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ADMINISTRATIVE RESOURCE SERVICES

IN THE MATTER OF:

SELAH SCHOOL DISTRICT

SPECIAL EDUCATION
CAUSE NO. 2014-SE-0083

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Administrative Law Judge (ALJ) Johnette Sullivan heard this case in Yakima, Washington, on December 8 and 9, 2014. The Parents of the Student whose education is at issue¹ appeared and were represented by Kerri W. Feeney and Monica K. Hollenberg, attorneys at law. The Selah School District (District) appeared and was represented by Lynnette M. Baisch and Andrea L. Bradford, attorneys at law. The following is hereby entered:

STATEMENT OF THE CASE

On October 22, 2014, the Parents filed a Due Process Hearing Request (Complaint) with the Office of Superintendent of Public Instruction (OSPI). The Parents filed their Complaint without the assistance of counsel. The Complaint stated the IEP is not sufficient to meet the Student's needs and the proposed placement, effective October 22, 2014, is not a least restrictive environment. The Complaint was assigned Cause No. 2014-SE-0083. The Parents sought counsel and on November 3, 2014, the Parents' attorney filed a Notice of Appearance and an Amended Due Process Hearing Request (Amended Complaint). The Amended Complaint raised issues involving a change of the Student's educational placement because of disciplinary removal. On November 6, 2014, the District filed its Response to Amended Due Process Hearing Request (Response). The Response did not object to the expedited timeline requested by the Parents. The due process hearing was set for December 11, 2014, which was more than five days from the filing of the Parents' motion to amend. The District did not object to the motion. Accordingly, the Parents' motion to amend their Complaint was granted effective with the entry of the Prehearing Order on November 7, 2014.

Due Date for Written Decision

If at the time a complaint is first filed it is apparent the complaint raises an issue that requires expedited hearing under Washington Administrative Code (WAC) 392-172A-05160 and 34 Code of Federal Regulations (CFR) §300.532, the assigned docket number will include the suffix "X" at the end of the cause number. Solely for administrative purposes, however, the cause number for this Amended Complaint was not changed to add the suffix "X". Nevertheless, this matter is subject to expedited time lines under the rules cited above. The due process hearing must be held within twenty (20) school days of the filing of the Amended Complaint. The hearing was held on December 8 and 9, 2014. The rules also state a final order must be entered no later than ten (10) school days after the due process hearing. Due to

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

the Winter Break from December 22, 2014, to January 2, 2015, ten school days after December 9, 2014, for the District is January 6, 2015. Therefore, the due date for a written decision is **January 6, 2015**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Parents' Exhibits: P1, pp. 1-78 and pp. 83-145, P4 – P18, P19 (except paragraph 31 on page 10, as explained below).

District's Exhibits: D1 – D6, D8 – D17, D19 – D41, D43 – D62, D64 – D72.

The following documents filed with the Office of Administrative Hearings were marked in order of date received as Court's exhibits and were admitted:

- C1: Parents' Due Process Hearing Request;
- C2: Parents' Amended Due Process Hearing Request;
- C3: District's Response to Due Process Hearing Request;
- C4: Parents' Correction to Amended Due Process Hearing Request;
- C5: Parents' Second Correction to Amended Due Process Hearing Request; and
- C6: District's Response to Amended Due Process Hearing Request.

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

Kelsey Farr, Northwest School of Interactive Learning (NWSOIL) school supervisor
Diane Liebe, M.D., Children's Village
Terri Allen, M.S., Family Counseling & Autism Consulting
Dana Floyd, District special services director
Student's Mother
Student's Father
Katrina Brooks, District behavior specialist
Jessica Paulson, District paraeducator
Rob Darling, District elementary school principal
Tami Turner, District elementary school assistant principal

Rebuttal Evidence. The testimony by witness Tricia Parker, Toppenish School District school psychologist, regarding her credentials and Exhibit D35, are admitted as rebuttal evidence. Also admitted as rebuttal evidence is Exhibit P20 (the witness's curriculum vitae and resume). See Order on Parents' Offer of Rebuttal Evidence.

Evidence excluded. The following were excluded from evidence:

Parents: Exhibit P1, pp. 79-82, which are duplicates of admitted Exhibits D58 and D61;

Paragraph 31, page 10, of Exhibit P19: A warning to Student's Father by Declarant 1 that Declarant 2 relayed gossip from Declarant 3, when only one declarant's full name is disclosed and none of the three declarant's testify, is not evidence which meets the standard of RCW 34.05.452. The connection of these hearsay statements to the admissible non-hearsay

testimony of Ms. Allen is tenuous and insufficient to support a ruling that reasonably prudent persons in the conduct of their affairs would rely on the evidence.

Testimony of rebuttal witness Parker on topics other than Exhibit D35 and her credentials. See Order on Parents' Offer of Rebuttal Evidence.

