Dr. Prosch-Jensen's opinion that the classroom was excessively noisy and distracting, given that the Student has very significant and documented problems in such environments. The District relied on Ms. Celms' observation of a child who was isolated in 1:1 instruction, wanted to work with a small group but was not allowed to, and regularly misbehaved in the 1:1 setting. Ms. Celms interviewed four APL staff and reviewed APL records in addition to conducting her own observation. Although the Student was in a classroom with four typically-developing peers, he was largely working apart from them. For all of these reasons, the District determined the setting inappropriate for the Student. It concluded the Student would make more progress, both academically and socially, with small groups of two to three students working on similar goals to his own.

39. The Parents have presented contrary evidence from APL staff and Dr. Malmquist (who has significant connections with APL), and from the Father, but have not carried their burden of proof that their analysis is more compelling than the evidence on which the District relied. Dr. Prosch-Jenson also analyzed APL's performance data and concluded the Student made no meaningful progress on 11 of his 17 annual goals during the 2013-2014 school year. Her analysis was not sufficiently rebutted by the Parents' witnesses to carry their burden of proving that the District chose an inappropriate educational placement when it rejected the APL model and selected something else.

40. In the current school year (2014-2015) – after the IEP was finalized on October 3, 2014 - - the Student has spent less time in a 1:1 setting and more time in a group setting. He has also made more progress on his annual goals this year than last year. However, the District's IEP and placement decisions must be judged primarily as of the time they were adopted. The Ninth Circuit has cautioned:

We do not judge an [IEP] in hindsight; rather, we look to the [IEP's] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [the student] with a meaningful benefit. . . .

Actions of the school systems cannot . . . be judged exclusively in hindsight. . . . An [IEP] is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.

*Adams v. Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999) (internal citations omitted).

41. At issue is whether the District selected an educational placement that was reasonably calculated to offer the Student a meaningful educational benefit based on the information available at the time. *Rowley, supra*, 458 U.S. at 207; *M.M v. Lafayette School Dist., supra*, 767 F.3d at 852; *Adams v. Oregon, supra*, 195 F.3d at 1149. The District did due diligence in investigating the Parents' preferred placement, in which the Student has more physical presence with typically-developing peers, before concluding the Student was not making significant progress in that placement and was not sufficiently participating with those peers due to the predominance of 1:1 instruction. The Parents have not carried their burden of proof to the contrary.

BCBA to perform various functions

42. The Parents argue the IEP is inappropriate because it does not include a BCBA to analyze data, make prompt adjustments to the Student's programming based on that analysis, assist classroom staff with unpredictable behavior, and provide ongoing supervision and training of classroom staff. The District presented evidence that its SCC teacher and classroom staff engage in daily data collection, weekly analysis of that data, and weekly adjustments to student programming based on that analysis. Weekly analysis is the same interval described by APL's BCBA. The SCC teacher, Ms. Cook, testified without contradiction that she is able to appropriately address student behavior in her classroom, make adjustments to student programs as needed, and has expert resources to call upon in the event she needs help. The data collection and analysis methods used in the SCC program may be different than used at APL and APL's methods might be better. However, a court has recently articulated again the legal standard in IDEA cases:

Collection and analysis of educational data . . . is a matter of educational policy and methodology. . . . While the data collection and analysis methods proposed by Student's experts might be "better" than those employed by the District, the ALJ [who was reversed] provides no legal authority requiring that the District employ those methods. Nor is there any indication that the methods used by the District fell below any standard established by the IDEA or the state and federal regulations. To the contrary, it is well established that school districts are not required to provide the "best" educational program.

*Grants Pass School Dist.*, 2015 U.S. Dist. LEXIS 55998, 115 LRP 18582 (D. Ore. 2015) (internal citations omitted).

43. Regarding supervision and training by an on-site BCBA, this may be superior and closer at hand than the supervision and training the District's SCC teacher has available from Alex LaRosa and the TAT. However the legal standard is not what is superior, but what provides a "basic floor of opportunity" *Rowley, supra*, and a meaningful educational benefit.

