

Hon. Marsha J. Pechman

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

J.L. and M.L., and their minor daughter, K.L.,

Plaintiffs,

v.

MERCER ISLAND SCHOOL DISTRICT,

Defendant.

NO. 2:06-cv-00494-MJP

PLAINTIFFS' OPENING BRIEF  
[Amended]

I. INTRODUCTION

The Individuals With Disabilities Education Act (IDEA) seeks to ensure students with disabilities become as independent as possible and have the opportunity to achieve post-school outcomes, such as attendance at college and competitive employment, of which they are capable. To achieve this, K.L. needs a program designed to remediate her literacy skill deficits. The ALJ held that the Mercer Island School District (District) satisfied its duty to provide K.L. with a free appropriate public education (FAPE) by accommodating her literacy deficits by reducing work expectations and having other people read to her and write for her, to access academic content. When K.L. enrolled at Landmark School for 10<sup>th</sup> grade after years in the District, despite good intellectual ability (slightly above the mean), she was behind her peers by 5-6 years in reading and 7 years in writing, and the gap was not narrowing. At Landmark, K.L. made significant gains, closing the achievement gap in her ability to read accurately (decoding), understand what she read (comprehension), and express herself

1 in writing. She became more independent in doing her own work. The ALJ ignored the IDEA's  
2 purpose, which is so clearly stated in the Act and its implementing regulations, it is surprising to have  
3 to address the subject on appeal, and the standard of educational benefit applied by the Ninth Circuit.  
4 Findings are based on nonexistent and misinterpreted evidence.<sup>a</sup>

## 5 II. FACTS

6 K.L., age 17, has average intellect with severe learning disabilities affecting her ability to read,  
7 write and calculate. K.L. attended the District from Kindergarten until 4<sup>th</sup> grade, when, due to  
8 academic difficulties, she enrolled in a private school. K.L. returned to the District for the 6<sup>th</sup> grade  
9 in fall 2000. The District found K.L. to qualify for special education under the IDEA as specific  
10 learning disabled in the area of basic (word) reading. She had difficulty, but not a severe discrepancy  
11 between her ability and achievement, in reading comprehension, written expression and math. After  
12 completing 7<sup>th</sup> grade, K.L.'s reading skills were at an approximate mid-4<sup>th</sup> grade level.<sup>1</sup>

13 Grade 8 (2002-03 school year) and June 2003 District reevaluation. K.L. attended Islander  
14 Middle School for the 8<sup>th</sup> grade (2002-03 school year). In addition to special instruction in reading,  
15 writing and math, K.L. was provided accommodations under an individualized education plan (IEP)  
16 that included: a peer notetaker, a peer or adult to read materials, exams given orally, extended time  
17 for tests, reduced assignments, extra time for assignments, written instructions for assignments, and  
18 use of a calculator. In spring 2003, K.L. took the Iowa Test of Basis Skills, earning a Core Total  
19 percentile score of 2, which her teacher conceded was "terrible," and the Washington Assessment of  
20 Student Learning, failing to meet the standard in the only area tested."<sup>2</sup>

21 The District reevaluated K.L. in June 2003, the end of 8<sup>th</sup> grade. The standardized Wechsler  
22 Individual Achievement Test (WIAT) showed K.L.'s word decoding skills to be at the 2.8 grade  
23 level, and her reading comprehension skills to be at the 5.6 grade level. K.L. had lost ground, being  
24 *further behind* her classmates by 2.3 grade levels in decoding and .7 grade levels in comprehension,  
25 than when last given the same test in May 2000. The report states, "In comparison to test findings

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27 <sup>a</sup> Footnotes in this brief use lowercase letters; endnotes are numbered. The administrative decision, in the  
record at 309-370, is cited as: Findings of fact (FF #); Conclusions of law (CL #). All bolded text herein is added.

1 from three years ago, [K.L.'s] current scores suggested a decline in decoding skills” and “Writing  
2 skills fall lower than they did when she was given the same test three years ago. Her writing was  
3 described as “very simplistic, lacking detail and support,” with “errors in grammar, sentence structure,  
4 capitalization, and punctuation.” K.L.’s skills were at the 3.4 grade level in spelling and 2.1 in written  
5 expression. Her skills were *further behind* her classmates by 2.3 grade levels in spelling and 4.8 in  
6 written expression, than in May 2000. Her written expression skills declined in absolute terms by 1.8  
7 grade levels during this time. K.L.’s special education teacher and her school psychologist conceded  
8 that this decline meant that, “something was not working.” K.L.’s numerical operations test score  
9 also declined significantly. K.L. now had a severe discrepancy between her ability and performance  
10 in written expression and math that did not previously exist.<sup>3</sup>

11 The report noted that expectations were modified for K.L. in her 8<sup>th</sup> grade general education  
12 science and social studies classes and she received so much support, school work did not represent  
13 a true rating of her abilities. K.L.’s science teacher described her as a reluctant learner who was  
14 dependent on others to help her with her course work. Her social studies teacher described her as  
15 often quiet during group discussions. K.L. and her special education teacher reported that she was  
16 frustrated with her reading difficulty and overwhelmed with school. She was frustrated being singled  
17 out for special help and treatment. This affected her attitude and self-esteem, which was poorer than  
18 when she re-entered the District. Despite K.L.’s decline, the reevaluation report recommended no  
19 new strategies. The District’s team leader and school psychologist admitted that she was not “well  
20 versed” in the literature, did not know why K.L. was struggling to read or to complete work, that she  
21 lacked expertise in writing, and could not determine what specialized designed instruction (including  
22 curricula and strategies) were needed to address K.L.’s deficits in these areas, and that without this  
23 knowledge, a remedy to solve the problem could not identified.<sup>4</sup>

24 The District did not share the reevaluation report with the Parents before its completion on  
25 June 6, 2003 or the June 10, 2003 IEP meeting (end of 8<sup>th</sup> grade), at which K.L.’s 9<sup>th</sup> grade program  
26 was developed. The IEP states that K.L. struggled with completing work and participating in class.  
27 She had difficulty putting thoughts down on paper, and her writing was often simplistic. She needed

1 adult assistance to complete homework. K.L. had difficulty completing social studies and science  
2 homework and inconsistent test performance. She was very quiet, and rarely participated in class.  
3 She received modified grades due to modified assignments, tests, quizzes, and projects. K.L. became  
4 overwhelmed, appeared unhappy and shut down in regards to school work. She benefitted from  
5 having all reading materials (i.e. novels or parts thereof, text book material) read aloud. Her  
6 organization skills declined. The District's report of K.L.'s progress on her 2002-03 IEP objectives  
7 indicates that she met 0 of 3 in writing, and only 2 of 4 in reading.<sup>5</sup>

8 Grade 9 (2003-04 school year). K.L. attended Mercer Island High under an IEP essentially  
9 unchanged from the previous one. She received special instruction in reading, writing, and math,  
10 needing all accommodations on her previous IEP, and others "on top of that." K.L. was at times  
11 frustrated with school and afraid. She remained quiet and largely non-participatory, even compared  
12 to her disabled peers. She continued to have difficulty finding words when speaking. She needed so  
13 much assistance with the reading assigned in her science and social studies (history) classes, the  
14 District added an extra hour per day of "resource room" for someone to do this for her. K.L.  
15 struggled with feeling like she had to be helped with all of her work, and she lacked self-confidence.  
16 K.L.'s parents had to read virtually all content-area textbook and literature assignments to her, and  
17 help her with written assignments, because she was unable to independently read significant portions  
18 of the material or write down her thoughts. In January and June 2004, the District gave K.L. the  
19 standardized Gates-MacGinitie Reading Tests. Her overall reading scores were at the 1<sup>st</sup> percentile  
20 for her age, described by her teacher as "very low" in all areas. The District did not share these test  
21 results with the Parents. K.L.'s primary teacher confirmed that she was 5-6 years behind grade level  
22 in reading. In 9<sup>th</sup> grade, K.L.'s met 0 of her 3 IEP objectives in writing and 1 of 3 in reading.<sup>6</sup>

23 K.L.'s self-esteem and confidence about school and her ability to learn continued to decline  
24 during grade 9. She was overwhelmed with school work, and reported feeling stupid and being  
25 frustrated due to her inability to independently learn the material as it was being presented. Her  
26 teacher discussed these concerns with the Parents and staff throughout the school year. K.L. had  
27 reached the "end of the road" with school frustration and was at risk for becoming lost as a student.<sup>7</sup>

1 District's proposed IEP for 10<sup>th</sup> grade. On June 9, 2004, the District developed an IEP for  
2 the 2004-05 school year. The District did not even attempt to comply with minimum meeting  
3 requirements, sending only a teacher. The IEP provided for K.L. to receive special instruction in  
4 reading, writing, math and study/organization skills, without specifying the time to be devoted to each  
5 area, or methodologies to be used. In addition to accommodations included in previous IEPs, K.L.  
6 was to have access to books on tape and a scribe for written work. K.L.'s IEPs were essentially  
7 unchanged for years. For transition planning, the IEP anticipates that after graduation from high  
8 school, K.L. would attend "community college/college" and engage in "competitive employment."  
9 The IEP notes that the District's program for K.L. "is aimed at attending a community or technical  
10 college," while the Parents were investigating colleges for her.<sup>8</sup>

11 Deborah Hill, Ph.D., independent educational evaluation (IEE). In July 2004, the Parents  
12 obtained an IEE of K.L. by Deborah Hill, Ph.D., a neuropsychologist, for which the District paid.  
13 Dr. Hill found K.L.'s reading decoding ability to be at about a 3<sup>rd</sup> grade level and that she was able  
14 to independently read at a rate-disabled pace to comprehend 4<sup>th</sup> grade material. (WIAT-II) K.L.'s  
15 skills in spelling tested at below the 3<sup>rd</sup> grade level and in written expression at the beginning 3<sup>rd</sup> grade  
16 level. K.L. could not even write at the sentence level. Dr. Hill determined that,

17 in terms of relative rank in her peer group regarding academic skills, [K.L.] appears  
18 to have further lost ground relative to her same-age normative group of peers, that  
19 is, her standard scores continue to decline. This indicates that special instruction is  
not sufficient to stop her academic skill decline, much less to reverse the trend and  
show improvement.

20 To learn why K.L. was acquiring literacy skills so slowly, Dr. Hill administered more explicit tests  
21 of component reading and writing skills and of higher level language to supplement measures of  
22 intellectual and academic achievement. Dr. Hill found K.L. to have difficulty with higher level  
23 language, including word fluency, word retrieval, and story recall, as well as with language-related  
24 functions such as working memory. K.L. had deficient skills in phonological (sound to letter) and  
25 morphological (word families and routine parts of words) awareness. To improve K.L.'s ability to  
26 independently read material to make academic progress in a pre-baccalaureate curriculum and gain  
27 independent living and job skills, Dr. Hill found her to need intensive reading interventions to include,

1 among other things, individual instruction in phonological and morphological attributes of words.  
2 To progress in grade level academic subjects such as history and science, Dr. Hill recommended that  
3 K.L. be taught in a highly visual manner as well as orally. Dr. Hill recommended a specialized  
4 instructional setting that could work on K.L.'s language difficulties (such as oral expression) that  
5 underlie the ability to read and write. Dr. Hill endorsed Landmark School as a placement that  
6 appeared to meet K.L.'s needs as she had identified them and as supported by the literature.<sup>9</sup>

7 K.L. enrolls at Landmark School for the 10<sup>th</sup> grade (2004-05 school year). On August 6,  
8 2004, the Parents notified the District in writing of their intent to place K.L. at Landmark School,  
9 located in Massachusetts, at District expense, citing their dissatisfaction with the District's program.<sup>10</sup>  
10 K.L. started school at Landmark in the fall 2004, her 10<sup>th</sup> grade.