ISSUES

The issue for the due process hearing is whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) after an emergency expulsion by:

1. Removing the Student from his current educational placement for more than 10 days without conducting a manifestation determination;
2. Holding a conference on October 14, 2014, without notice to the Parents the conference was an IEP meeting and denying Parents the opportunity to prepare for participation in an IEP meeting;
3. Predetermining placement without Parental involvement;
4. Deciding the placement for the Student which was not in the least restrictive environment;
5. Failing to provide services to the Student after he was removed from school for more than 10 school days; and
6. Whether the Parents are entitled to the requested remedies, including specially designed instruction and related services in the least restrictive environment and compensatory education services or other equitable remedies, as appropriate.

See Second Prehearing Order, November 17, 2014, and Corrected Second Prehearing Order, November 24, 2014.

FINDINGS OF FACT

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

Student's current status.

2. The Student is eleven years of age and lives in the District. He has not attended school since October 7, 2014.

3. On October 8, 2014, the District issued a letter to Parents that the Student was placed on emergency expulsion and that he must remain at home. Exhibit P1, pp. 73, 77.

4. On October 15, 2014, the District sent by certified mail a Prior Written Notice (PWN) to inform Parents of a proposed change in the Student's educational placement to a residential program effective October 22, 2014. Exhibit D63. The District identified two programs being considered: Northwest Children's Home Education Center, in Lewiston, Idaho; and, Heartspring School, in Wichita, Kansas.

5. On October 21, 2014, Parents filed a Due Process Hearing Request. Exhibit C1. The same day the District obtained an ex parte Temporary Restraining Order (TRO) from the Yakima County Superior Court that restrained the Student from attending "Selah School District, Robert Lince Elementary School." Exhibit P16, p. 25.

6. The TRO ordered the District to "continue to offer Defendant placement at Heartspring School in Wichita, KS, while Defendant is restrained from attending" the District.

7. On October 31, 2014, the District and Parents, by then represented by counsel, appeared before the superior court. The District did not inform the superior court, the Parents, or their attorneys, that it learned on October 28, 2014, that Heartspring School no longer had any openings and any placement would be in January 2015. Exhibit P13, p. 9. The superior court issued a preliminary Injunction. The Student was enjoined from attendance at "Robert Lince Elementary in the Selah School District" and from coming on school grounds of same unless in a vehicle with Parents picking up a sibling. The Parents were enjoined from sending the Student to the District's elementary school. The preliminary injunction remains in effect until disposition of this special education administrative appeal. Exhibit D67.

8. The principal described the situation as heartbreaking. He thinks the Student is a great kid. He acknowledged "nobody wants to have somebody taken from their family or have a family need to completely move to accommodate the needs of their child." Report of Proceedings (RP) 537. However, the principal no longer believes the District can educate the Student at a District school without sacrificing the safety of everybody. RP 535. The District rejected the Parents' proposal for a home-based educational program.

The Student

9. The Student was referred for special education services in kindergarten as a child with a developmental delay. At the end of first grade, his disability category was changed to Autism. D3. Each school year, an Individualized Education Program (IEP) has been in place for him. The Student is currently in the fifth grade.

10. The Student has difficulty maintaining appropriate school behavior. He has been hitting, spitting and kicking at others, urinating and defecating in school rooms, and hiding or running from the classroom or school building, since first grade. Exhibit D1. He hit, spit and kicked on his first day in the District in fall 2012. Exhibit P1, p.104.

11. The Student has been an unpredictable flight risk at school and church since age 5. Exhibit D1, p.2; Exhibit D39, p.4. His IEPs identify that his behavior at school includes hiding, and running out of the classroom or the school building. He presents a flight/fight risk. Exhibit D13, p. 6; Exhibit D27, p. 9; Exhibit D51, p3. The Student fled from home in April, July and September 2014. Allen, RP 142, 146.

12. The Student's cognitive abilities are in the average range with full scale intelligence quotient (FSIQ) scores ranging from 92 to 96. Exhibit D1, p.1; Exhibit D2, p.9; Exhibit D20, p.8.

13. The Student's most recent psychological evaluation was completed in February 2014, by Kelly A. Johnson, Ph.D., Licensed Clinical Psychologist, at the University of Washington Autism Center. Exhibit D39. The Student's diagnoses were:

- Autistic Disorder/Autism Spectrum Disorder
 - Without co-occurring intellectual disability
 - With significant internalizing and externalizing behaviors, particularly at school
 - With significant executive functioning problems
 - With significant sensory processing difficulties
- Anxiety Disorder Not Otherwise Specified
 - With separation anxiety features
- Learning Disorder Not Otherwise Specified
 - Relative weaknesses in some aspects of phonological processing/rapid naming which may be impacting reading fluency and comprehension;
 - Weaknesses in processing speed found in previous cognitive testing which may impact writing
- Disruptive Behavior Disorder Not Otherwise Specified
- Tic Disorder Not Otherwise Specified
 - History of motor and vocal tics waxing and waning for several years, not observed in last 6 months

Id., at pp. 14-15.

2014-2015 School Year

14. The Student's IEP was updated for the subsequent school year at an IEP meeting on May 23, 2014. His Functional Behavioral Assessment (FBA), Behavioral Intervention Plan (BIP), and Aversive Therapy Plan were updated by the IEP team on June 4, 2014. Exhibits D51, D52.