44. The Parents cite this ALJ's decision in *Olympia School Dist.*, 110 LRP 2303 (SEA WA 2009), where an IEP's general requirement to provide ABA training of classroom staff was found insufficient, and the school district was ordered to list specific hours of training in the IEP. *Olympia School District* is distinguishable from the present case. There, a profoundly impacted student with almost no ability to communicate was found to require a specific methodology, and there was no evidence that her middle school classroom staff had any training in it or any capability of performing it. That has not been established in the present case.

45. The October 2014 IEP states the frequency, location and duration of training: Frequency – as needed; Location – classroom; Duration – the full term of the IEP. D-13:22. It is important to note that the Parents raise no objection to many identical "as needed" provisions in the Accommodations/Modifications section of the same IEP. D-13:21-22; see Parents' closing brief at 20-21.

46. The IDEA requires a statement of frequency, duration and location for all services, accommodations/modifications, and supports in an IEP, so that the level of an agency's commitment of resources will be clear to parents and other IEP team members. See 20 USC



§1414(d)(1)(A)(i)(VII); WAC 392-172A-03090(1)(g)(i); 34 CFR §300.320; U.S. Department of Education comments, 64 Fed. Reg. 12,479 (March 12, 1999). The frequency and duration of some services, most notably specially designed instruction and related services, must always be stated in exact minutes, not only because of their centrality to a student's program, but also because the LRE/placement calculation cannot be made without knowing the number of minutes the student spends in special education vs. general education. Some provisions in an IEP may be appropriate with a frequency of "as needed" rather than X minutes per week, but this *depends on the individual needs of the student*. "As needed" makes clear to parents that the agency's commitment is zero minutes unless and until there is a need. Thus, if parents believe a particular level of commitment of resources is needed, they may advocate for that at the IEP meeting.

47. The Parents have not established that SCC staff must have a specific training plan and number of hours of training in order to educate the Student. He does take more time from the APL BCBA than the other seven students in the class who have treatment plans. But with three educators serving eight children, the District reasonably determined that the teacher would have the time to focus on the Student's needs. Unpredictable behavior is characteristic of children with autism, according to APL's BCBA. All of the children in the SCC have a diagnosis on the autism spectrum. What is more unusual about this child is that he has a lot of difficulty learning and retaining component skills, but he can understand some higher level concepts. Every child is a unique individual, and every child with autism is a unique individual. But that does not mean every teacher requires a training plan and training hours specific to every child.

48. The Parents have not established that the October 2014 IEP was not reasonably calculated to provide the Student a meaningful educational benefit for lack of a BCBA in the Student's program.

#### 1:1 Aide

49. The Parents argue that a 1:1 aide must be guaranteed throughout the IEP's term, not just in the first month, with an extension only if the District determines a need has been demonstrated. However, it was reasonable for the District to rely on the views of Dr. Prosch-Jensen and Ms. Celms, who observed that the Student was motivated to work with other children rather than 1:1, regularly engaged in more off-task behavior with the 1:1 aide than in group settings, was highly dependent on the 1:1 aide for redirection, and worked in a very noisy, distracting classroom.

50. At issue is whether the District's choice about a 1:1 aide was reasonably calculated to offer the Student a meaningful educational benefit. The District determined that in the SCC -- a quieter classroom with significantly fewer students and staff than at APL -- the Student would have fewer distractions and may not need constant redirection and reinforcement from a 1:1 aide, thereby increasing his independence. While the Parents' beliefs to the contrary are reasonable, the District's determinations are based on record evidence and the Parents have not carried their burden of proof in challenging them.

51. The Parents have not established that the October 2014 IEP failed to offer the Student a FAPE due to its provisions concerning a 1:1 aide.