11 On September 22, 2004, the District developed another IEP for the 2004-05 school year,  
12 providing for K.L. to receive special instruction in reading, writing, math and study/organization  
13 skills, without specifying the time to be devoted to each area, or methodologies to be used. The IEP  
14 included all accommodations from the June 2004 IEP. The IEP team agreed with Dr. Hill that K.L.'s  
15 reading levels were most accurately described as being at the beginning 4<sup>th</sup> grade in word reading, the  
16 beginning of 3<sup>rd</sup> grade in psuedo-word reading, and mid-4<sup>th</sup> grade in comprehension, and her written  
17 expression was at the beginning 3<sup>rd</sup> grade level. Dr. Hill attended the IEP meeting, and the District  
18 made a few changes to its plan. However, it was clear that the District did not understand K.L.'s  
19 disability or what needed to be done to remediate her literacy skill deficits.<sup>11</sup>

20 Evaluation by District Experts. David Breiger, Ph.D., and Betty Moering, a speech/language  
21 pathologist (Children's Med. Center), evaluated K.L. in November 2004. Their written recommenda-  
22 tions included that K.L.'s program have "consistency in instructional strategies across academic  
23 contexts, and "team organization to facilitate communication...to create consistency;" "individual  
24 instruction to focus directly on [K.L.]'s reading and writing," and that teachers use the following  
25 strategies: "visual cues," "teach new vocabulary" before K.L. reads it, and "use visual information  
26 to support information presented verbally." Dr. Breiger advised the District that it had been working  
27 at too high a level in trying to teach K.L. to read, and that she needed to go back to working at the

1 single-syllable level. He recommended District staff read pertinent literature with which staff was  
2 unfamiliar, to obtain information about necessary program characteristics, which include work on  
3 phonemic awareness and oral expression. Ms. Moering advised that K.L. needed to work on oral  
4 discussion to help reading, but that such work could wait while K.L. focused instead on reading  
5 instruction, a choice K.L did not have to make at Landmark due to its design and intensity.<sup>12</sup>

6 District Reevaluation and IEP of March 11, 2005. The District scheduled another meeting  
7 for March 11, 2005, to complete K.L.'s reevaluation and formulate another IEP. Before the meeting,  
8 the Parents gave the District a detailed statement of what they believed needed to be included in the  
9 IEP, based on input from Dr. Hill and Landmark School. The District scheduled a pre-meeting  
10 attended by Dr. Breiger, at which its staff decided to follow the Children's evaluators' findings and  
11 recommendations in developing K.L.'s reevaluation and IEP, and to reject those of Dr. Hill, to the  
12 extent they differed. According to K.L.'s 9<sup>th</sup> grade special education teacher, this was done "Because  
13 that's the expert the School District was involved with and hired." The Parents were neither invited  
14 to this meeting nor informed of the decisions reached at it.<sup>13</sup>

15 On March 11, 2005, the District presented a completed reevaluation of K.L that reflected  
16 decisions reached in its secret meeting. The District's March 11, 2005 IEP does not allocate time for  
17 K.L.'s special instruction between specific activities, such as reading and writing, affording her no  
18 assurance she would receive the necessary amount of instruction in any area. The list of accommoda-  
19 tions K.L. needed had increased yet again, and included: A peer to read materials, peer note taker  
20 and/or access to teacher notes, access to books on tape, access to a scribe, tests taken in resource  
21 room with 100% extended time, alternative methods for exams (multiple choice, reader, scribe), extra  
22 time to respond to questions, reduced and extra time for assignments if needed, use of a calculator,  
23 and written instructions for assignments. The reevaluation report has most of the same deficiencies  
24 in identifying K.L.'s program needs as the IEP developed on the same date.<sup>14</sup>

25 The March 11, 2005, IEP lacked the following content the Parents asked that it include:

26 Present levels of performance/how disability affects education: The IEP did not recognize  
27 K.L.'s: (1) Need to improve phonological or morphological awareness or oral expression skills in



1 order to become a competent reader and writer; (2) Receptive and expressive higher-level language  
2 difficulty with finding and organizing words into concise and clear responses, or comprehending  
3 longer and/or more complex oral instructions, causing her to need directed questioning to completely  
4 understand what was asked of her; (3) Loss of ground relative to her same-age normative group of  
5 peers; or (4) Frustration, anxiety and depressed mood suffered when she had difficulty with  
6 schoolwork due to disability-related skill deficits.<sup>15</sup>

7 Goals and objectives: The IEP lacked: (1) Goals in phonemic/phonological, or morphological  
8 awareness to enable K.L. to increase auditory perception/conceptualization skills and track-  
9 ing/spelling/reading skills; and (2) Objectives for work on phonology and morphology (e.g., breaking  
10 words into component phonemes and morphemes), discourse and pragmatics (e.g., oral practice using  
11 description, enumeration, expressing relevant information), and memory and retrieval (e.g., retrieving  
12 target words using visualization strategies). The IEP objectives lacked benchmarks necessary to  
13 measure K.L.'s progress toward the goals that are included in the plan.<sup>16</sup>

14 Instructional methodologies: The IEP omitted: (1) Individual (one-on-one) instruction to: (a)  
15 improve phonemic awareness (sound-symbol relationships) related to decoding (tracking sounds and  
16 syllables within words, decoding multi-syllable real and nonsense words, visualizing and manipulating  
17 letters in words, and studying word patterns) to improve reading accuracy; and (b) Reading and  
18 discussing books within K.L.'s independent reading level to improve fluency and comprehension; (2)  
19 One-to-one and small group instruction to address expressive language difficulties as part of an  
20 integrated curriculum that reinforces the relationship between listening, speaking, reading and writing.  
21 Work on expressive language coordinated throughout K.L.'s classes. (3) Techniques to increase  
22 writing skills, including specialized class discussion rules and cueing (phonemic, semantic, gestural,  
23 visual and pictorial); (4) Work on oral language coordinated with written language work. Thematic  
24 units used to develop skills in the areas of phonology (speech sound discrimination and articulation),  
25 morphology (meaningful parts of words such as prefixes), semantics (vocabulary and word  
26 meanings), syntax (sentence structures), and discourse (multi-sentence oral formulation and social  
27 skills). Strategies for retrieval discussed and practiced; and (5) Highly visual and oral instruction in



1 high school level academic subjects. Directions and information broken down into small chunks, with  
2 frequent checking for understanding by asking K.L. to repeat what she has been asked to learn.<sup>17</sup>

3 Special Education/Related Services: The IEP did not allocate the time to be devoted to  
4 special instructional among specific activities, such as reading and writing, affording K.L. no  
5 assurance she would receive the necessary amount of instruction in any area. It contained no  
6 commitment for one-on-one and small group instruction in reading and written language, or small  
7 group instruction in content classes (math, science, history). The IEP even omitted program  
8 attributes, including instructional strategies, which the Parents sought that the District's own experts  
9 also recommended and that the District determined K.L. needed in its own reevaluation: Individual  
10 instruction in some areas, employment of "A case manager to coordinate generalization and intensity  
11 of special education instruction throughout the whole school day," and that when teaching K.L., staff  
12 will "Pre-teach vocabulary," and "Pair verbal instruction with visual instruction."<sup>18</sup>

13 Significance of IEP omissions. An effective reading program for a student with dyslexia must  
14 include work on phonemic awareness, vocabulary, decoding, fluency, and comprehension. No  
15 evidence was presented supporting the effectiveness of reading instruction for dyslexic students that  
16 omits work on phonemic awareness. Even District staff conceded that phonemic awareness  
17 difficulties underlie the ability to spell, as well as to read, and targeted instruction assists in increasing  
18 these skills. Inaccuracy in reading interferes with academic performance. For years, K.L.'s  
19 frustration with reading difficulty caused her to shut down. Her primary District teacher in grades  
20 8 and 9 conceded the IEP should have addressed the emotional impact of K.L.'s frustration relating  
21 to difficulty with schoolwork. To begin to close the achievement gap, individual (one-to-one)  
22 instruction for phonemic/morphological awareness and other component reading skills is critical for  
23 a student like K.L. who is so far behind despite years of reading instruction. Even Dr. Breiger  
24 advised the District that K.L. needs individual reading instruction.<sup>19</sup>

25 K.L.'s word finding (retrieval) difficulty was noted by those who worked with her the most  
26 in the District and at Landmark, and was reported by K.L., and her evaluators. (Dr. Breiger noted  
27 K.L.'s difficulty organizing oral responses and Ms. Moering never tested K.L.'s word finding,

1 although she recommended strategies to “increase word retrieval”). As already shown, this affected  
2 K.L.’s class participation and self-image. It also affected her reading efficiency and likely contributed  
3 to mood concerns. Because work on oral expression underlies the ability to read and write, its  
4 omission limits the progress in these areas K.L. could make under the IEP.<sup>20</sup>

5 All experts agreed that K.L. needs (1) to be pre-taught vocabulary; (2) visual instruction  
6 paired with auditory instruction to help organize verbal language, and because she has deficient  
7 working memory and strong perceptual skills; (3) cueing; and (4) consistency in instructional  
8 strategies across settings. Ms. Moering premised her opinion about whether the District could meet  
9 K.L.’s needs on the inclusion of the first two instructional strategies as part of K.L.’s program. No  
10 evidence suggested K.L could receive FAPE without these program attributes. This alone provides  
11 a sufficient basis to conclude the District IEPs are inappropriate, without the need to further weigh  
12 the credibility of evidence about other omitted program requirements. The District’s school  
13 psychologist admitted that the IEP’s omission of a requirement that District staff use strategies such  
14 as directed questioning and cueing (which K.L. needs for abstract, symbolic language, and to get  
15 detail in her oral expression), meant that there was no assurance K.L. would be provided what she  
16 needed to participate in general education classes, such as science.<sup>21</sup>

17 To be sufficiently effective, strategies used by various teachers across settings to teach reading  
18 and writing must be consistent. The District’s IEP did not commit to this or to train staff for this  
19 purpose, which would be necessary to accomplish this. By not committing to any minimum level of  
20 intensity of reading or writing instruction, much less the level the Parents’ requested, the District  
21 failed to ensure K.L. would meaningfully progress even if appropriate strategies were employed.<sup>22</sup>

22 K.L. did not meaningfully benefit from the District’s program in grades 8 and 9, and would  
23 not have done so under any of its proposed IEPs for grade 10. The deficiencies identified in the  
24 District’s March 11, 2005, IEP apply to all previous plans. The IEPs were not designed to enable  
25 K.L. to narrow her achievement gap in literacy skills, or to independently succeed in college (or  
26 community college) or competitive employment. K.L. suffered harmful effects in her District  
27 programs. She experienced frustration, became overwhelmed and shut down, lost confidence in her

1 ability to understand instruction and to learn, and felt over-dependent on others for help, due to her  
2 low literacy skill levels. She was viewed as someone incapable of succeeding in college. The IEPs  
3 proposed for K.L.'s 10<sup>th</sup> grade did not fully address her underlying need for skill remediation.

4 Landmark School program - 10<sup>th</sup> grade (Fall 2004) to present. Landmark is a fully accredited  
5 private day and residential school, state-approved for children with average or higher intelligence and  
6 language based learning disabilities. It has specialized in educating students with dyslexia since 1971,  
7 and a successful track record with students who have not progressed satisfactorily in public or  
8 non-specialized private schools. Many Landmark students are funded by public schools. It offers a  
9 comparable range of classes and activities to a public high school. Unlike the District, Landmark  
10 focuses on skill development of its high school students, rather than compensatory strategies. A high  
11 percentage of graduates attend college and pass standardized state competency tests.<sup>23</sup>

12 At Landmark, K.L. receives daily, intensive, one-on-one and small group instruction in all  
13 basic component skills needed for reading and writing, including phonological and morphological  
14 awareness, also worked on in other classes. She works on oral expression (receiving directive  
15 questioning and cues) to assist her in developing oral and written language skills and enhance her  
16 reading ability. She works intensively on writing skills, focusing on how to approach the writing  
17 process. Landmark provides a high level of staff training and holds frequent staff meetings to ensure  
18 instructional methods (including use of visuals and pre-teaching and checking for understanding) are  
19 integrated and consistent across classes. Instruction to address each of K.L.'s discrete component  
20 literacy skills is carefully planned and her progress monitored. K.L. has the advantage of being  
21 educated with peers with reading and writing disabilities, allowing her to feel comfortable in her  
22 learning environment and exposing her to other learning disabled students who overcome literacy  
23 deficits. Her social interactions are typical of those she experienced in the District.<sup>24</sup>

24 Assessment of K.L.'s progress at Landmark. In summer 2005, the Parents sought assessment  
25 to obtain objective confirmation of K.L.'s progress at Landmark by Dr. Hill and Patricia Moroney,  
26 M.A., CCC-Sp, a language pathologist specializing in remediating literacy skills. Standardized testing  
27 showed increased language-related component literacy skills. Between November 2004 and Summer

1 2005, K.L.'s scores on the Comprehensive Test of Phonological Processing (CTOPP) increased by  
2 27 standard score points<sup>b</sup> and more than 20 percentile points in phonologic memory, and by 31  
3 standard score points and 44 percentile points in rapid naming—skills both parties' experts stated to  
4 be initially very low and very important for learning to decode and to read fluently. (Dr. Hill also  
5 found that K.L.'s rapid naming improved). K.L.'s phonologic awareness composite score on the  
6 CTOPP increased by 18 standard score points, from well below the mean to the 79<sup>th</sup> percentile. From  
7 summer of 2004 to 2005, K.L.'s phonemic sequencing skills improved (Lindamood Auditory  
8 Conceptualization Test). Test of Language Competence-2 scores increased by 2 scaled score  
9 (mean=10) points and 17 percentile points in understanding ambiguous sentences, and by 3 scaled  
10 score points and 8 percentile points in recreating sentences, representing notable improvement in her  
11 understanding of sentences, and of form relating to sentences. K.L.'s word finding/retrieval skills  
12 improved, as measured by the WRAML-2, by 34 percentile points (16-50%). In two Delis Kaplan  
13 measures of language-related executive function, K.L. increased in inhibition by 2 scaled score points  
14 and 21 percentile points, and in inhibition/switching by 9 scaled score points and 49 percentile points,  
15 showing that her language was being remediated.<sup>25</sup>

16 These increases in component reading and writing skills, including phonemic awareness,  
17 translated into notable literacy gains. By May 2005, after less than one school year at Landmark,  
18 K.L.'s performance on the Woodcock Reading Mastery Test-Revised increased from late August  
19 2004 by more than 3 grade level equivalents (GLE) in Word Identification (real words), and by 1.4  
20 GLE in Word Attack (the ability to use phonics to decode nonsense words) skills. Between the  
21 summers of 2004 and 2005, re-administration of the WIAT-II showed that K.L.'s skills had increased  
22 by 11 standard score (SS) points and 2.0 GLE in word reading, 20 SS points and more than 5 GLE  
23 in reading comprehension, and 23 SS points and more than 5 GLE in pseudoword decoding. This  
24 resulted in a reading composite score increase of 18 SS points and 22 percentile points. K.L.'s skills  
25 increased in written expression by 21 SS points, 18 percentile points, and more than 4 GLE.<sup>26</sup>

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27 <sup>b</sup> Standard scores express the distance from the average (mean=100) in terms of the standard deviation of the  
distribution.