15. The IEP team agreed to 900 total building instructional minutes per week, 0% in a general education setting. Exhibit D51, p. 6. The team planned for 2014-2015 school year to start with a half-day morning schedule, a teacher the Student liked, with a change in room to a larger area between two classrooms where services would be provided to the Student one-on-one. For consistency, paraeducator Paulson and behavior specialist Brooks would continue to work with the Student.

16. The Student's Mother drove him to and from school daily. His fall 2014 daily school schedule was a half-day, starting at 8:35 a.m. and ending at 11:45 a.m.

17. The principal estimated the distance from one end of the elementary school campus to another exceeds the length of three football fields. He believes the campus is the third largest in the state. RP 520.

18. The Mother and the District's educators designed a daily tracker sheet to report the Student's progress in behavior and academics. Exhibit P1, pp. 37-62. The daily tracker for September 10, 2014, reports that the Student went into the time out room at 9:00 a.m., re-joined the classroom but attempted to leave, and then did leave and took flight about 9:45 a.m. He stayed outside on campus, returning to the building about 11:15 a.m. With the exception of September 10, 2014, the Student had no disciplinary incidents from August 25 through October 2, 2014.

19. Upon arrival at school on October 1, 2014, the Student's Mother discussed his progress with his special education teacher/case manager. The Mother asked whether the Student could begin riding the school bus, and about scheduling an IEP meeting to discuss extending his day. She also asked whether paraeducator Jessica Paulson could meet with the Student. By e-mail, the case manager informed the special education director, assistant principal, and principal about the Mother's requests. The assistant principal replied that she was pleased the Student was having a successful start to his school year but would like to see continued success after the long breaks for Thanksgiving and Christmas before adding to his day. The principal agreed that any conversations around increasing time should wait until after January 2015. He stated "our initial goal is compliance, then academics and social emotional/social skills." He also felt that the District should be able to provide the Student with academics and social skills work without increasing his time at school, by creating a different plan that could still fit in a half-day schedule. Exhibit P1, pp. 5 and 71.

20. The case manager told the Mother that if she wanted to request an IEP team meeting, she needed to put the request in writing. She did not tell the Mother about the comments of the assistant principal and principal.

Friday, October 3, 2014

21. On Friday, October 3, 2014, the Student arrived on time, had breakfast in the cafeteria, had piano time and group time, and played a game on his iPad. He began a keyboarding task about 9:30 a.m., and when he asked to change tasks, paraeducator Paulson gave him the option of typing vocabulary words and definitions. He chose the latter. He typed two definitions but did not include the words being defined. He became upset when the paraeducator showed him how to type the word with the definition beside it. He did not want to do it that way and he was not going to complete the task if he could not do it the way he wanted. The paraeducator reminded him he could return to the keyboarding task, or something else he preferred to do. The Student did not verbally respond. He did begin to move various documents to the recycle bin on the computer, until the paraeducator intervened and removed the mouse when he tried to put desktop programs into the recycle bin. She offered the Student a break, the swing, or a visit to the sensory room, or to do something different. Staff stopped the Student from leaving the classroom area about 9:40 a.m. He walked around the classroom and to his cubicle, and began throwing chairs at the paraeducators Paulson and Suzanne Matthews. He ran out through a door opposite from staff and went to the steps of another campus building. Exhibit P1, pp. 63-64.

22. The assistant principal was wearing a tiara and sash for her birthday. She joined paraeducator Paulson near the steps where the Student stood. When the Student began to spit in her direction she challenged his conduct by reminding him it was her birthday. The Student directed the spit toward the paraeducator. The Student went inside the building and entered the bathroom. Staff gave him space and did not confront him. He spent nearly 15 minutes in a bathroom, exiting with a ball of paper which he threw at the assistant principal and behavior specialist. He left the building and walked around campus while District personnel used radio communication to track the Student's movement, trying to ensure his safety while not escalating the behavior. His attempt to lower the flags was stopped by the special education teacher and paraeducator Paulson. He left the campus about 10:45 a.m. and crossed through a fence to enter a city park adjacent to campus. The District called the school resource officer (SRO) and 911, with the goal of safely returning the Student to the school. The police returned him to the campus at 11:10 a.m. Exhibit P1, p. 64; Turner, RP 577-579.

23. While in the park, the Student picked up rocks or objects and put them in his pockets. The District staff maintained their distance from the Student so as not to appear in pursuit and escalate his flight. The Student entered a gazebo area. A police officer approached. The Student was so unresponsive that the police officer asked staff if the Student could talk. Staff assured the officer the Student could speak. The police officer did not make physical contact with the Student until the Student removed a rock from his pocket and raised his arm as if to throw the rock. The officer placed him in a hold. Darling, RP 527-528; Turner RP 581.

24. The Mother was called, but once the police were returning the Student to the school, a second call to the Mother asked that she not come until the regular pick-up time. The staff wanted the opportunity to keep the Student at school. Testimony of Paulson, Turner, Darling, Brooks and Mother.