#### Size of General Education Classes

52. The Parents object to the size of the general education classes in which the Student would have participated under the District's IEP (science, P.E., art, and library). While APL's Ms. Moors assumed those general education classes would have approximately 32 – 34 students, the only evidence in the record on class size is that the science class the Student would have attended has 24 – 26 students. It is also an expeditionary class where students work primarily in small groups. There is no evidence how the Student would perform in a class with more than 17 but fewer than 32 students. In any general education class he would also have the accommodations and modifications required by his IEP. The Parents failed to elicit evidence on the size of the other general education classes the Student would have attended.

53. The Parents have not established that the District's general education classes for science, P.E., art and library were too large to offer a meaningful educational benefit to the Student.

#### Accommodations

54. The Parents argue the following accommodations/modifications should have been included in the Student's IEP:

- (1) Fidget tool;
- (2) Repeat/paraphrase/clarify/simplify directions;
- (3) Frequent monitoring and adjustment of instructional strategies and general education curricula based on analysis of data on Student's performance;
- (4) Pre-teaching of challenging material to help the Student engage in and learn the general education curriculum; and
- (5) Exclusively use a teacher qualified and trained to work with the Student as a substitute when his regular teacher is unavailable.

55. Regarding (1), this is encompassed in another accommodation that requires the District to provide "[s]ensory objects and activities." D-13:21.

56. Regarding (2), this is a teaching technique or methodology that would naturally be used in an SCC like the one to which the Student was assigned, and used by aides who accompany the SCC students to general education classes. It is impossible to list every teaching technique and methodology in an IEP, nor is it required. It is unnecessary to list this one in this Student's IEP. The situation would be different for a child who participates in general education classes without an aide, where the general education teacher may not otherwise employ this teaching technique, so it must be listed in the IEP. The decision what to list must be based on the individual needs of each student and the settings in which he or she will be receiving instruction. In the present case it is unnecessary to list this teaching technique in the IEP.

57. Regarding (3), the comments made under (2) apply here as well. It has been found that the SCC teacher takes extensive data on student performance on their IEP goals, and adjusts their instructional strategies on a weekly basis. Also, another accommodation, not mentioned by the Parents, provides something similar: "Ongoing analysis of [the Student's] skills and specific targeting of missing component skills to a high level of fluency and mastery before moving on to more complex learning tasks." D-13:22.

58. Regarding (4), the comments under (2) apply here as well. District witnesses explained that the Student is unlikely to need pre-teaching except for his general education science class, because for all other academics subjects he will be taught in groups of two or three special education students at a lower level of complexity, and will not be exposed to an unmediated general education curriculum. Again, it is impossible to list every teaching technique and methodology in an IEP, and it is not required. This accommodation is a teaching technique that would be important to include in the IEP of a child who attends general education classes without an aide and who is not in an SCC program.

59. Regarding (5), the Parents offered no evidence about substitute teachers or the Student's needs in this regard.

60. The Parents have not established that the October 2014 IEP is not reasonably calculated to offer the Student a FAPE for lack of accommodations.

#### Computer-Based Instruction

61. The Parents claim that the computer-based instruction and assistive technology provisions of the IEP are inappropriate. As discussed in the Findings of Fact, there is almost no difference between the provisions for which the Parents advocate and the provisions in the IEP. The wording of the IEP arguably guarantees greater access to computers than the Parents' wording.

62. The Parents have not established that the October 2014 IEP is not reasonably calculated to offer the Student a FAPE due to lack of necessary computer resources.

#### Transition to New Placement

63. The Parents allege it would have been unduly harmful for the Student to transition to a new placement in the middle of a school year. In many situations, a transition after summer break would be easier. However, that depends on the student's individual situation. As discussed in the Findings of Fact, the District presented evidence on a number of factors, including this Student's anxiety level, that indicate a transition after winter break would be preferable to a transition after summer break. Certain factors that make a transition at the start of the school year preferable in other cases are not present here: Where a class remains together all day long (such as a developmental preschool class, a general education elementary school class, or a totally self-contained special education class), the routines and rhythms of the class are shared by the group and taught at the beginning of the school year. A student coming in later would miss that. Also, in a class that remains together all day, a student arriving mid-year must fit into a more cohesive group. In the SCC where the Student is placed, the students have individual schedules and go to different places when they leave the SCC – some to fourth grade and some to fifth grade general education settings. Also, for students who have both significant anxiety and the need to be introduced to new situations gradually, a transition after summer break may be contraindicated: After visiting their new placement to meet the teacher and students, they would have the whole summer to be anxious and perseverate about starting. Even assuming the classroom staff remained the same the next year, the student composition will be different. In a two-grade class like the Student's proposed placement (fourth and fifth grade), approximately half of the students will be gone by the fall, with a new group replacing them. This would not occur if the Student transitioned after winter break, as the District offered.