1 In addition to improved reading accuracy (word attack and identification) and comprehension,  
2 K.L.'s word reading was more efficient (TWRE). Reading fluency for lengthy passages remained  
3 poor, but this takes up to 3 years to improve. K.L.'s other skill increases are typical of students  
4 whose ultimately become more fluent, as K.L. is expected to. K.L. became more independent in her  
5 work and the level of reading she could tackle herself increased at Landmark, which, unlike the  
6 District, expects her to do her own work,. She gained confidence and was more verbally expansive.<sup>27</sup>

7 K.L. meaningfully benefitted from Landmark, with marked gains in phonological awareness,  
8 phonological memory, rapid automatic naming, word retrieval, and expression at the sentence level,  
9 including sentence structure. This contributed to achievement gains in reading decoding and  
10 comprehension, and written expression, described as "statistically significant," "dramatic," and  
11 "sizeable," allowing K.L. to **narrow the achievement gap between herself and her peers**. K.L.'s  
12 former District teacher and its own expert conceded that such reading gains are "impressive." K.L.  
13 and the experts who assessed her identified specific components of the Landmark program (largely  
14 those the District refused to include in its IEP) as the reason for her progress.<sup>28</sup>

15 K.L. reported having a bigger vocabulary, finally knowing how to break up a word and what  
16 goes together (like vowel teams and endings). Writing and spelling were easier. She could write more  
17 complete sentences, knew what to add and what not to add, and when to add more detail. She was  
18 better able to work independently. The Landmark program made K.L. feel like a more competent  
19 learner and more confident. K.L. attributed this to teachers and peers who better understand her  
20 learning disability, and the instruction that taught her strategies that improved her reading and writing  
21 skills, instruction that is provided in a manner that enabled her to understand it, and assignments that  
22 challenge her but enable her to complete her work independently. K.L. viewed herself as someone  
23 who could successfully attend college and was motivated to do so, which her 9<sup>th</sup> grade District special  
24 education teacher conceded to be a significant change in self-image.<sup>29</sup>

25 On June 6, 2005, the Parents requested a hearing challenging the District's failure to  
26 appropriately evaluate and develop an IEP for K.L., provide an appropriate program to her for grades  
27

1 8 and 9 (2002-2003, 2003-2004 school years)<sup>c</sup>, or propose one for grade 10 (2004-2005) or  
 2 prospectively. K.L.'s Parents paid \$49,900 for costs relating to her attendance at Landmark School  
 3 for the 2004-05 school year, including \$10,400 for room and board, and about \$50,000 for such costs  
 4 for the 2005-06 school year.<sup>30</sup> The Parents moved from Mercer Island during summer 2006. K.L.  
 5 is expected to graduate from Landmark in June 2007.

### 6 III. ARGUMENT

#### 7 A. The Standard of Review Requires the Administrative Decision to Be Given Little Deference

8 An IDEA administrative decision is reviewed on "the preponderance of the evidence." 20  
 9 U.S.C. § 1415(i)(2)(B)(iii). The extent of deference given the decision "Is a matter for the discretion  
 10 of the courts." A court must "consider the findings 'carefully and endeavor to respond to the hearing  
 11 officer's resolution of each material issue,' but the court 'is free to accept or reject the findings in part  
 12 or in whole'," and the deference accorded depends on whether the findings are thorough and careful.  
 13 Capistrano Unified School Dist. v. Wartenberg, 59 F.3d 884, 891 (9th Cir. 1995). Conclusions of  
 14 law or mixed questions of fact and law are reviewed *de novo* unless the mixed question is primarily  
 15 factual. Gregory K. v. Longview School Dist., 811 F.2d 1307, 1310 (9<sup>th</sup> Cir. 1987). The court  
 16 reviews "de novo the ultimate determination of the appropriateness of the educational program.  
 17 *Smith*, 15 F.3d at 1524." Capistrano, supra. The ALJ's decision is neither thorough nor careful and  
 18 it is not entitled to deference. It misstates the record and incorrectly applies the IDEA's substantive  
 19 benefit standard, ignoring the Act's stated purpose. Deference is premised on IDEA hearing officers  
 20 from a "state agency with expertise in the field," having "expertise in educational needs of  
 21 handicapped children." Doe By And Through Doe v. Smith, 879 F.2d 1340, 1343 (6th Cir. 1989).  
 22 Washington's state agency (OSPI) delegates responsibility for IDEA hearings to the state Office of  
 23 Administrative Hearings, and, unlike other states, OSPI does not review decisions. ALJ Harvin-  
 24 Woode has no special expertise in the educational needs of the disabled.

25  
 26 \_\_\_\_\_  
 27 <sup>c</sup> The IDEA had no express limitations period before July 1, 2005. The three year limitations period of RCW  
 4.16.080(2) is consistently applied. Dreher v. Amphitheater Unified School Dist., 22 F.3d 228, 232 (9<sup>th</sup> Cir. 1994)  
 (Requiring adoption of analogous state statute). Plaintiffs claims start with the June 10, 2002 IEP (for grade 8).



1 B. The IDEA Has a Both a Procedural and Substantive Benefit Test for Compliance.

2 Hendrick Hudson District Bd. of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 3051  
3 (1982) (“Rowley”), established the following test to evaluate compliance with the IDEA:

4 First, has the State complied with the procedures set forth in the Act? And second,  
5 is the individualized education program developed through the Act's procedures  
reasonably calculated to enable the child to receive educational benefits?

6 The District’s failure of either test supports a conclusion that it denied K.L. a FAPE. Hacienda La  
7 Puente Sch. Dist. of L.A. v. Honig, 976 F.2d 487, 492 (9th Cir. 1992). Noncompliance with the  
8 IDEA’s procedures makes it unnecessary to address the question of whether the District met the  
9 benefit test. W.G. v. Bd. of Trustees of Target Range School D., 960 F.2d 1479, 1485 (9th Cir.  
10 1992); Amanda J. ex rel. Annette J. v. Clark Cnty School, 267 F.3d 877, 891-92 (9<sup>th</sup> Cir. 2001). The  
11 level of benefit required to meet the substantive test of appropriateness requires a careful examination  
12 of a student’s unique needs and the purposes of the IDEA as amended in 1997.

13 C. The IDEA’s Purpose Is to Ensure All Students with Disabilities Meet the Challenging  
14 Expectations Set for All Children and Become Independent, Self-sufficient Adults

15 Congress enacted IDEA 1997 to ensure “equality of opportunity, full participation,  
16 **independent living**, and economic **self-sufficiency** for individuals with disabilities.” 20 U.S.C. §  
17 1400(c)(1). It seeks to ensure disabled students receives services sufficient to enable them, “(i) to  
18 meet developmental goals and, to the extent possible, those challenging expectations that have been  
19 established for all children; and (ii) to be prepared to lead productive, **independent, adult lives, to**  
20 **the maximum extent possible.**” Sec. 1400(c)(5)(E). The IDEA’s stated purpose includes,

21 to ensure that all children with disabilities have available to them a free appropriate  
22 public education that emphasizes special education and related services designed to  
meet their unique needs and prepare them for employment and independent living;

23 Sec. 1400(d)(1)(A); 34 CFR § 300.1. The Act does not allow a district to focus on accommodations  
24 or compensatory strategies instead of special education and related services,<sup>d</sup> if a student and parents

25 <sup>d</sup> By definition, the term “‘Free appropriate public education’ means special education and related services...”.  
26 “‘Special education’ means specially designed instruction, at no cost to parents, to meet the unique needs of a child  
27 with a disability;” and “‘related services’ means ... developmental, corrective, and other supportive services ...” Sec.  
1401(8),(22)&(25). The terms “accommodation” and “compensatory strategies” are not defined in the IDEA or

(continued...)

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1 prefer otherwise. When developing an IEP, the team “shall consider - .... (i) the strengths of the child  
2 and **the concerns of the parents** for enhancing the education of their child...” Sec. 1414(d)(3)(A);  
3 34 CFR § 300.346. The agency interpretation, 64 Federal Register (Fed. Reg.) 12472, 12473: March  
4 1999, further explains that,

5 The IDEA Amendments of 1997 also contain provisions that **greatly strengthen**  
6 **the involvement of students with disabilities in decisions regarding their own**  
7 **futures**, to facilitate movement from school to post-school activities.

8 .....  
9 Section 300.346(a)(1) adopts the statutory requirements related to considering the  
10 strengths of the child and the concerns of the parents.... **The requirements in**  
11 **paragraph (a)(1) and (a)(2) of this section impose an affirmative obligation on**  
12 **the IEP team to ensure that the child’s IEP reflects those considerations.**

13 IDEA 1997 increased the focus on “transition services,” defined as “an outcome-oriented  
14 process, which promotes movement from school to post-school activities,” that “(B) is based upon  
15 the individual student’s needs, **taking into account the student’s preferences and interests..**” Sec.  
16 1401(30); 34 CFR § 300.29. *See also*, Sec. 1414(d)(I)(A)(vii); 34 C.F.R. § 300.347(b). The  
17 Interpretation of these requirements, 64 Fed. Reg. 12470, 12474, provide,

18 The IEP requirements....of the IDEA emphasize the importance of three core  
19 concepts:..(2) the involvement of parents and students ... in making individual  
20 decisions to support each student’s educational success, and (3) the preparation of  
21 students with disabilities for employment and other post-school activities.

22 .....  
23 Similarly, one of the key purposes of the IDEA Amendments of 1997 was to  
24 ‘promote improved educational results for children with disabilities through ....  
25 educational experiences that prepare them for later educational challenges and  
26 employment.’ (H. Rep. No. 105-95, p. 82 (1997); S. Rep. No. 105-17, p. 4 (1997)).

27 Thus, throughout their preschool, elementary, and secondary education, the IEPs  
28 for children with disabilities must, to the extent appropriate for each individual child,  
29 **focus on providing instruction** and experiences that enable the child to prepare  
30 himself or herself for later educational experiences and for post-school activities,  
31 including formal education, if appropriate, employment, and independent living.

32 Although preparation for adult life is a key component of FAPE throughout the  
33 educational experiences of students with disabilities, Part B sets forth specific  
34 requirements related to transition planning and transition services that must be  
35 implemented no later than ages 14 and 16, respectively, and **which require an**  
36 **intensified focus on that preparation as these students begin and prepare to**  
37 **complete their secondary education.**

38 .....  
39 ‘The purpose of [the requirement in Sec. 300.347(b)(1)(i)] is to focus attention

---

40 <sup>d</sup>(...continued)  
41 included among the means by which a school may satisfy its duty to provide a student with FAPE.

1 on how the child's educational program can be planned to help the child make a  
 2 successful transition to his or her goals for life after secondary school.' (H. Rep. No.  
 105-95, pp. 101-102 (1997); S. Rep. No. 105-17, p. 22 (1997)).....

3 Thus, beginning at age 14, the IEP team, in determining appropriate measurable  
 4 annual goals (including benchmarks or short-term objectives) and services for a  
 student, must determine what instruction and educational experiences will assist the  
 student to prepare for transition from secondary education to post-secondary life.

5 The statement of transition service needs should relate directly to the student's  
 goals beyond secondary education, and show how planned studies are linked to these  
 goals.

6 The ALJ overlooked the IDEA's core purpose in her misapplication of its benefit standard to K.L.

7 **D. The ALJ Failed to Properly Apply the IDEA's Substantive Benefit Standard**

8 The ALJ measured only whether K.L. derived more than de minimis or trivial educational  
 9 benefit [CL 47, 63], a standard no reported Ninth Circuit case applies, rather than the proper  
 10 meaningful benefit standard. M.L. v. Federal Way School Dist., 387 F.3d 1101, 1126 (9<sup>th</sup> Cir. 2004)  
 11 (“[Student] has no expected opportunity for making **meaningful** academic progress ...”); Adams v.  
 12 State of Or., 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999) (“[T]he district court should have asked the more  
 13 pertinent question of whether the IFSP was appropriately designed and implemented so as to convey  
 14 [ ] with a **meaningful** benefit.”); Seattle School Dist., No. 1 v. B.S., 82 F.3d 1493, 1501 (9<sup>th</sup> Cir.  
 15 1996) (“district court and ALJ did not require the School District to provide [student] the ‘best’ or  
 16 ‘potential-maximizing’ education. Rather, they found that [ ] was unable to derive *any meaningful*  
 17 educational benefit from her past education...”); Poolaw v. Bishop, 67 F.3d 830, 834 (9<sup>th</sup> Cir. 1995)  
 18 (Educators must provide a “**meaningful** education to the student..... to comply with the Act’s main  
 19 requirement---that the child receive a free appropriate public education.”). The ALJ ignores Ninth  
 20 Circuit precedent, incorrectly citing only Florence County Sch. Dist. Four v. Carter, 950 F.2d 156,  
 21 160 (4<sup>th</sup> Cir. 1991).<sup>e</sup> The ALJ merely measures whether K.L. made any progress.<sup>f</sup>

22 \_\_\_\_\_  
 23 <sup>e</sup> The ALJ cites Supreme Court affirmation of Florence County, at “ 510 U.S. 7 (1993).” [CL 47] However,  
 24 the Supreme Court addressed only the availability of reimbursement for parental private placement, not the proper  
 25 application of the IDEA’s benefit standard. The Fourth Circuit more recently applied a “meaningful benefit” standard.  
G. Ex Rel. R.G. v. Fort Bragg Dependent Schools, 343 F.3d 295, 306 (4<sup>th</sup> Cir. 2003) (The question is “whether [the  
 student]’s April 1997 IEP was ‘reasonably calculated’ to provide [the student] **meaningful** educational benefit.”)