25. The Student did not want to exit the police car and went down on the ground. The assistant principal placed her hand under his head so he could not hurt himself. She felt the weight of the Student's head press down on her hand and she told the behavior specialist "it really hurts." Floyd, RP 581. The Student was escorted into school by the assistant principal and behavior specialist. He pinched the behavior specialist. The behavior specialist was of the opinion that his conduct on October 3rd was not different in type or degree than the conduct she had observed in the past. Brooks, RP 470.

26. The assistant principal and behavior specialist sat with the Student in the front office seating area, expecting the Student would calm and walk back to his classroom. When the Student did not calm, they moved to the assistant principal's office. When the Mother arrived at school about 35 minutes later for the usual 11:45 a.m. pick-up, the student did not come outside as usual. She entered the school and learned the Student had not calmed down enough to return to his classroom. The Student was escorted out of the office by two staff each holding an arm, and left with his Mother without further incident. Turner, RP 582.

Monday, October 6, 2014

27. The Mother drove the Student to school the next school day, Monday, October 6, 2014. The Student did not want to leave the car. Paraeducator Paulsen greeted them. The Mother coaxed and encouraged and eventually succeeded in persuading the Student to enter the cafeteria to eat breakfast. Since the Student was reluctant to enter school, and considering his flight from school the previous Friday, the Mother decided to stay. The Student continued to state his desire to go home. In the cafeteria, after he had eaten the Mother and paraeducator Paulson encouraged him to go to his school room. The Mother thought to ask the Student about something she knew could only be shown in his school room. The Student finally agreed to leave the cafeteria and accompanied his Mother and paraeducator Paulson to his school room. The Mother was disappointed when the Student stayed in the school room for just a few minutes before exiting. He was intent on going home. He returned to his Mother's car. The Mother accepted that it was unlikely more progress could be made that day. She left with the Student. The Mother expected to see many District staff on hand to prevent another flight from campus. She was surprised that during the short period of time she and the Student were inside the school building, they were accompanied by only paraeducator Paulson.

Tuesday, October 7, 2014

28. The Mother drove the Student to school the next day, Tuesday, October 7, 2014. When the Student exited the car with ease and walked into school without delay, his Mother drove away.

29. The Parents suspect the school staff instigated or "set up" the Student on October 7, because no one could identify an antecedent to his conduct and because his conduct was most extreme. The evidence does not support the Parents' suspicions.

30. Paraeducator Paulson was present and noted the events of the day on the daily tracker. The Student entered the school cafeteria where he ate his breakfast on schedule, but staff noticed he did not give staff and others the usual greetings. Back in the classroom, paraeducator Paulson asked the Student about his breakfast but he did not respond. He took a bathroom break, then walked into a hallway area and closed both doors. About five minutes later he exited, walked to the other side of his classroom and sat on the couch, then sat on the floor. After a few minutes, he walked to another classroom. The paraeducator and special education teacher initially said nothing in order to give the Student space and quiet time. He play-acted taking locks off cabinets, threw some blocks at the paraeducator's feet, turned on water in the sink, blew up an exercise ball, then let the air out with the flow aimed toward the faces of staff. At 9:25 a.m., the Student began throwing objects, moving furniture, lifting up a safety rug, and staff cleared the room. For the next 35 minutes, the Student alternated from throwing or moving things and trying to escape the room, to sitting in a chair, then back to throwing and attempting to leave. He threw marbles, beads, putty, removed and then put back the fire extinguisher, turned lights on and off, and threatened to pull the fire alarm. He threw a chair at a window and the glass broke shortly after 10:00 a.m. He swung chairs around in the room and threw chairs at windows and doors. He banged against the door window with a chair and eventually broke the glass. He broke the glass in another window, but the presence of staff and the SRO prevented him from exiting. He went into a cabinet in the corner of the room and closed the door. Exhibit P1, pp. 65-67. Testimony of Turner and Darling.

31. Staff moved students from the adjacent classrooms. Had the Student pulled the fire alarm, his actions would have resulted in evacuation of the entire campus. It was that threat and the window breakage that prompted the principal to come to aid the assistant principal, the SRO, and other staff. When the principal arrived, the Student was not in sight. The principal was informed the Student had entered the cabinet. Quietly, the principal entered the room and began to remove chairs and other objects. The Student called out to learn who was there, but the principal continued to clear the room in silence. The Student peeked and saw the principal. He exited the cabinet. He threw a chair and play-dough toward the principal. The principal continued to remove items from the room. The Student picked up a wooden wand one that was eighteen inches long with a solid plastic pointer finger attached to the end of it. He began to hit the principal's back and legs with the pointer finger, which eventually caused the principal to exit the room, too. He and others ducked when the Student used the pointer finger to strike the window and the glass shattered. The principal saw pieces of the shattered glass on the assistant principal and the SRO. The assistant principal left to call the Mother. The SRO entered the room and placed the Student in a safe hold and gave prompts for relaxing breaths. The Student kicked and attempted to free himself. The principal and behavior specialist and others eventually sat on the floor with the Student holding arms and legs, to prevent further property damage and injury to self or others. Exhibit P1, pp. 67-68; Darling, RP at 529-532.