64. For these reasons, the Parents have not established that a transition to the District's placement after winter break would have denied the Student a FAPE.

### Related Services

#### *SLP Services*

65. At issue is whether the District offered appropriate SLP services to the Student beginning March 15, 2014. The first part of this time period was governed by the September 2013 IEP. It offered 60 minutes per week of SLP services. This IEP expired on September 3, 2014. A new IEP was adopted on October 3, 2014. It offered 70 minutes per week of SLP services. The Parents provided no evidence that the SLP services offered in either IEP were inappropriate to meet the Student's needs. Both IEPs contained detailed PLOPs in communication and annual goals that targeted areas recommended by the Parent's private SLP evaluation.

66. There was a gap of one month between these two IEPs. One expired on September 3, 2014, and the next was not finalized until October 3, 2014. Even assuming this could have caused a one-month gap in services, the Parents would not be entitled to a remedy on equitable grounds. The Parents could have dual-enrolled the Student with the District to receive SLP services at any time during the years the Student has attended APL. See WAC 392-172A-04010(1); see also 34 CFR §300.132.<sup>32</sup> There is no evidence the Parents would have availed themselves of District SLP services during the one-month period in question, since they did not do so in the year before that month or the year after that month.

67. The Parents have not established that the District offered inappropriate SLP services to the Student beginning March 15, 2014.

#### *OT Services*

68. The testimony of the Parents' private OTs, Ms. Jackson and Ms. Sachse, established that the Student has significant deficits in this area and requires 50 – 60 minutes per week of direct OT services. The District did not offer testimony from an OT to the contrary. Ms. Sachse's and Ms. Jackson's services to the Student are found to have been appropriate.

69. The September 2013 IEP governed one of the periods at issue: March 15, 2014 through the end of the school year in June 2014. It contained one annual goal in the motor area, concerning dribbling a ball. That is not a skill targeted by either of the OTs who testified at the hearing. There is no other information in the record about what the Student would have been doing, other than dribbling a ball, for 40 minutes per week.

70. The successor IEP of October 2014 reduced the Student's OT services from 60 minutes per week to 60 minutes per month of undifferentiated consultative or direct services. There is

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<sup>32</sup> Alternatively, the Parents could have requested an equitable service plan to receive some SLP services pursuant to WAC 392-172A-04040. See also 34 CFR §300.138.

no evidence in the record to support this level of OT service as being sufficient for the Student's needs. The only motor goal in this IEP concerns keyboarding. The private OTs who testified at the hearing established that the Student required OT in other areas not addressed in this IEP. They also established that he required many more minutes of service than 60 per month, and required direct, not consultative service.

71. The Parents have established that the District offered inappropriate OT services to the Student beginning March 15, 2014.

## Summary

72. In summary, except the area of OT services, the Parents have failed to carry their burden of proof concerning the October 2014 IEP. Regarding the educational placement in that IEP, it was selected in compliance with the four factors in WAC 392-172A-02060(2); see also 34 CFR §300.116: It is based on the needs and services set forth in the Student's IEP, which can be met in the proposed placement. It is based on the least-restrictive environment requirement, as discussed in the section on Participation with Typically-Developing Peers, above. It provides a reasonably high probability of assisting the Student to attain his annual goals by offering the services and accommodations he needs. Finally, it considered the possible harmful effects of potential placements, such as the isolation of 1:1 instruction and transitioning to a new school. It is concluded that, except in the area of OT services, the October 2014 IEP was reasonably calculated to provide the Student a meaningful educational benefit.