26 <sup>f</sup>The ALJ concludes that, “if a student progresses in a school district’s program, the courts should not examine  
 27 whether another method might produce additional or maximum benefits” [CL 48], citing the fact K.L. “made academic

(continued...)

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1 Sch. Dist., 36 IDELR 153 (N.D. Ill. 2002) [Appx:46] (“[I]n determining whether a school district  
2 has provided a FAPE, the court must analyze the child’s intellectual potential and then assess the  
3 student’s academic progress. *See Ridgewood Bd. of Ed.*, 172 F.3d at 247 (reversing the trial court,  
4 for failing to analyze the student’s academic potential.”)).

5 The ability to read and express oneself in writing is fundamental to any level of independence  
6 and economic self-sufficiency. Nein v. Greater Clark Cty., 95 F.Supp.2d at 970, noting that,

7 The ability to read is a fundamental ingredient in a free appropriate education that can  
8 be diminished only by a finding that the disabled child is clearly incapable of achieving  
9 reading skills transferable to life settings. The failure to use an approach that will  
provide Student with the tools to become an independent reader is alone an important  
reason why the LEA did not provide an appropriate education....

10 He’s obviously made some growth; it’s just extremely limited, and he’s entitled to  
11 more growth than that. A structured language program with reading remediation may  
take up to three years to get the Student to an independent reading situation.

12 In Susquenita Sch. Dist. v. Raelle S., 25 IDELR 120 (M.D. Pa. 1996) [Appx:61],

13 The minimal reading skills [ ] possessed when she began the ninth grade would have  
14 made such tasks nearly impossible for her to perform without substantial tutoring.

15 The methods adopted did not bring [ ] closer to solving the main obstacles to her  
16 academic progress, that is, her inability to read and comprehend materials on her own  
and her inability to write comprehensible prose.

17 The tutoring and study aide methods proposed by the district for [ ]’s ninth grade  
18 year solved the immediate problem of helping [ ] keep up in some subjects but did  
19 not help her make meaningful academic progress, because it failed to address, propose  
and implement methods likely to help her overcome her learning disability and learn  
to read and to work without constant teacher intervention and assistance.

20 K.L.’s poor reading skills prevented her from independently completing school work. Dr. Hill’s  
21 recommendations were based on what K.L. needed for “educational progress toward an **independent**  
22 level of adult functioning including college and career preparation,” “to improve comprehension for  
23 ... college level material,” and “sufficient to permit her to continue academic progress in a  
24 pre-baccalaureate curriculum and gain independent living and job skills.” These goals required  
25 intensive instruction to remediate her literacy skill deficits. District staff were funneling K.L. to a  
26 career track because she did not like school and needed a better feeling of accomplishment. At the  
27 hearing, several staff conceded that K.L.’s inability to read her own school work necessitated that

1 someone else do it for her, that she wanted to be more independent, and that the ultimate goal for her  
 2 should have been to read independently instead of depending on someone else to do it. Yet becoming  
 3 more independent was not even part of the criteria for KL to meet her IEP goals. In District, K.L.  
 4 may have graduated by acquiring information through other people reading to her and expressing  
 5 herself through someone writing for her. However, she would not become independent.<sup>31</sup>

6 E. The ALJ Set the Level of Educational Benefit to Which K.L. Is Entitled Far Too Low.

7 IDEA 1997 states, “the implementation of this chapter has been **impeded by low expectations**  
 8 ...”, seeking to ensure students “have the skills .. to enable them -... (i) **to meet developmental goals**  
 9 **and, to the maximum extent possible, those challenging expectations** that have been established  
 10 for all children. Sec. 1400(c)(4)&(5)(E). The Interpretation, 64 Fed. Reg. 12470, provides,

11 In enacting the IDEA Amendments of 1997, the Congress found that .. an effective  
 12 educational system now and in the future must.. provide for appropriate and effective  
 13 strategies and methods to ensure that students who are children with disabilities have  
 14 **maximum opportunities to achieve those standards and goals.**

15 The Parents sought a program designed for K.L. to achieve independence and her target post-school  
 16 outcomes, as her capabilities and appropriate programming allow. Being the IDEA’s purpose, this  
 17 goal cannot exceed its mandate. The increasing accommodations K.L. needed in the District reveals  
 18 her failure to become more independent and the reduced expectations for her. K.L. was unable and  
 19 not required to take notes, read assignments/material, complete written work, read tests, complete  
 20 tests and assignments in the time allowed others, or complete the same number and/or length of  
 21 assignments as others.<sup>i</sup> The District admitted to its focus on accommodations and compensations for  
 22 K.L.’s severe reading and writing deficits,<sup>32</sup> while IDEA required it to provide specially designed  
 instruction to remediate them.<sup>j</sup> Fisher v. Bd. of Educ., 856 A.2d at 555 (Student denied FAPE

23 \_\_\_\_\_  
 24 <sup>i</sup> The Parents do not dispute K.L.’s need for these accommodations while in the District’s program, where the  
 25 lack of intensive focus on special education services to remediate her literacy skill deficits left no choice but to  
 accommodate them. However, K.L.’s experience at Landmark proved that with proper instruction, she could markedly  
 increase skills and do her school work with increasing independence, reducing her need for accommodation.

26 <sup>j</sup> Citing no supporting authority, the ALJ held that once K.L. reached a certain age, the District may properly  
 27 decide to focus on accommodations and compensatory strategies to access grade-level content, rather than on  
 remediation. [FF 252, 253] This conclusion is contrary to the IDEA’s purpose, improperly de-emphasizes the

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1 because, “the school district has maintained his placement in an inclusion program, which provided  
2 accommodations and assistance, but no remediation to improve his functional literacy skills.”).

3 1. The ALJ failed to measure K.L.’s attainment of IEP objectives and goals

4 The ALJ concluded only that “K.L. made progress during the 7<sup>th</sup> and 8<sup>th</sup> grades on her reading  
5 and writing IEP goals and objectives.” [CL 13] The IDEA requires services sufficient to enable a  
6 student to meet or attain IEP goals. Sec. 1400(c)(5)(E)(I) An IEP must include “a statement of  
7 measurable annual goals, including benchmarks or short-term objectives.....” and a “(iii) a statement  
8 of the special education and related services...to be provided to the child...(I) to advance  
9 appropriately toward **attaining the annual goals,**” and “(viii) a statement of -....(II) how the child's  
10 parents will be regularly informed” of “(bb) **the extent to which that progress is sufficient to**  
11 **enable the child to achieve the goals by the end of the year.**” Sec. 1414(d)(1)(A); 34 C.F.R. §§  
12 300.347(a)(3)(I) & 347(a)(7)(ii)(B); WAC 392-172-160(1)(c)(i) & (g)(ii)(B). *See* Interpretation, 64  
13 Fed. Reg. 12471 (purpose of IEP objectives to “gauge, at intermediate times during the year, how  
14 well the child is progressing toward **achievement** of the annual goal.”) The IEP team “reviews the  
15 child’s IEP periodically, but not less than annually to determine whether the annual goals for the child  
16 are being **achieved**. Sec. 1414(4)(A)(I); 34 C.F.R. § 300.343(c); WAC 392-172-156 (Mandating  
17 “revising as necessary each student’s [IEP],” if annual goals are not **achieved**”). A student is entitled  
18 to, “The placement option(s) that provides a reasonably high probability of assisting the student to  
19 **attain** his or her annual goals.” WAC 392-172-180(2)(c).

20 By District report, K.L. failed to attain her reading or writing goals for the two school years  
21 at issue (2002-03 and 2003-04), having met 0 of 6 objectives in writing, and only 3 of 7 in reading.  
22 [FF 57, 58, 90, 92] One cannot achieve a goal without meeting the objectives that, by law, are its  
23 benchmarks. District staff conceded that the target for K.L. should be to meet, not merely progress  
24 toward her goals and objectives.<sup>33</sup> *See* County of San Diego v. Cal. Special Educ. Hearing, 93 F.3d

25 \_\_\_\_\_  
26 i(...continued)

27 importance of K.L. being independent and to succeed in college and competitive employment, and ignores K.L.’s  
28 preferences and her Parents’ concerns.



1 1458, 1467, 1468 (9<sup>th</sup> Cir. 1996) (“[T]he school failed to enable [student] to **meet** her goals as  
 2 established in her IEP, and therefore that the placement violated IDEA,” and “While every effort is  
 3 to be made to place a student in the least restrictive environment, it must be the least restrictive  
 4 environment which also **meets** the child’s IEP goals.” District ordered to fund private placement that  
 5 enabled her “to **accomplish** her IEP goals.”)<sup>k</sup>

6 2. The ALJ relied on K.L.’s grades without regard to modified expectations and supports.

7 The ALJ held that K.L. received a FAPE because she was able to complete her school work,  
 8 obtain better than passing grades, [CL 63] and advance from grade to grade. [CL 49]<sup>l</sup> K.L.’s grades  
 9 and credits reflect such reduced expectations, they are not comparable to other students’. Her  
 10 general education classes (often for students with adjustment problems) were slower and easier than  
 11 the norm. K.L.’s reduced work/test expectations are substantial. She was excused from taking some  
 12 tests altogether. In general and special education classes, K.L. was graded on effort (merely  
 13 completing work), attendance, behaving well, pasting notes taken by someone else in a book and  
 14 cleaning up, and whether she met the reduced expectations set for her, regardless of the correctness  
 15 of assignments or how she compared to her peers. K.L. earned credit (and “A’s”) for menial tasks  
 16 (chores/errands) as a “teaching assistant” in two classes for younger students. Her grade point  
 17 average/credits included “A” grades from this and her “special education” classes.<sup>34</sup>

18  
 19  
 20 <sup>k</sup> See also, A.S. Ex Rel. S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 537, 542 (D.Conn. 2002) (Failure  
 21 to meet IEP objectives a reason for failure to meet the meaningful benefit test); Board of Educ. of Frederick County  
 22 v. I.S., 325 F. Supp. 2d 565,583,584,587 (D.Md. 2004) (Student who “partially achieved” objectives did not make  
 23 “meaningful academic progress in the area of reading,” though quarterly IEP reports indicated he “was making  
 24 sufficient progress towards achieving her IEP goals.” The student “**achieved** only two out of four written language  
 25 objectives on the 2001-02 IEP and none in her 2002-03 IEP. The Court finds that [ ]’s progress in writing during the  
 26 2001-02 school year was not meaningful.” Id at 585); Barnett v. Memphis City Schools, 113 Fed. Appx. 124, 42  
 27 IDELR 56 (6th Cir. 2004) [Appx.:72] (Student “failed to **reach** the goals set forth in his IEPs,” and was denied a  
 28 FAPE, despite teachers’ testimony that he “made steady improvement,” the test results did not corroborate); and Kevin  
T. v. Elmhurst, supra. [Appx.:46-48] (Citing Sec. 1414(d)(4)(A) and 34 C.F.R. § 300.346(b), the court held,  
 “Therefore, the district court must examine the student’s IEPs to ensure that IEP objectives are being **met** and that the  
 student is not just advancing from grade to grade.” District violated IDEA by failing to measure the student’s “success  
 or failure by her ability to **master** specific objectives.”).

<sup>l</sup> The ALJ concludes that, “When a child is in a mainstream class, the ‘attainment of passing grades and  
 regular advancement from grade to grade are generally accepted indicators of satisfactory progress.’ Capistrano, 59  
 F.3d at 896.” However, this quote appears nowhere in the cited decision.



1 Courts take a more realistic view of special education grades as a measure of benefit than the  
2 ALJ. In Montgomery Township Board of Educ. v. S.C., 135 Fed. Appx. 534 (3<sup>rd</sup> Cir. 2005)  
3 [Appx.:76], the district’s “paper record ... overstated [student’s] actual progress,” and his,  
4 teacher had also allowed a high degree of informal accommodation of his disabilities,  
5 in the form of substantial assistance by his parents (amounting, at times, to outright  
6 completion by them of their child’s assignments), as well as extra time to complete  
assignments. [ ]’s ‘successful’ completion of classroom tasks does not appear  
probative of a ‘meaningful educational benefit,’ under the circumstances.

7 In West Chester Area Sch. Dist. v. Bruce C., 194 F. Supp. 2d at 419, the student’s,  
8 [high level] class placement and grades fail to tell the whole story. Throughout much  
9 of [ ]’s schooling, [ ]’s mother has worked with him on a daily basis, typically two  
10 or three hours each school night plus additional time on the weekends, to ensure  
11 assignments were completed and [ ] was prepared for tests.... Thus, as a matter of  
12 law the Appeals Panel erred in focusing on [ ]’s grades while disregarding [ ]’s  
potential. Furthermore, in light of the totality of the evidence, including the extensive  
amount of time [ ] spent out of class receiving remedial and supplement assistance  
from his mother and [ ]’s potential as evinced by the District’s testing..

13 In Fisher v. Bd. of Educ., 856 A.2d at 558, 559, the court noted that the,  
14 School District made accommodations, such as: rereading directions, extending time,  
15 allowing him to complete the test over several sessions, using a tape recorder or test  
16 administrator to record answers, and reading him passages of text.  
.....  
Therefore, his ‘progress’ in areas such as spelling and writing was more a function of  
the School District’s accommodations than any real improvement...