32. Unlike prior occasions, the Student did not slowly relax and calm down. He continued to struggle even after the Mother arrived. He licked or spit and tried to bite his Mother, which surprised the principal. The Mother moved her car to a rear entrance to provide greater privacy for the Student's exit. The Student did not respond to choosing slippers or shoes, and was barefoot when he left, escorted by staff, to his Mother's car. The Student's continued misbehavior in the car was surprising to the principal. The duration of misbehavior in the car for five to seven minutes and attempts to flee the car and his Mother surprised staff. Before the Mother began driving, he honked the horn, undid the seatbelt, kicked his Mother and the interior of the car, spat out the window, pulled the keys out of the ignition, and hit his Mother. Eventually, the Student calmed down enough to leave with his Mother. Exhibit P1, pp. 68-69.

33. The Student's conduct on October 7th did not result in injury to himself or others. The behavior specialist had never previously felt afraid when working with the Student, but felt fear on this occasion. RP 473. The assistant principal became "truly terrified" when the glass began to shatter from the Student's repeated striking with a chair. RP 585.

34. The Student exhibited several first-time behaviors on October 7, 2014. The Student's repeated hitting of the school's highest authority figure--the principal--was unusual. The Student's continued struggle for about 30 minutes to escape the hold was unusual in duration. The Student's attempt to bite or injure his Mother was unusual. The Student's attempt to flee his Mother's car was unusual. The Student's rejection of the opportunity to go home was unusual. Since fall 2012, the Student's most desired outcome following misconduct was to be able to go home. He had often attempted flight from school in order to go home.

35. The Student's Mother was orally informed on October 7, 2014, that the District would be issuing an emergency expulsion.

Expulsion

36. On October 8, 2014, the assistant principal sent an expulsion letter to the Parents as an attachment to e-mail. Exhibit P1, pp. 73, 77.

37. The expulsion letter described the Student's specific conduct:

[Student] threw marbles, chairs, rubber bowling balls, containers of playdoh and any object he could find at staff. He used a chair to break two windows in doors. He hit two staff members and the police officer with a heavy, plastic 'pointer' stick. He threw a chair at Mr. Darling, kicked Officer Martin and Mrs. Turner, and threw a chair and other objects at Mrs. Brooks.

Id., p. 77.

38. The expulsion letter bore the date October 6, 2014. The date was repeated in a section at the bottom of the page documenting phone communication from the assistant principal to the Mother. Sometime later, the assistant principal corrected the date at the top of the letter by crossing out the "6" and handwriting in a "7." She did not correct the dates at the bottom of the page. Exhibit D58.

39. The Parents suspect the District's expulsion decision was made before October 6, 2014. They refer to the date in the expulsion letter, that paraeducator Paulson was the lone

provider on October 6, that prior to October 6, 2014, the special education director contacted a Redmond, Washington facility about placement and subsequently sent some of the Student's educational records to that facility on October 6, 2014. While reasons exist for the Parents' suspicions, the preponderance of credible evidence supports a finding that the dates of October "6" were typographical errors. The letter's description of conduct is not consistent with the Student's October 3rd conduct, and is consistent with the Student's October 7th conduct. It is found by a preponderance of evidence that the decision to issue an emergency expulsion was made on October 7, 2014.

40. The expulsion letter informed the Parents of the right to request a hearing. The next sentence stated, "However, I am requesting a conference with you first to discuss the situation. If our conference does not bring a satisfactory resolution, you may still request a formal hearing with the school district's Hearing Officer."

41. At 10:32 p.m. on October 8th, the Father e-mailed the assistant principal with subject line "Re: [Student] Emergency Expulsion":

Tami,

In response to your request for a meeting before requesting a hearing, we ask that you schedule this meeting as soon as possible.

We have availability on October 9, 10, 13, 14 and 16.

Thank you,
[Parents]

Exhibit P1, p. 73. Two minutes later, he e-mailed the special services director, school principal and special education teacher, "Please see meeting request below." Exhibit P1, p. 75.

42. On October 9, 2014, the Father thought to clarify whether the Parents were expected to also request a manifestation determination. He left a voice mail message for the assistant principal, who left the following voice mail reply:

Hi, [Father's first name], This is Tami Turner from [school]. Uhm..., I did get your voice mail this morning regarding the meeting from the letter, and actually, no, this would not be a manifestation determination. This would just be a conference to discuss, uhm. . . what occurred and the reason for the emergency expulsion. If you may call back with the questions that you have, or you may go ahead and as per the rights on the back of your letter, go ahead and begin the appeal process for a, uhm. . . emergency expulsion with the superintendent. But, please feel free to call back with the questions you have. My phone number is [number]. Thank you, bye bye.

Exhibits P1, p.7; P19, p. 3.

43. At 2:16 p.m. on October 9th, the Father sent an e-mail to the assistant principal, and copied the principal, the special education director, and the Mother:

I received a phone message from Tami Turner that gave me the impression that there would be no manifestation determination.