## Remedies

### Compensatory education

73. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra*, 401 F.3d at 523-524.

74. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra*, 401 F.3d at 524. The Parents have not engaged in conduct that would warrant a reduction or denial of compensatory education, and have been cooperative with the District throughout. Their choice not to dual-enroll the Student to receive District OT services is the only matter to consider in this regard, and it is found not to effect the remedy in this case. On the District's side, it has committed the violations of the IDEA set forth herein, but has not engaged in conduct above and beyond that which should be considered in determining a compensatory education remedy.

### *Reimbursement for Private OT Expenses*

75. Reimbursement for past educational services purchased by parents is a form of compensatory education. The District offered inappropriate OT services throughout the period

at issue here. The Parents purchased private OT services during that period that were appropriate for the Student.

76. The next question is whether the Parents' remedy should be reduced or denied on equitable grounds because they did not take advantage of OT services they could have received from the District. The Parents had no obligation to dual-enroll the Student in the District to receive these OT services because they were inappropriate. Under the September 2013 IEP, an appropriate number of minutes of service were provided, but the one goal area of dribbling a ball was too narrow to meet the Student's needs. Under the October 2014 IEP, the one goal area of keyboarding was also too narrow to meet his needs, and the number of minutes of service was significantly inadequate. For these reasons, the Parents' remedy should not be reduced or denied on equitable grounds for having declined to dual-enroll the Student to receive inappropriate services.<sup>33</sup>

77. The District will be ordered to reimburse the Parents' out-of-pocket expenses for private OT services incurred from March 15, 2014 through the end of the District's 2014-2015 school year, on the following terms. (1) Reimbursement shall only be for services rendered during the District's school year, since the Student's IEP does not provide for extended school year services in the summer; (2) Reimbursement shall be for one session per week of no more than 60 minutes (Ms. Sachse's sessions were 60 minutes long; Ms. Jackson's sessions are 55 minutes long); and (3) Reimbursement for services not yet rendered shall be based on charges no higher than those charged by Ms. Jackson at the MOSAIC Children's Therapy Clinic.

*Remedy for impeding Parents' participation rights in Spring 2014 evaluation*

78. It has been found above that the Parents' participation rights were significantly impeded by the District's failure to hold an evaluation review meeting and produce an evaluation report for the Spring 2014 evaluation. However, the Parents did receive a partial substitute for what they lost: They participated vigorously in the decision-making process for the PLOP, which set forth the assessment procedures, results, and conclusions from the Spring 2014 evaluation. They had the opportunity to request additional assessments. The Father's written comments on the evaluation consent form show he knew he had this right, and the Parents were represented by able counsel during that time. The Parents participated in the September 2, 2014 IEP meeting that reviewed the PLOP, and they provided extensive written comments on the PLOP before they were finalized. Perhaps for these reasons, the Parents did not mention the absence of an evaluation report or meeting in several lengthy letters to the District in September and October 2014 detailing other alleged violations, and only spent six words on this claim in their complaint.

79. For these reasons, the determination whether the Parents' rights were significantly impeded was a close question. The question was determined in the Parents' favor, but the

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<sup>33</sup> The situation might be different if, for instance, a school district offered 45 minutes of *appropriate* OT services but the evidence established the Student required a somewhat higher number of minutes. In that case it would be appropriate to consider whether a compensatory education award of OT services should be reduced based on the parents' decision not to dual-enroll the student to receive the appropriate services that were offered.

impairment of their participation rights was not large enough to render the Spring 2014 evaluation substantively inappropriate.

80. The next question is determining an appropriate compensatory remedy. The Parents criticize the District's IEP for guaranteeing a 1:1 aide only for the Student's first 30 days in a District placement, with the aide to be continued if data indicate there is a need. A 1:1 aide is a service that is very important to the Parents, and for which they have consistently advocated. They likely would have advocated for it at a meeting to review the District's Spring 2014 evaluation report, had such a report been written. It is not found they would have succeeded in this advocacy, as the District heard their arguments on this matter several times before and several times after such a meeting would have been held. However, it is an area in which relief can be granted.