17 *See also*, Nein v. Greater Clark Cty., 95 F.Supp.2d at 977-78 (Rejecting argument that student’s  
18 “good grades and promotions from grade to grade show he was making some educational progress,”  
19 because “[The student] was graded on a modified scale and his tests and quizzes were modified, often  
20 being read to him aloud because he was unable to read them. .... promotions to the next grade level  
21 are not evidence of educational benefit from the [district] program.”)

22 3. The ALJ failed to properly consider the lack of progress revealed by standardized tests

23 Standardized tests measure K.L.’s *independent* reading and written language achievement in  
24 comparison to her age-mates. K.L. left the District behind her peers by 5-6 years in reading and 7  
25 years in writing (WIAT-II), and that the gap was not narrowing. District staff stated the goal should  
26 be to close the gap.<sup>35</sup> As noted in Susquenita Sch. Dist. v. Raelee S., *supra*, [Appx.:61], “One of the  
27 goals imposed by federal regulations is an emphasis on closing the gap between the exceptional

1 student's achievements and his or her ability levels. 34 C.F.R. 300-40(a), Appendix C." The student's  
 2 test scores "had not improved significantly, and, more importantly indicated that the gap between  
 3 [student]'s abilities and her current grade level remained much the same over time.... In practical  
 4 terms, this meant that [ ] was not catching up to her peers.."<sup>m</sup>

5 The ALJ also omitted mention of other standardized test results that were inconsistent with  
 6 a finding of meaningful progress. WIAT results led District staff to conclude in its June 2003  
 7 reevaluation, that important aspects of K.L.'s literacy skills had declined over a three year period.  
 8 K.L.'s teacher found her overall reading level to be at the 1<sup>st</sup> percentile at the middle and end of 9<sup>th</sup>  
 9 grade (Gates MacGinitie). K.L.'s word attack standard score on the Woodcock Reading Mastery  
 10 Test [WRMT-R] *declined* between 2000 and Summer 2004. The ALJ mistakenly compared scores  
 11 from the WRMT-R and WIAT II [FF 126] given one month apart in 2004, despite uncontradicted  
 12 evidence of incomparability provided by both parties' experts, for reasons that include the tendency  
 13 of the latter test to overestimate reading scores for low achievers.<sup>36</sup>

14 4. The ALJ relied on subjective teacher testimony, ignoring objective measures of progress

15 The ALJ afforded more weight to K.L.'s classroom performance based on teacher testimony  
 16 and K.L.'s grades, than her achievement of IEP goals or performance on standardized tests. [FF 183,  
 17 CL 54]<sup>n</sup> The ALJ cites testimony of Gerald Duffy that, "teachers are better at knowing if the Student

18 \_\_\_\_\_  
 19 <sup>m</sup> See also, Independent School District No. 701 v. J.T., 106 LRP 12718 (D. Minn. 2006)[Appx.:82, 86, 89]  
 20 (Insufficient benefit where "Student's academic skill gap was not closing and that he would expect the skill gap to  
 21 close..," and performance with extra support "does not constitute academic progress when the Student's academic goal  
 22 was to work independently."); Bd of Ed.of Frederick Cty., 325 F. Supp. 2d at 582-83, 587 (Comparing test scores that  
 23 "showed little or no change in [student's] skills...". With "low-average intellectual ability," ... student, "although  
 24 disabled, should be able to make meaningful progress in reading, writing, ...if provided with proper assistance.");  
 25 Nein, 95 F.Supp.2d at 974 ("Nor was the district court compelled by a showing of minimal improvement on some test  
 26 results to rule that the school had given [ ] a FAPE. Rowley recognized that a FAPE must be tailored to the individual  
 27 child's capabilities ..."); Hall v. Vance Cty., 774 F.2d at 635-36; Kevin T. v. Elmhurst., supra, [Appx.:48] (Citing Hall,  
 28 in which, "standardized test scores demonstrated that the child did not receive educational benefits as required by the  
 IDEA and Rowley. The student was of above average intelligence, but his test scores indicated that he made little  
 improvement in his reading ability over several years, despite the implementation of an IEP supposedly designed to  
 address his disability and problems with reading."); Fisher v. Bd. of Educ., 856 A.2d at 559 ("[ ]'s test scores in  
 critical areas, such as decoding.." revealed insufficient progress).

<sup>n</sup> Courts routinely discount teachers' subjective claims of progress that conflict with evidence from IEP  
 objectives and standardized tests. Barnett v. Memphis City, supra. [Appx.:71, 72] (Teacher testimony student "made

(continued...)

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1 made progress than standardized tests.” [FF 244] Duffy never met K.L., and testified to support one  
 2 of K.L.’s teachers, a former student with whom he had a previous relationship. Every witness who  
 3 tested K.L., including her District teachers and its hired expert (Dr. Breiger), and both District school  
 4 psychologists, testified to the accuracy of the standardized tests establishing K.L.’s poor literacy skill  
 5 levels in the District. The school psychologist and K.L.’s primary teacher conceded that K.L.’s test  
 6 scores represented a lack of progress that indicated the reading and writing instruction she was  
 7 receiving was not working.<sup>37</sup>

8 5. The ALJ’s findings of K.L.’s progress are not supported by experts or the record

9 The ALJ found that K.L.’s reading fluency rate increased from 110 to 120 words per minute  
 10 during grade 8 [FF 28], concluding that “by June 2003, K.L.’s reading fluency had increased.” [CL  
 11 8] Yet, K.L. was reading material *many* years below her grade level. No expert cited this miniscule  
 12 “increase” in the rate of reading elementary-level material to be significant. The ALJ found that with  
 13 some struggle, K.L. could read her general education materials, but at a slower pace than her  
 14 nondisabled peers. [FF 82] Yet, though substantially reduced in quantity, K.L. was unable to read her  
 15 own material, as she was mostly read to outside of class. Testing by the District, Dr. Hill and Dr.  
 16 Breiger showed K.L. to be many years behind in reading accuracy and comprehension. The ALJ  
 17 mistakenly compares K.L.’s approximate *independent* reading skills at the end of grade six, with her  
 18 approximate *instructional* reading level (which exceeds what K.L. can read independently) at the end  
 19 of grade 9 based on completely different and non-standardized assessment (QRI) designed to get a  
 20 general sense of skills, assuming this represents one grade year’s growth per year. [CL 52] No expert  
 21 cited these tests to support this conclusion. Even if correct, it would not represent meaningful  
 22 benefit. One year’s growth per year will not begin to close the gap between K.L. and her peers. The

23 \_\_\_\_\_  
 24 <sup>n</sup>(...continued)

25 steady improvement in her class” rejected when “neither his IEPs nor his test results corroborate such a  
 26 conclusion....Accordingly, we find that the district court erred in concluding that [ ] received a FAPE..,” due to a  
 27 “lack of meaningful progress.”); Bd. of Educ. of Frederick Cty, 325 F. Supp. 2d at 575, 587 (Rejecting quarterly teacher  
 28 reports “indicating that [student] was making sufficient progress towards achieving her IEP goals,” and “final first  
 grade report card, which ... reported that [student] had achieved all ‘outstandings’ and ‘satisfactories’ in academic  
 areas.... Despite [student]’s failure to achieve many of the objectives in the IEP, [district] promoted [student] to the  
 second grade.”); Nein, 95 F.Supp.2d at 967 (Rejecting teacher testimony that student “was having a lot of success.”).

1 ALJ concludes that, “The preponderance of evidence establishes the Student had learned to read  
2 using the instructional methods employed by the District.” [CL 60] The issue is not whether K.L.  
3 could read at all, but whether the poor reading skill levels she attained while in the District reflect  
4 meaningful progress, particularly when she was falling further behind her age-mates.<sup>38</sup>

5 The ALJ cites an essay of K.L.’s in 9<sup>th</sup> grade language arts as the basis for finding that she  
6 learned good writing skills [FF 78, 180-81], and concludes, “In 9<sup>th</sup> grade, she was able to write several  
7 paragraphs independently, using graphic organizers.” [CL 53] Yet the organizer’s instructions (given  
8 in advance) provided such a high level of structure to guide the essay’s completion (typed in class  
9 from notes), it shows nothing of K.L.’s independent writing skills. The 9<sup>th</sup> grade teacher who worked  
10 with K.L. the most testified that she needed assistance to write a complete sentence. The ALJ  
11 compared K.L.’s writing skill levels at various times using criteria lacking any described significance,  
12 and mistakenly held she achieved her writing goal in 8<sup>th</sup> grade. [CL 53] Citing no evidence, the ALJ  
13 found K.L. had written expression skills at the sentence formulation and paragraph level in 8<sup>th</sup> and  
14 9<sup>th</sup> grade classes. [FF 183] (A meaningless finding as stated, failing to specify an age or grade level of  
15 the skill performed. K.L.’s independent writing skills (by standardized measures) were at the  
16 beginning 3<sup>rd</sup> grade level at the end of grade 9. Descriptions of K.L.’s skills by numerous people who  
17 observed them, including District staff, contradict the ALJ’s conclusions.<sup>39</sup>

18 The Parent never acknowledged that K.L. generally made good progress in 9<sup>th</sup> grade. [FF 82]  
19 The District’s IEP and staff confirm that, “[K.L.] & parents were generally **dissatisfied** with  
20 program.” Contrary to the ALJ’s conclusion [CL 61], Dr. Hill clearly opined that the District’s  
21 programs did not meet K.L.’s needs, citing a history of a lack of progress due to insufficient special  
22 instruction. Dr. Hill stated that at the IEP meetings, the District clearly did not understand K.L.’s  
23 needs and was unable to formulate a program to meet them, for reasons including a lack of a suitable  
24 reading program and intensity in literacy instruction, and inadequate staff knowledge and training.  
25 Dr. Hill never indicated that she believed an appropriate local option for K.L. existed or that she was  
26 recommending what was best or more appropriate (implying the District option was also appropriate)  
27 for K.L. Both Dr. Hill and Ms. Moroney testified that the local service option Dr. Hill recommended

1 for some families was not appropriate for K.L., given the severity of her skill deficits.<sup>40</sup>

2 F. Only Programming and Services the District Committed to Provide in its Proposed IEPs May  
3 Be Considered in Measuring Whether it Proposed a FAPE

4 A court may not consider services or programming unless a district: (1) provides formal  
5 written notice including detailed description of the specific action proposed. Sec. 1415(b)(3), (c); 34  
6 CFR §300.503(a),(b); and (2) develops a proper IEP specifying the program elements. The ALJ's  
7 decision is based on programming for which the District did neither. Union Sch. Dist v. Smith, 15  
8 F.3d 1519, 1526 (9th Cir. 1994) (Refusing to consider services not offered formally because, "The  
9 requirement of a **formal, written offer** creates a clear record that will do much to eliminate  
10 troublesome factual disputes many years later about when placements were offered, what placements  
11 were offered, and what additional educational assistance was offered to supplement a placement, if  
12 any.") Written prior notice must be accompanied by an IEP stating the dates, duration, frequency,  
13 and location of all services to be provided. Sec. 1414(d)(1)(A); 34 C.F.R. §300.347. The IEP must  
14 include instructional methodology. The Interpretation, 64 Fed. Reg. 12552, provides:

15 the particular teaching methodology that will be used is an integral part of what is  
16 'individualized' about a student's education and, in those circumstances will need to  
17 be discussed at the IEP meeting and incorporated into the student's IEP. For example,  
18 for a child with a learning disability who has not learned to read using traditional  
19 instructional methods, an appropriate education may require some other instructional  
20 strategy.

21 The IEP must explicitly address parent concerns for enhancing their child's education and recent  
22 evaluation results. Sec. 1414(d)(3)(A); 34 C.F.R. §§300.345 & 346(a)(1). Sec. 300.346(c) requires  
23 a statement in the IEP of all needed services, including interventions. As further explained,

24 The amount of services to be provided must be stated in the IEP, so that the level of  
25 the agency's commitment of resources will be clear to parents and other IEP team  
26 members (Sec. 300.347(a)(6)). The amount of time to be committed to each of the  
27 various services to be provided must be (1) appropriate to the specific service, and (2)  
28 stated in the IEP in a manner that is clear to all who are involved in both the  
development and implementation of the IEP.

Interpretation, 64 Fed. Reg. 12478.<sup>o</sup> State regulations require that "a properly formulated IEP

26 <sup>o</sup> In Bend-Lapine School Dist. v. K.H., 43 IDELR 191 (D. Ore 2005)[Appx.:103-09], the court refused to  
27 consider programming in an informal "amended IEP." The IEPs lacked a statement of: (1) all aspects of the student's

(continued...)

1 consistent with WAC 392-172-160(1)(c)” be drafted so “that the needs of the student and services  
 2 provided to the student will be clear to the parents and other IEP service providers.” WAC  
 3 392-172-045(4). A “‘free appropriate public education’ means special education and related services  
 4 that - .... (D) are provided in conformity with the individualized education program.” Sec. 1401(8).  
 5 Accordingly, a student’s placement must be “based on the child’s IEP.” 34 C.F.R. § 300.552(b)(2);  
 6 WAC 392-172-180(2)(a).