According to the procedural safeguards, after 10 days [Student] will return to his original placement. Any change in placement requires a manifestation determination. This is a legal requirement for the District. Please let us know when the manifestation determination will take place as soon as possible.

Thank you,
[Parents]

The assistant principal replied at 2:40 p.m. with an email:

[Father],

My message never stated that there would be no manifestation determination. I responded to your voice mail in which you said, "you requested a conference with us before a hearing. I am assuming that the conference you are referring to is the manifestation meeting."

My response was that this meeting was not the manifestation determination but that you may move ahead with the appeal as outlined in your rights if you felt it was necessary. I never stated there would be no manifestation determination.

Yours,
Tami

The Parents responded at 4:41 p.m.:

Thank you for the clarification. Please send meeting times as soon as possible.

Exhibit P1, pp. 75-76.

Predetermination: District search for alternative placements

44. One reason that the Parents believe the District predetermined the Student's placement was the timing of the inquiry into alternative placements by the special education director. Between October 1 and 3, 2014, the special education director contacted Northwest School of Innovative Learning (NWSOIL) in Redmond, Washington. The purpose of the call was to see if NWSOIL would consider a referral for a potential student. Farr, RP pp. 43-46; Floyd, RP 181; Exhibit P1, pp.121-122. The special education director searched the state superintendent's website for approved non-public residential schools. Based on the Student's age, educational needs and programs offered, she identified several facilities. Between October 6 and 8, 2014, she contacted Heartspring School in Wichita, Kansas, and Northwest Children's Home Inc., in Lewiston, Idaho. She did not contact an approved school located in Utah.

45. The preponderance of evidence is that the special education director identified, selected, and contacted facilities on her own, without specific advance directive by or planning with other members of the District team. Floyd, RP 176. She did speak to the District

superintendent about funding. She cannot recall the date of the conversation, only that it occurred before October 14, 2014, and that funding was approved. Testimony of Floyd; Exhibit P1, p. 120. The costs for a student at Heartspring depend on need and range from \$18,000 to \$26,000 per month. Floyd, RP 351; Exhibit P1, p. 121.

46. The District maintains an access log to show the date and identity of persons who access a student's educational files. The special education director admits she did not complete the log when she accessed the Student's records prior to October 8, 2014. RP 172.

47. The special education director caused some of the Student's education records to be sent to NWSOIL, Heartspring, and Northwest Children's on October 6, 7 and 8, 2014. Exhibit P12; Exhibit P13. The same day the records were sent to Heartspring, the District mailed the expulsion letter to the Parents.

48. The District does not dispute that it did not seek Parents' consent before it sent the Student's educational records to NWSOIL, Heartspring, and Northwest Children's.

49. The District does not dispute that the redaction process was not completed in a careful and thorough manner, and records sent to NWSOIL and Northwest Children's contained multiple references to the identifying information of the Student and Parents.

50. On October 8, 2014, NWSOIL orally informed the special education director they had an opening for the Student. The information was not shared with the Parents until after they filed a due process hearing request.

51. On October 15, 2014, Heartspring sent an acceptance letter by e-mail to the special education director for the Student. Exhibit D65. The Parents were informed of the acceptance on October 17, 2014. Exhibit D66.

52. On October 22, 2014, the special education director informed the Parents she just received word that Northwest Children's was also willing to accept the Student. Exhibit D68.

Predetermination: Other reasons

53. Another reason the Parents believe the District predetermined the Student's placement was because the special education director also sent to Heartspring and Northwest Children's a sibling's educational records. Floyd, RP 181; Exhibit P1, pp.121-122.

54. Another reason the Parents believe the District predetermined the Student's placement was because the special education director reported she had a conversation in her office after the October 3rd incident with the principal, assistant principal, and behavior specialist. The special education director had not been present during the October 3rd incident, and only learned of the event from verbal and written reports of others. The assistant principal does not remember if after the October 3rd incident, she spoke to the special education director about the effectiveness of the Student's current placement. RP 582. The principal had been late for a meeting on October 3rd. He drove to the adjacent park, and once the police officer and assistant principal had matters under control, the principal drove to his meeting. RP 527. He recalled speaking to the special education director in October 2014 about alternatives for educating the Student. His memory is that circumstances were at the point where he could not protect his

staff and students anymore. His description of the scope and depth of his safety concerns supports a finding that, more likely than not, the conversation he recalled occurred after the Student's October 7th conduct. RP 534-535. The behavior specialist testified but was not questioned about her memory of an October 3rd conversation in the office of the special education director.