81. As discussed above, the Parents have not established that the absence of a guaranteed 1:1 aide beyond 30 days meant the October 2014 IEP was inappropriate. However, one additional guaranteed month of a 1:1 aide might assist in the Student's transition, since he is accustomed to having such an aide for the last four years. The District will be required to fund the aide for a second month,<sup>34</sup> and have the aide present in all environments for the Student. However, nothing in this decision dictates the methodology that the special education teacher decides to use with the Student regarding the 1:1 aide. The teacher is not barred from, for instance, instructing the aide to attend to the Student less closely or provide fewer prompts to the Student. The aide is required to be present in the same setting with the Student for two full months, but the teacher will determine the methodology that aide will use.

*Whether Parents are entitled to an additional remedy for the District's failure to have an IEP in effect at the beginning of the school year*

82. As mentioned above, the District has already paid the Parents \$21,000 in tuition reimbursement (half a year's tuition at APL) in compensation for failing to have an IEP in effect at the beginning of the school year. The Parents have not made a cogent argument why they should receive further compensation for this violation. They have not argued they are automatically entitled to a full year's tuition because of it, nor have they cited any authority holding this.

83. It has been found above that transitioning to a new placement after winter break is at least as good a choice for this particular Student, and may in fact be a better choice, than transitioning after summer break. This is an additional reason why no further remedy is awarded for this violation.

#### Prospective relief

84. In Student's IEP for the 2015-2016 school year, the District will be ordered to offer a minimum of 50 minutes per week of direct, individual OT services. This is the minimum amount of service recommended by Ms. Jackson. The IEP team will determine what portion of those

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<sup>34</sup> Two months means the following: If the service begins, for instance, on September 3<sup>rd</sup>, then it will continue through November 2<sup>nd</sup>.

services are to be delivered as a related service, and what portion are to be delivered as specially designed instruction. The District shall revise the Student's IEP to provide appropriate, measureable annual goals in the three areas recommended in Ms. Jackson's October 2014 evaluation of the Student (P-22:7) unless, prior to adoption of the IEP, the Parents notify the District that Ms. Jackson (or the Student's then-current OT) has changed her recommendation on the areas in which the Student should receive therapy. Once the IEP described in this paragraph is in effect, the District will not be responsible for reimbursing any private OT expenses the Parents may choose to incur. However, if there is no IEP in effect at the beginning of the 2015-2016 school year, the District shall continue with reimbursement of private OT expenses on the same terms ordered above until the new IEP goes into effect.

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

### ORDER

1. The District violated the IDEA and denied the Student a FAPE by failing to produce an evaluation report for the Spring 2014 evaluation and failing to convene an evaluation team meeting with the Parents to review that report. In compensation for these violations, the District shall amend the Student's IEP to provide for two months of a guaranteed 1:1 aide instead of 30 days. This amended provision shall be in the Student's IEP for the 2015-2016 school year

2. The District violated the IDEA and denied the Student a FAPE by failing to have an IEP in effect at the beginning of the 2014-2015 school year. The Parents have received \$21,500 in private school tuition reimbursement as compensation for this violation, and no additional relief is found warranted.

3. The District violated the IDEA and denied the Student a FAPE by offering inappropriate occupational therapy (OT) services in the Student's IEPs beginning March 15, 2014. In compensation for this violation, the District shall reimburse the Parents' out-of-pocket expenses for private OT services incurred from March 15, 2014 through the end of the District's 2014-2015 school year, on the terms set forth in Conclusion of Law no. 77, above.

4. In the Student's IEP for the 2015-2016 school year, the District shall include a minimum of 50 minutes per week of direct, individual OT services on the terms set forth in Conclusion of Law no. 84, above.

5. In all other respects, the Parents' requests for relief are DENIED.

Signed at Seattle, Washington on June 10, 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*

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cc: Administrative Resource Services, OSPI  
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