7 Put simply, an IEP must be evaluated by its actual contents. Knable Ex Rel. Knable v. Bexley  
 8 City School Dist., 238 F.3d 755, 768, 770 (6<sup>th</sup> Cir. 2001) (An “**IEP must be evaluated as written,**”  
 9 and, citing Union Sch. Dist., courts “must limit our evaluation of [district’s] proposed IEP to the  
 10 terms of the document itself, as presented in writing to the [parents];” what IEP “actually promised,”  
 11 rather than what could be provided.); S.H. v. State-Operated School Dist. of Newark, 336 F.3d 260,  
 12 267, 272 (3<sup>rd</sup> Cir. 2003) (“It is through the IEP that the School District must prove that it will confer  
 13 a meaningful educational benefit..” IEP lacked “services and instructional modifications,” and did  
 14 not address all aspects of the student’s disability.); S.A. v. Seattle School District, Cause No.  
 15 C01-143R (W.D.Wa. 2001) [Appx.:96] (“The court must assess the options proposed rather than  
 16 the options that might exist but that the district failed to put in writing. See Union School Dist. v.  
 17 Smith.”); Briere v. Fair Haven Grade School District, 948 F.Supp. 1242 (D.Vt 1996) (citing Union  
 18 Sch. Dist., rejecting rationale that the plan allow the district flexibility in providing services)

19 The three IEPs the District proposed for K.L.’s 10<sup>th</sup> grade failed to include significant  
 20 components required to meet her needs. (Supra at pp. 7-10)<sup>p</sup> By June 10, 2004, the Parents knew

21 \_\_\_\_\_  
 22 °(...continued)

23 disabilities in the present levels of performance; (2) all special education services the student needed; (3) the specific  
 24 amount of time services were to be provided (citing the above-stated Interpretation of the IDEA that this must be clear  
 to parents); (4) specific methodology needed to achieve IEP goals, and (5) “‘supports’ for school personnel,” (IEP did  
 not specify staff were to be trained to employ needed methodologies.)

25 <sup>p</sup> Nein, 95 F.Supp.2d at 968, 970 (IEP lacked “specific strategies to be implemented to assist [student],  
 26 particularly in the area of reading,” or “provide for the use of any specific techniques designed to address his dyslexia.”  
 Student needed to be “directly t[ought] the sound-symbol relationship and the blending of individual phonemes into  
 27 syllables.”); Independent Sch. Dist. v. J.T., supra. [Appx.:84] (“IEP’s goals and objectives were inadequate”); Taylor  
v. Bd. of Educ., 649 F.Supp. 1253, 1256-58 (N.D.N.Y.1986) ( While “IEP certainly touches upon some of the

(continued...)



1 the District's program was not working, but were unaware of specific changes to request.<sup>41</sup> By  
 2 September 22, 2004, Dr. Hill had assessed K.L. and had advised the Parents and District about  
 3 needed program components. Before the IEP meeting, the Parents informed the District in writing  
 4 of their concerns, including word retrieval, oral expression, expressive language, and K.L.'s emotional  
 5 distress. Before the March 11, 2005 IEP meeting, having Dr. Hill's report, the Parents informed the  
 6 District of IEP contents required to meet all of K.L.'s needs. The District understood the Parents  
 7 expected the IEP to include these elements, but rejected substantial portions of them. The Parents  
 8 reasonably expected the District's program to reflect its IEPs and that K.L. would not receive the  
 9 rejected services. Yet, in measuring the merits of the District's proposed program, the ALJ  
 10 erroneously relied on programming and services not included in its IEPs.<sup>41</sup>

11 The ALJ states that at the September 22, 2004 meeting, a teacher chose to use the REACH  
 12 program, which included all five recommended reading instruction components. [FF 135, 137] The  
 13 IEP omits mention of any reading program. Furthermore, uncontradicted evidence showed that  
 14 REACH is not for use beyond grade 8, and literature the ALJ cites does not endorse it for high school  
 15 students. No staff had been trained to use REACH more than a year after the IEP meeting. The  
 16 District specifically refused to commit to provide any phonemic awareness goals or instruction, which  
 17 staff stated was intended to convey to the Parents that it would not work on this skill area.<sup>42</sup>

18 The ALJ incorrectly found that the District planned to further reduce final staffing (following  
 19

20 \_\_\_\_\_  
 21 <sup>P</sup>(...continued)

22 necessities for the child to benefit from an educational program, ....it reduces or omits at least several of the services  
 23 that those who know [student] believe are essential.”); Pawling Cent. School v. Education Department, 771 N.Y.S.2d  
 24 572, 576 (A.D. 3 Dept. 2004) (IEPs lacked goals in “fundamental areas in which the child experienced a deficiency”,  
 25 “goals addressing the child’s deficits in the skills necessary to progress,” and a “description of the modifications that  
 26 the child requires.”); and Susquenita Sch. Dist., supra, [Appx.:63, 65] (“[District] program did not offer methodologies  
 27 specially adapted for students like [ ] .... failed to specify what strategies or specialized instructions would be used  
 28 to improve [ ]’s skills in the areas in which she was seriously deficient,” and “benefit ....must be ‘meaningful’.. and  
 must comport with the child’s IEP. *Rowley*, 458 U.S. at 204-05.”)

<sup>q</sup> The District cannot evade responsibility for lacking knowledge about how to address K.L.'s needs before  
 Dr. Hill's independent evaluation. Districts, not parents, have the duty to do what is necessary to determine a student's  
 needs, including obtaining expert input. W.G., 960 F.2d at 1484; Union Sch. Dist., 15 F.3d at 1523; Amanda J., 267  
 F.3d at 891-92; Shapiro v. Paradise Valley Unified Sch. Dist., 317 F.3d 1072, 1076-79 (9<sup>th</sup> Cir. 2003); and S.A. v.  
Seattle Sch. Dist., supra, [Appx.:91-93, 94-95]



1 the March 2005 IEP meeting) to 1:1 instruction for written language and keyboarding, and 2:1 for  
 2 reading. [FF 171] The District made no such commitment at the meeting and this is not in the IEP.

3 G. The District Denied K.L. a FAPE by Violating Procedures in Formulating Her IEPs

4 1. The District withheld information from the Parents during the IEP development process

5 The District did not send its June 9, 2003 reevaluation report to the Parents until more than  
 6 two weeks after development of the IEP on June 10, 2003. This denied the Parents access to  
 7 information upon which the IEP was required to be based, including staff conclusions that K.L.'s  
 8 skills in reading decoding and writing were lower than when tested three years earlier—which staff  
 9 conceded at the hearing indicated the program was not working. The ALJ held that the Parents'  
 10 opportunity to participate in the reevaluation process was not seriously infringed, mistakenly  
 11 assuming that the District gave them a copy of the report at a meeting on June 25, 2003. [CL 15]  
 12 There was no meeting on this date. The Parents had no opportunity to discuss the reevaluation  
 13 results before the report was completed or as part of the IEP team.<sup>43</sup>

14 The District did not disclose to the Parents before or at the June 9, 2004 IEP meeting, that  
 15 the only standardized measure it had obtained of K.L.'s academic achievement during grade 9, the  
 16 Gates MacGinitie, twice revealed K.L.'s overall reading score to be in the 1<sup>st</sup> percentile. [See n. 6] The  
 17 District first revealed this in its required exhibit disclosure five days before the hearing, in fall 2005.

18 An IEP team cannot possibly meet its duty to consider the concerns of the parents and the  
 19 most recent evaluation results if parents are not informed of all information, including test results,  
 20 which may raise concerns. Amanda J., 267 F.3d at 890-93 (Failure to allow parents “to examine all  
 21 relevant records with respect to the identification, evaluation, and educational placement of the child.”  
 22 Such “egregious procedural violations denied [the student] a FAPE.”). W.G., 960 F.2d at 1484  
 23 (“procedural inadequacies that result in the loss of educational opportunity [cite omitted] or seriously  
 24 infringe the parents’ opportunity to participate in the IEP formulation process [cite omitted] clearly  
 25 result in a denial of a FAPE.”) *See also*, Shapiro., 317 F.3d at 1078; and Seattle School District v.  
 26 K.E., Cause No. C03-995 RBL (W.D.Wa. 2004)[Appx.:113-116] (Failure to provide parents all  
 27 available information to make decisions supports reimbursement; no need to address the merits of a

1 district program). Accordingly, the substantive merits of the District programs described in both the  
 2 June 10, 2003 and June 9, 2004 IEPs need not be addressed.

3 2. The District predetermined K.L.'s program before the March 11, 2005 IEP meeting

4 District IEP team members and its expert met without the Parent's knowledge before the  
 5 March 11, 2005 meeting. <sup>[See n.13]</sup> The ALJ held that this did not constitute an improper predetermi-  
 6 nation of K.L.'s program [CL 21-24], because, "A meeting also does not include preparatory activities  
 7 that public agency personnel engage in to develop a proposal or response to a parent proposal that  
 8 will be discussed at a later meeting. 34 C.F.R. § 300.501(b)(2)." This regulation is inapplicable. The  
 9 scheduled meeting was not limited to school personnel and did not result in a mere "proposal." The  
 10 District unilaterally decided whose recommendations to accept, rendering any discussion of these  
 11 matters at the meeting meaningless. As Interpretation, 64 Fed. Reg. 12606-12607, explains,

12 Regarding the definition of 'meetings,' the proposed definition was intended to  
 13 make clear that parents have the right to be notified of and attend meetings which,  
 14 generally, are scheduled in advance, and in which public agency personnel are to come  
 15 together at the same time, whether face-to-face or via conference calls or  
 16 video-conferencing, to discuss, and potentially resolve, any of the issues described in  
 17 paragraph (b)(2). [referring to § 300.501(b)(2)]

18 Informal discussions among teachers and administrators, which may or may not  
 19 be pre-arranged, are not meetings for which parents must receive notice and the  
 20 opportunity to attend. Whether or not a meeting is prearranged is not the deciding  
 21 factor in determining whether parents would have the right to attend; rather, the fact  
 22 that the meeting is to **discuss and potentially resolve one or more of the issues**  
 23 **identified in paragraph (b)(2) triggers the parents' right to be involved.**

24 .....

25 The right of parents to participate in meetings where the provision of FAPE to  
 26 their child is being discussed is statutory. **The point of the provision is to ensure**  
 27 **parents have the opportunity to participate in discussions where substantive**  
 28 **decisions regarding their child's education are made--a key principle of the**  
**IDEA Amendments of 1997.**

Parents have the right to be team members and participate in each meeting at which decision are made  
 about their child's IEP. 34 C.F.R. § 300.552(a)(i); WAC 392-172-15700(1) & 15705(1). It is a  
 significant procedural violation for a school district to make a program decision beforehand. W.G.,  
 960 F.2d at 1484 (District proposed "a preexisting, predetermined program"). In Deal v. Hamilton  
County, 392 F.3d at 857, the district,

pre-decided not to offer ..[certain] services.... This predetermination amounted to a  
 procedural violation of the IDEA. Because it effectively deprived [student]'s parents

1 of meaningful participation in the IEP process....

2 .....The district court erred in assuming that merely because the Deals were present  
 3 and spoke at the various IEP meetings, they were afforded adequate opportunity to  
 participate. Participation must be more than a mere form; it must be meaningful.  
*W.G.*, 960 F.2d at 1485.

4 *See also*, Spiegelberg v. Henrico County Public Schools, 853 F.2d 256, 258-59 (4th Cir. 1988) (District  
 5 pre-IEP meeting letters focusing on a particular program show predetermination): Briere v. Fair  
 6 Haven Grade Sch. Dist., 948 F.Supp. at 1255. The District did not included much of what Dr. Hill  
 7 recommended in its reevaluation and IEP [FF 160-62, CL 24], and this would not cure the violation  
 8 were this true. The Parents' proposed IEP contents were not fully discussed at the meeting, and it  
 9 is precisely what the District pre-decided to omit from the evaluation and IEP, including work on  
 10 phonemic awareness, that is at issue in assessing the plan's merits and most directly defines how the  
 11 District's program differs from that K.L. needs and what she receives at Landmark.<sup>44</sup>

12 3. The District's evaluation and IEP teams lacked sufficient expertise

13 The District's June 2003 evaluation team did not include members with adequate knowledge  
 14 or expertise about all of K.L.'s needs. 34 C.F.R. §300.532(g)&(h); WAC 392-172-106, -186(2)(c).  
 15 [*see* footnote "q"] The ALJ concluded the District did not violate this requirement because various staff  
 16 had attended some workshops. [FF 248], and mischaracterized the Parents' argument to be that "the  
 17 evaluation team for every learning disabled and dyslexic student must include an SLP and/or  
 18 neuropsychologist." [CL 6] Staff training was minimal and included none of the reading programs the  
 19 District "claimed" it would use. By June 2003, K.L.'s evaluation and IEP teams required a higher  
 20 level of expertise because the plans had not worked well. The District's evaluation team leader  
 21 admittedly lacked expertise in K.L.'s disorders and did not know how to remedy the problem. [*See* n.  
 22 4, 22, 42, 49] Every IEP team must include "an individual who can interpret the instructional implications  
 23 of evaluation results." Sec. 1414(d)(1)(B)(v); 34 C.F.R. §§ 300.344(a) & 346(d). The District's June  
 24 2003 and March 2005 evaluations were insufficient in scope to develop an appropriate IEP. 34 C.F.R.  
 25 § 300.532(b)(2) & (h). The team did not genuinely consider all input from the Parents and Dr. Hill.  
 26 The evaluation reports did not make appropriate recommendations regarding the special education  
 27 and related services K.L. needed, including specially designed instruction, or recommend all needed

1 instructional or curricular practices. WAC 392-172-10905(1)(a) & (b), (3)(b)-(d); (5)(c).