55. Another reason the Parents allege the District predetermined the Student's placement is that they believe the special education director's declaration in superior court in support of the TRO exaggerated and was inconsistent with the Student's school records. Special education director Floyd admits she made mistakes in the declaration. RP 226. She declared she had "personally observed" when in fact she related facts reported to her by others or seen in a video recording. She identified a former District employee who worked with the Student as a "Board Certified Behavior Analyst," when in fact she had not completed her Master's graduate degree program. Exhibit P1. P. 96; Floyd, RP 211. Regarding "increasingly dangerous" behavior during flight from the classroom, she described in her declaration an occasion when the Student "found a large, sharp shard of glass behind the school, and threatened a teacher with it." Exhibit P1, p. 94. The special education director was referring to an incident involving a piece of glass measuring 1.5 inches. After an investigation, the Student's records show the District determined that:

[Student] uncovered a piece of broken glass while digging his foot in the dirt. As he reached down and picked it up, the teacher knocked the glass out of hand. He was then walked up to the office. In light of this, suspension or further discipline is not warranted. The emergency expulsion is being removed and he may return to classes effective December 20, 2013.

Exhibit P1, pp. 114-115.

56. Other reasons the Parents believe the District predetermined the Student's placement relate to how and when the District scheduled an IEP meeting and a manifestation determination meeting to review the Student's conduct.

IEP Meeting

57. Friday, October 10, 2014, was not a school day, and the assistant principal had not responded to the Parent's October 9th e-mail which thanked her for the clarification and asked for meeting times as soon as possible.

58. On Monday, October 13, 2014, the assistant principal began to gather records in preparation for the District's plan to petition the local superior court for a TRO to prevent the Student's return to the District. RP 157. That same day, she replied by e-mail to the Parents' request for meeting times:

Per your request for a meeting we would like to reconvene the team on Tuesday October 14, 2014 @ 12:00 PM. This was a day you stated worked well for you. With the last day of the emergency expulsion being October 21, the team needs to discuss plans to continue [Student's] education.

Exhibit P1, p. 74. The District contends that this e-mail from the assistant principal to the Parents constituted the District's notice to Parents of an IEP meeting.

The Father replied at 3:55 p.m., with subject line "Re: request for meeting" and wrote:

We will meet with the team tomorrow at noon.

The Father copied the e-mail to the Mother, the principal, special education teacher, special services director, psychologist, counselor, paraeducator, and behavior specialist. The District asserts the act of copying individuals who usually attend IEP meetings is evidence of the Parents' understanding of the meeting's purpose. Exhibit P1, p. 74.

59. The Parents usually attend IEP meetings with an advocate or private counselor in support. They arrived alone for the October 14, 2014, meeting. Father, RP 427.

60. The Parents and other persons attending the October 14, 2014, meeting were each handed an agenda printed on the top half of plain paper:

Agenda for IEP meeting: [Student]
October 14, 2014
12:00 PM

Attendees: [Parents], Debbie Butler (case manager), Jessica Paulson, Katrina Brooks, Suzan Kelley, Diane Knutson, Rob Darling, Tami Turner, Dana Floyd

Others in attendance if not listed:

12:00: Purpose of meeting: Plans for continuing [Student's] education

Discussion points:

- Current progress: discuss most recent incidents (10/3/14 and 10/7/14)
- Are there changes the team can make to the IEP to enable [Student] to continue to receive services in current placement?
- Parent input
- Team discussion
- Team decision for IEP
- Additional information notable

Exhibit D61.

61. The October 14, 2014, meeting attendees were very familiar with the Student and his educational history. The principal had always viewed the Parents as the experts on the Student, as the Parents spent much more time with the Student than educators and could offer valuable insight on what to do to help the Student be successful. RP 554. The principal and assistant principal met the Student on his first day in fall 2012, and were actively engaged thereafter. The Student had a good relationship with the special education teacher, Debbie Butler, in the prior year. Paraeducator Paulson and behavior specialist Brooks had worked with the student for at least one year. The special education director, and Ms. Brooks and Ms. Butler, had attended the last IEP meeting in May 2014.

62. The Father was stunned that the agenda mentioned an IEP meeting. As an educator himself, he was familiar on a professional level with requirements for advance notice. As a parent, he was familiar with the notice form used by the District. Exhibits P8, p.1; P19, p. 3. The Mother expected the meeting was related to the expulsion and they would review the daily tracker and restraint paperwork. She did not realize until after the meeting that the agenda heading said it was an IEP meeting. RP 402. She did not understand in advance that the District had changed the expulsion conference to an IEP meeting. There is no evidence that Parents protested to District staff or asked to stop the meeting. The District asserts the Parents fully participated in the IEP meeting.

63. The school psychologist took meeting notes. Exhibit D62. The discussion began with a review of the Student's current progress and what led up to the October 3rd and 7th incidents. A reference to the Student's on-going patterns, injury to staff and progressiveness of behaviors over the last couple of years prompted the Father to ask for clarification. The special education director explained about patterns, refusals and explosiveness, citing the October 7th restraint and police involvement.

64. The Parents asked for the tracker sheet and restraint paperwork, as they had not yet received it. Someone left the meeting to get the paperwork. The notes state no tracker sheet was found for October 6.

65. The Father asked about what happened on October 7th, and the assistant principal explained the scene upon her arrival and the behavior she observed. Parents spoke about the five weeks of positive behavior and their observations of types of events which threw the Student off and the length of recovery needed after dysregulatory periods. The Parents asked about what set him off on October 7th, as the intensity was unique and not normal. The special education director reminded the group about the challenges last year, which included urinating on staff and removing a desk and shelves which had been specially bolted to the wall.