2 H. The ALJ Improperly Penalized the Parents for Asserting Their Clear Rights

3 1. The Parents had no duty to dissent to the District's reevaluations or IEPs

4 The ALJ repeatedly cites Parent failure to express disagreement with District evaluations/IEPs  
5 or request further meetings. [FF 56, 61,138; CL 15, 38, 39] For the June 2003 reevaluation, no meeting  
6 was ever held at which concerns could be expressed. The ALJ incorrectly states that at the June 9,  
7 2004 IEP meeting, the Parents expressed dissatisfaction for the first time, [FF 110] and the District  
8 offered to convene another meeting. [CL 39] The Parents repeatedly voiced concerns about K.L.'s  
9 program during the entire period at issue. Also, K.L.'s teacher told the Parents the District had no  
10 other option she would recommend for K.L. Until receiving Dr. Hill's evaluation recommendations  
11 in late summer 2004, the Parents had no expert help in identifying evaluation/IEP deficiencies and  
12 solutions, leaving them with no idea what to request. The ALJ found that neither parent disputed any  
13 portion of the September 22, 2004 IEP. [FF 138] The Parents and Dr. Hill voiced numerous concerns  
14 at the meeting, and clearly rejected the IEP.<sup>45</sup> Furthermore, parents have "no obligation to file a  
15 dissent," at or after an IEP meeting, and cannot waive the right to challenge the plan. W.G., 960 F.2d  
16 at 1485; M.L., 387 F.3d at 1115; G. v. Fort Bragg, 343 F.3d at 308; and S.A. v. Seattle Sch. Dist.,  
17 *supra*. [Appx.:94-95] (Blaming parents for not seeking further IEP meetings improperly "put the  
18 burden of complying with the IDEA on [student] rather than the District.").

19 2. The ALJ ignored the Parents' right to an independent educational evaluation (IEE)

20 The ALJ blamed the Parents for not immediately consenting to a District-proposed evaluation  
21 of K.L. before she left for Landmark. [CL 41-44] The Parents requested an IEE on June 2004, and  
22 selected Dr. Hill to conduct it. Instead of responding to this request as the law provides,<sup>r</sup> the District  
23 sought to require K.L. to receive an IEE from Children's Hospital. Parents have the right to select  
24

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25 <sup>r</sup> Parents who disagree with a district evaluation have the right to obtain an IEE at District expense . Once  
26 requested, the District must either initiate a hearing to oppose the request or ensure the IEE is obtained at public  
27 expense. A district may not impose conditions or timelines related to obtaining an IEE at public expense. 34 C.F.R.  
28 § 300.502. Amanda J., 267 F.3d at 891 (The parental right to an IEE is one of the "procedural rights guaranteed to  
parents by the IDEA" intended to assist in "ensuring that every eligible child receives a FAPE.")

1 the independent evaluator. Rambo, 16 EHLR 1078 (1990) [Appx:118-19] Rather than waive this  
 2 right, the Parents properly refused to consent to the District proposed IEE. The District eventually  
 3 conceded it had the duty to fund Dr. Hill's IEE, and changed its proposal to one of further  
 4 reevaluation. The Parents responded promptly to this proposal.<sup>46</sup>

5 I. The District's Program Cannot Be Deemed K.L.'s Least Restrictive Environment (LRE)

6 The LRE requirement never mandates placement in a district program that does not meet a  
 7 student's needs, and, in such case, the LRE analysis need not be made. *See Capistrano*, 59 F.3d at  
 8 897; Poolaw, 67 F.3d at 835-38 (Need to acquire skills for future success supports otherwise more  
 9 restrictive placement); Bd. of Educ. of Murphysboro v. Ill. Bd. of Educ., 41 F.3d 1162, 1168 (7th  
 10 Cir. 1994). The LRE analysis and placement decision requires that "consideration is given to any  
 11 potential harmful effect on the child or on the quality of services that he or she needs." 34 C.F.R. §  
 12 300.552(d); WAC 392-172-180(2)(d). In the District, K.L. was frustrated, became overwhelmed and  
 13 shut down, came to think of herself as stupid, lost confidence in her ability to understand instruction  
 14 and to learn, and felt over-dependent on others for help. Even a District expert testified that if K.L.'s  
 15 teachers had been successful in helping her, she would have felt like she had become a more  
 16 competent learner. In addition to loss of self-esteem due to academic difficulties, K.L. felt different,  
 17 misunderstood and embarrassed to participate. Her District peers included at most, one other student  
 18 her age with a similarly-size literacy deficit. The District was funneling K.L. into a vocational track,  
 19 although she is capable of attending college.<sup>47</sup>

20 The ALJ recognized evidence from expert testimony and literature that, "building self-esteem  
 21 in a child is necessary for success, and that parents should make their number one goal the  
 22 preservation of self-esteem," [FF 194] but ignored this admonition because K.L. had not developed  
 23 a full-blown mood disorder. [FF 215] Dr. Hill diagnosed K.L. with the lowest level mood difficulty  
 24 disorder based on the stress of being learning disabled and not making progress. The ALJ mistakenly  
 25 assumed that because Dr. Golden, who did not make this diagnosis, is a psychiatrist, his opinion is  
 26 entitled to more weight. In addition to being a neuropsychologist, Dr. Hill is a licensed clinical  
 27 psychologist, has degrees in psychology from Harvard and the U. of Washington, and did post-

1 doctoral work in child psychology at Stanford. Dr. Hill spent substantially more time evaluating K.L.  
 2 than Dr. Golden, who did not testify, making her better qualified to formulate an opinion about K.L.'s  
 3 emotional condition. Dr. Golden saw K.L. after she had been at Landmark for months, alleviating  
 4 her distress.<sup>48</sup> Even had the ALJ been correct, neither the law nor common sense requires K.L. to  
 5 slide into a mental health disorder before considering the effects of school-related emotional distress.  
 6 *See Bd. of Ed. of Frederick Cty v. I.S.*, 325 F. Supp. 2d at 582 (District program required too much  
 7 support, and “discouraged [ ] from becoming independent.”)

8 The District's program did not provide a reasonably high probability of assisting K.L. to attain  
 9 her *properly formulated* annual goals,<sup>s</sup> a required placement consideration. WAC 392-172-180(2)(c).  
 10 Its IEPs do not meet all of her needs and it is unlikely the District could successfully implement a  
 11 proper program, because its personnel are insufficiently trained in the methodologies Dr. Hill  
 12 recommended (and Landmark uses) to improve reading skills, and the inappropriate ones staff  
 13 claimed at the hearing they would employ.<sup>t</sup> The District did not commit in its IEP to train staff,  
 14 although this is a “support for personnel,” the frequency and duration of which it was obligated to  
 15 specify. 34 CFR § 300.346(d)(2); WAC 392-172-160(1)(c).<sup>u</sup> The District's program lacked sufficient  
 16 coordination and consistency in the use of instructional strategies across settings for her to  
 17 meaningfully benefit from it. This could not possibly be accomplished until all of K.L.'s teachers  
 18 completed training. Further, K.L.'s District teachers were unaware of the instructional methods each

19  
 20  
 21 <sup>s</sup> Actual student experience in a district is “relevant to determining the efficacy of educators' policy choices,”  
 22 and the likelihood of future benefit. *Ojai Unified School Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993); *Seattle*  
 23 *Sch. Dist.*, 82 F.3d at 1501 (District had “been attempting various forms of intervention to no avail for several years”).

24 <sup>t</sup> The ALJ incorrectly states that Ms. Bartow was trained in using the program she had selected, and she has  
 25 expertise in reading and writing remediation. [FF 136] The decision cites the attendance by District staff at various  
 26 training sessions in the use of one reading program or another as the basis for the determination that the staff had  
 27 sufficient expertise, [FF 248] but these training sessions involve none of the programs on which the decision relies.

28 <sup>u</sup> *See, Bend-Lapine Sch. Dist.*, supra. [Appx.:105-07] (IEP inappropriate for reasons including failure to  
 include staff training); *Nein*, 95 F.Supp.2d at 979, 981 (“[District] personnel did not demonstrate any expertise or  
 extended training in teaching students defined as dyslexic,” and, “The [private school], however, did use such a  
 teaching method with [student], and had a history of working with dyslexic children.”); *Susquenita Sch. Dist. v. Raelee*  
*S.*, supra, [Appx.:63] (District proposed specialized reading program, but “the person designated to be [student]'s team  
 coordinator was not familiar with that particular program.”).



1 other used because they did not meet to coordinate. District staff selected to teach K.L. reading  
2 admitted that her other teachers would not use the same approach.<sup>49</sup>

3 J. The Remedy of Reimbursement for the Cost of Private Programming

4 None of the District's IEPs were designed to afford K.L. meaningful educational benefit. She  
5 did not derive such benefit under June 2002 and 2003 IEPs (for grades 8 and 9), and the IEPs of June  
6 10, 2004, September 22, 2004 or March 11, 2005 would not have allowed her to do so. When a  
7 district has not made FAPE available in a timely manner prior to private placement, a court may order  
8 reimbursement for its cost. Sec. 1412(a)(10)(C)(ii).<sup>v</sup> The District failed to provide K.L. a FAPE and  
9 offered no ideas for doing so before the Parents placed her at Landmark in fall 2004. When informed  
10 by Dr. Hill of K.L.'s needs, the District refused to commit to meet them. The Parents waited long  
11 past the six months the literature advises parents to give a district program to show measurable results  
12 before placing their child in a specialized private school (like Landmark) with a more integrated  
13 approach and documented success with students who have not attained adequate literacy skills  
14 through specialized instruction in other settings. The sheer size of K.L.'s skill deficits, the limited  
15 amount of time remaining in her secondary school career and her declining self-esteem made her  
16 private placement timely. K.L.'s reading and writing skills meaningfully progressed at Landmark, and  
17 her independent work production, confidence and motivation increased. Both K.L. and the experts  
18 who assessed her after her first year cited the specific aspects of the Landmark program that were  
19 lacking in the District and its IEPs as the reason for this growth.<sup>50</sup>

20 Parents are also entitled to recover necessary residential costs. 34 CFR § 300.302. This  
21 includes transportation, travel and parental visits. Ojai, 4 F.3d at 1476 (District ordered "to pay all  
22 costs associated with this placement including: tuition, transportation, caretaker fees, room and  
23 board."); Union Sch. Dist., 15 F.3d at 1527-28 (District must pay student/parent transportation costs  
24

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25 <sup>v</sup> The remedy was first established in School Comm. of Burlington v. Department of Educ., 471 U.S. 359,  
26 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), and Florence County School Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct 361,  
27 366 (1993) (Both maintaining that, "once a court holds that the public placement violated the IDEA, it is authorized  
28 to 'grant such relief as the court determines is appropriate'"); *See also*, Capistrano, 59 F.3d at 895-96 (Reimbursement  
for private service when district fails to propose appropriate program and placement selected by parents is beneficial).

1 and parents' lodging when visiting); and Poolaw, 67 F.3d at 833 (District required "to provide [the  
2 family] with a monthly travel allowance to facilitate visits to [the residential school]".

3 K. K.L. Is Entitled to Recover the Cost of Private Schooling to Compensate Her for Lost  
4 Educational Opportunity During the Time the District Denied Her a FAPE

5 Even had the District timely proposed an appropriate program for K.L. before she enrolled  
6 in Landmark, she would be entitled to recover its cost as compensation for her loss of educational  
7 opportunity. Compensatory education may be awarded in the form of services beyond a student's  
8 current needs. Parents of Student W. v. Puyallup School Dist. 3, 31 F.3d 1489, 1496, 1497 (9<sup>th</sup> Cir.  
9 1994) ("[I]t may be a rare case when compensatory education is not appropriate" to remedy a denial  
10 of FAPE; and "compensation in the form of **extra** tutoring and summer school" may be awarded. *See*  
11 *also*, M.C. v. Central Regional School Dist., 81 F.3d 389 (3d Cir. 1996) (Compensatory education  
12 for period equal to duration of denial of FAPE); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d  
13 238, 244, 249-50 (3<sup>rd</sup> Cir. 1999) (Compensatory education for years before student was identified  
14 as disabled for reasons including district's withholding from parents an evaluator's report). This  
15 remedy also supports reimbursement for K.L.'s final (2006-07) school year at Landmark. It applies  
16 even when a district no longer has the obligation to provide FAPE because a family has moved or the  
17 student is beyond the age of service entitlement. Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769,  
18 774-75 (8th Cir. 2001) ("The remedy sought is compensatory. It does not matter whether the District  
19 has any present or future obligation to develop a new IEP for her.."); Maine School Admin. Dist. v.  
20 Mr. and Mrs. R., 321 F.3d 9 (1<sup>st</sup> Cir. 2003) (Award of "further services in compensation for past  
21 deprivations, even after eligibility has expired,")

22 IV. CONCLUSION

23 The Parents waited years for the District to begin to reduce K.L.'s literacy skill deficits.  
24 When it became clear the District did not know how to do this, they sought expert help. The District  
25 program was impeded by low expectations, which its own expert said becomes a self-fulfilling  
26 prophecy. The District stubbornly persisted with its failed methodology, and increasingly focused on  
27 accommodating K.L.'s literacy skills, rendering her increasingly dependent on others. By contrast,

1 Landmark’s approach is well-characterized by it’s teacher’s statement that, “our philosophy is to  
2 **teach the students to read so that they don’t have to have other people do it.”** Once at  
3 Landmark, K.L. began closing the achievement gap in literacy. The District’s expert testified that an  
4 educational approach should be abandoned if the gap is not closing, and that if another method  
5 achieves this, the student should continue with it. The experts who evaluated K.L. after her year at  
6 Landmark agreed that, if K.L. is to become independent, it is imperative that she continue there.<sup>51</sup>  
7 The Plaintiffs are entitled to reimbursement for Landmark, and to an order requiring the District to  
8 pay for K.L.’s final year (2006-07), to compensate her for lost educational opportunity.

9  
10 Dated this 11<sup>th</sup> Day of September, 2006

11  
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19  
20 ENDNOTES

21 [Endnote format - admin. record page number: *line(s) or exhibit number*]

- 22  
23 1. 3847:1-18; 1534:9-13; 1535:3-8; 1541:7-12; 830:D207; 3311:2-8  
24 2. [Answer, ¶3.12]; 836:D207; 585:P303; 3326:5-15; 3328:1-10; 3329:3-21; 586:P304  
25 3. 771:D201; 854, 855, 856, 859, 860:D211; 1408:D247; 1628:5-24; 1629:25-1630:10; 2787:10-18; 1581:5-23  
26 4. 856:D211; 1578:18-19; 1630:16-1632:20; 844,846:D208; 866:D212; 2934:23-2935:10; 1633:4-5; 1699:1-3;  
27 1699:12-1700:6; 1700:18-1701:25; 1702:20-24; 1525:14-18; 1628:5-24; 1629:25-1630:10; 1635:25-1636:16;  
28 1636:23-1637:5  
29 5. [Answer, ¶ 3.22, .24, .26]; 3744:17-3746:1; 3868:22-3869:10; 866,868,869:D212; 3864:24-3865:20; 3866:5-  
30 3867:25; 1635:25-1636:6; 1637:6-1638:18; 1639:4-15; 1622:21-1623:2  
31 6. [Answer, ¶ 3.27, 28, .35, .36]; 1636:23-1637:5; 3868:1-21; 872:D212; 1582:19-24; 928:D218; 3-24; 3017:17-  
32 3018:5; 3859:8-24; 3373:17-20; 3274:7-15; 2053:23-2054:9; 2669:23-24; 2781:13-2783:9; 2784:2-4; 2621:21-24;  
33 2759:6-11; 3412:2-8; 3566:14-3567:2; 3594:2-3595:7; 3006:20-3007:5; 2937:20-2938:16; 2941:8-18; 3007:18-20;  
34 3842:15-3843:6; 1100:D228; 3379:11-3380:9; 2763:15-18  
35 7. 2626:6-8; 2630:25-2631:2; 2779:8-21; 2942:7-17; 3005:4-17; 3400:3-7; 3412:13-19; 3413:11-17; 3558:7-12;  
36 3746:7-21; 3748:19-3749:16; 928,931:D218; 1953:19-23; 3439:5-7; 3839:19-3840:7; 3873:7-3874:4  
37 8. [CL 27-30]; [Answer, ¶ 3.32, .34]; 2677:5-9; 929,935,936:D218; 1584:11-1585:5; 3007:21-3008:11

- 1 9. 3481:12-15; 596,600-01,603-04:P307; 1962:9-1964:22; 1965:1-1966:17; 598:P307; 1971:22-1972:19;  
2 1991:13-1993:2; 1980:5-23; 1982:11-1985:12; 1986:3-8, 16-20; 2019:5-8; 1954:22-1955:12; 1987:2-18; 1956:11-  
3 1959:18; 2016:2-2017:2; 2049:14-2052:7; 2025:25-2028:1; 2053:1-22; 2096:17-2099:2; 3009:21-3011:11
- 4 10. [Answer, ¶ 3.44]; 1115-16:D229E; 3511:17-3512:8.
- 5 11. 988-90,994-95:D220; 3575:9-12, 22-24; 2772:21-2774:6; 3556:9-3557:16; 2041:2-8
- 6 12. [Answer, ¶ 3.48]; 1035-36,1042:D224; 2789:6-17; 659:P312; 2039:22-2041:1; 2767:25-2768:15; 2795:12-25;  
7 2049:14-2052:7; 1745:22-1746:2; 1746:8-1747:2; 2728:18-2729:3
- 8 13. [Answer, ¶ 3.49]; 664-679:P313; 1163-79:D229, DD-2; 2749:4-7; 2783:22-2784:1; 3586:15-18; 2780:4-2781:5;  
9 3016:10-22; 3812:9-18
- 10 14. 1182-1189:D230; 1231-32:D232
- 11 15. 661,664-679:P313; 2722:17-20; 3603:5-12; 3607:23-3608:3; 3621:7-14; 2724:12-14; 2724:25-2725:2; 3597:25-  
12 3598:6; 3591:11-3593:5; 600:P307; [See endnotes 6, 7, 9]
- 13 16. 2726:15-19; 3468:4-24; 3473:1-3; 2728:10-15; 3471:17-20; 682-96:P315
- 14 17. 2746:1-8; 3468:4 -24; 3473:1-3; 3589:8-3591:3; 3621:7-14; 3620:9-25; 3621:20-3622:12
- 15 18. 3625:25-3626:19; 1188-89:D230; 3621:20-3622:12; 3623:6-3625:7 [See endnote 12]
- 16 19. [FF 211]; 1834:14-1835:2; 2016:2-2017:2; 2047:10-25; 2104:16-25; 2558:10-2561:17; 2278:11-2280:13;  
17 2310:22-2311:12; 2343:10-2245:3086:19-3088:3; 1536:5-21; 1614:13-19; 1765:11-22; 1828:3-4; 2252:7-2253:2;  
18 3204:5-8; 3213:1-3; 3230:14-3231:3; 3231:15-3232:14; 2779:8-21; 2547:24-2548:5; 2549:24-2550:5; 2551:13-  
19 2552:4; 2552:10-2553:6; 2567:18-2568:2; 2841:4-16; 658:P312; 1838:5-7; 1188:D230
- 20 20. 2781:13-2783:9; 2784:2-4; 3917:5-20; 3925:4-3926:15; 1954:22-1955:12; 1986:16-20; 1987:2-18; 2269:13-  
21 2270:20; 1042:D224; 1771:8-14; 1820:3-16; 600-01:P307; 2049:14-2052:7; 2249:22-2250:17; 2255:20-2258:15;  
22 2279:2-2280:13; 3086:19-3088:3
- 23 21. [See endnotes 12, 18]; 1745:5-12; 1747:1-2; 1956:11-1959:18; 1771:18-1773:15; 3697:19-3698:8; 3703:21-  
24 3704:1; 3591:11-3593:5; 3594:2-3595:7; 3596:21-24; 3620:9-25
- 25 22. 1829:19-21; 1896:7-18; 2797:8-19; 1997:20-1998:9; 1998:13-1999:23; 2022:15-2023:6-22; 2103:16-22;  
26 2104:16-25; 2105:16-2106:22; 2182:3-2186:20
- 27 23. 2963:1-10; 2968:11-14; 2986:7-23; 2009:21-2014:23; 2989:15-23; 2978:6-2986:3; 2991:2-19; 1812:8-10;  
28 3685:11-16; 1813:1-2; 2967:24-2968:3; 2968:20-2969:7
- 29 24. 2848:10-2849:1; 2983:6-20; 3679:6-18; 3685:1-10; 3902:3-11,16-25; 3903:15-24; 2839:24-2840:6; 3683:18-  
30 3684:17; 3703:21-3704:1; 3710:2-20; 3904:6-19; 3905:3-19; 3958:25-3959:25; 2930:17-2931:12; 2974:6-  
31 2976:21; 3673:4-7,12-21; 3674:15-25; 3675:15-3676:10; 2053:1-22; 2870:15-19; 3691:9-24; 682-96:P315;  
32 2030:6-23; 2863:6-2864:13; 2991:20-2993:12; 3700:20-3701:8; 3881:23-3882:17; 2955:17-2956:4
- 33 25. 2231:23-2232:10; 2234:22-2235:2; 2325:1-2; 1039-40:D224; 722-23,725:P320; 2056:10-2060:20; 1732:13-17;  
34 1734:4-9; 1762:16-1753:5; 1765:5-22; 2260:23-2263:5; 2265:21-2266:11; 612:P307; 2272:14-2273:23; 2067:23-  
35 2068:16
- 36 26. 725:P320; 2276:8-19; 697:P316; 2859:6-20; 597,610:P307; 727:P321; 984:D220; 1099:D228; 1408:D247
- 37 27. 2267:18-2268:5; 2062:23-2065:11; 2112:12-2113:3; 2113:19-22; 2118:19-22; 2182:12-2185:19; 2861:15-2862:3;  
38 3698:18-3699:23; 2857:3-2859:5; 702,708:P317; 2948:6-17; 3682:12-18; 3686:20-3687:8; 3815:13-25
- 39 28. 2060:25-2062:22; 2066:24-2067:4; 2193:17-22; 2788:3-12; 3095:4-3096:1; 725:P320; 2260:23-2263:5; 2265:21-  
40 2266:11; 2277:9-2278:10; 2556: 21-2567:17; 2948:18-2954:23

- 1 29. 2028:12-2031:1; 2255:20-2258:15; 2943:19-2944:20; 2945:9-2946:1; 2946:6-2954:23; 2957:15-2958:5; 2784:24-2785:14; 3021:20-23
- 2 30. 3816:1-18.
- 3 31. 2068:17-2069:1; 3700:11-14; 603:P307; 2747:3-25; 2748:8-11; 1652:14-19; 1653:13-14; 2757:8-11; 2759:6-11; 3218:4-20; 3255:11-22
- 4 32. 1583:2-1584:2; 2760:3-6; 3335:22-3336:7.
- 5 33. 3201:6-16.
- 6 34. 1630:16-1631:21; 1638:7-18; 3009:6-20; 3253:4-3254:3; 3485:8-11; 2637:17-21; 2648:15-2649:7; 2653:23-2655:6; 2656:1-4; [See endnotes 2, 6]; 3375:15-18; 3378:2-10; 2601:11-23; 2606:19-24; 2608:9-10; 2615:16-23; 2752:21-2753:15; 3360:3-6; 2633:13-20; 2658:7-16; 2659:11-13; 1619:1-5; 3525:3-19; 3531:13-3532:2; 3630:19-3631:4; 3637:1-16; 3795:15-3796:3; 3801:3-10
- 7
- 8 35. 3183:14-3185:2.
- 9 36. [See endnotes 3, 6]; 1550:1-6; 1867:3-10; 2376:15-2378:2; 2378:12-2379:15
- 10 37. 3070:2-6; 3082:15-20; 3083:7-13; 3084:14-17; 1627:10-22; 1633:24-1635:14; 1654:6-22; 1695:1-13; 1890:23-1891:2; 1954:4-16; 2149:17-2150:8; 3258:8-3259:20; 3571:2-9; 1628:5-24; 1629:25-1630:10; 2787:10-18.
- 11 38. 3315:18-3317:3; 1622:10-15; 2501:8-2502:3; 2516:1-4, 11-22; 2664:17-20; 2621:21-2622:5; 2759:6-11; 3412:2-8; 2932:20-2933:9; 2937:20-2938:16; 3230:14-3231:3; 3231:15-3232:14; 3373:17-20; 3274:7-15; 3379:11-3380:9; 3566:14-3567:2; 3594:2-3595:7; 1803:1-5, 21-23
- 12
- 13 39. 1973:5-1975:4; 3353:22-3354:5; 3357:6-7; 3689:1-3690:18; 3702:13-3703:21; 2714:12-14; 988:D220; 2713:15-20; 1421-22:D251&252; 3011:11-20; 3961:11-16
- 14 40. 928:D218; 1918:14-16; 2678:8-9; 2681:7-9; 2689:1-10; 601:P307; 1952:8-12; 1991:13-1993:2; 2041:2-8; 2092:14-2093:11; 3440:7-15; 2100:15-2101:25; 2187:9-2188:10; 2280:14- 2281:22
- 15 41. 1929:6-16 664-679:P313; 1163-79:D229, DD-2; 3547:8-15; 3582:10-14
- 16 42. 2056:5-9; 2174:14-24; 2178:13-2180:8; 2471:4-7 3154:23-3155:1; 3629:13-16; 3650:7-10; 3652:10-20 3018:6-11 3649:14-18
- 17
- 18 43. 853:D211; [See endnotes 3, 5, 12]
- 19 44. 3582:10-14; 661:P313
- 20 45. 3037:24-3038:15; 3861:25-3862:21; 3863:4-3864:7; 844,846:D208; 3571:18-23 2698:22-2699:9; 2751:1-10; 2765:4-2766:12 3008:12-16; 3037:24-3038:15; 3865:21-3866:4; 3746:2-6 2041:2-8; 2092:14-21; 3011:21-3012:12; 3439:12-23; 3440:7-15; 3450:1-4; 3804:15-20; 3813:10-15
- 21 46. 1111-12,1117:D229 3509:11-25; 3481:12-15; 3514:11-3515:11; 3525:3-19; 3531:13-3532:2; 3750:7-3755:6
- 22 47. 3098:7-17 2936:2-21; 2943:19-2944:20; 2946:20-2948:5; 2954:24-2955:16; 2958:19-2959:10 2792:6-22; 3569:11-19; 3655:8-13 [See endnote 31]
- 23 48. 2012:16-2013:16; 1988:9-1991:5; 1939:5-18; 1940:4-1941:1; 1941:6-11; 1942:1-13; 3808:4-4-16
- 24 49. 3154:23-3155:1; 3629:13-16; 3650:7-10; 3652:10-20 1829:19-21; 1896:7-18; 2008:11-2012:12; 2792:23-2793:6; 2796:4-2797:19 3655:14-16
- 25 50. [See endnotes 28, 49]; 2007:8-2011:24; 2013:18-2016:1; 2012:16-2013:13
- 26 51. 3085:2-3086:18; 3685:11-16; 3092:2-3093:10; 2023:10-22; 725:P320; 2277:10-19
- 27
- 28