66. The Parents were asked about their input on IEP changes. The Father asked about the safe room that was supposed to have been built in the Student's classroom, as an option for the Student other than restraint. He wondered if volcanic behavior may be due to not having a safe room. The special education director and principal questioned, even if the District had built the safe room, how they could get the Student to go in and stay in a safe room without restraint. The discussion progressed to staff descriptions of the many techniques and methods tried or considered (techniques for choices and sensors, self-regulation programs, Super Flex strategies, proactive strategies, role playing, red light/ green light). Parents talked about a 5 point scale in use at home, recommended by Ms. Allen, the private counseling consultant. The Father remarked about quality of interventions as opposed to quantity of interventions.

67. The third page of note-taking shows the next inquiry by the special education director is whether public school is the least restrictive environment for the Student. She raised the issue of residential or day treatment placement. She mentioned a program in Redmond. She reminded the group about the Student's success at the Oregon day treatment program. The Father indicated openness to further dialogue and confirmed the positive experience when they resided in Oregon. He explained the Student's need for the support of family while he was at those placements had prompted the family's move to Selah. The special education director stated there was no similar day treatment program in the Selah area.

68. The special education director mentioned again the Redmond program (NWSOIL), with another option being a residential program in Lewiston, Idaho, which would remove the Student's option of wanting to go home. She mentioned that residential program options were available in Kansas and Utah. The special education director raised the topic of placement at Lourdes. For reasons unrelated to this Student, the Parents were familiar with the Lourdes Children's Day Program in Richland, Washington. The meeting notes indicate Parents "are not crazy" about Lourdes. The principal recalled the special education director's reference to Lourdes was worded more to confirm her understanding that the Parents were not interested in having the District pursue that faith-based program. RP 538.

69. The Mother continued to remark how the Student had been so successful for five weeks. The assistant principal recalled there had been generally good behavior at the start of the prior school year. They discussed whether academic changes resulted in poor behavior, which prompted a discussion of the vocabulary/keyboarding work which occurred just prior to the Student's flight on October 3rd.

70. The Father expressed concerns about emotional trauma in a residential facility. There is no evidence of further discussion of that concern or the effect the Student's disabilities may have on his ability to live far away and apart from his family. There is no evidence of discussion of details about transportation, or the impact of the Student's disabilities on his ability to travel to out-of-state destinations. There is no evidence of discussion of the number or identity of travel escorts related to the various options. There was no discussion about whether additional psychological evaluation would be needed to assess the impact of separation from his family on the Student's emotional and social needs.

71. In response to the District's proposal, the Parents raised the option of educating the Student at home. Quoted verbatim, the minutes end:

Team recommends non-public setting.
[Father] - concerned about discussion re: placement.
Manif. Det.-- over 10 days of emerg expuls.
Long-term placement - doesn't involve Man. Det mtg.
[Father] - concerned that this should be brainstorm
Parents will discuss w/ each other
What options - w [sic]
Special education director - will email list of providers, OSPI approved
[Mother] - what are the credentials would be [sic] for teacher for in-home
Special education director - need to credential teacher
Sped. recomm. Also Therapeutic person - ABA specialist

72. The testimonies of the District witnesses and Parents are consistent with the meeting notes as to the scope of discussion of residential placement and how the meeting ended. The District's placement options were identified by name and city. The specific programs offered by each facility and differences or comparisons of the facilities were not discussed. There is no evidence of group discussion about the details regarding transportation, or the impact of the Student's disabilities on his ability to travel to out-of-state destinations. There is no evidence of group discussion about the number or identity of travel escorts related to the various options. The group attendees were very familiar with the Student's regularly expressed desire to flee school and go home. The attendees were very familiar with the Student's fight/flight response.

The details about how a home placement might be structured to address safety and meet the Student's needs were not discussed or explored during the meeting with the Parents.

73. The Parents left the meeting expecting to receive further information from the special education director in order to research and discuss with each other the District's suggestions. There is no evidence of discussion about scheduling a next meeting date, although attendees were aware of the passage of time after expulsion and the approaching 10-school day deadline.

74. After the Parents left the meeting, the District team members discussed the Parents' proposed in-home placement. The District team members considered the Student's experience in the District, the many efforts made to address the Student's needs, concerns about control of the environment, and importance of staff and student safety, including the Student's safety. The principal recalls, "Within five minutes, it became glaring apparent to the whole team that that was not even an option. There was no way we could provide that for him and provide what he needs and to guarantee the safety of the staff." RP 537. These concerns were not discussed with the Parents because they had already left the meeting.

75. There is no evidence of discussion of whether the Student was capable of safely commuting daily to Lourdes.

76. The Parents understood they were to do their own research about the various facilities identified by the special education director. During the meeting, the special education director had not shared with the Parents what she had learned about specific program opportunities and why she thought they would be suited to the Student's needs. She had not informed the Parents that the three facilities already had begun to review the Student's records for possible admission, and that as of October 8, the Redmond program (NWSOIL) had indicated its willingness to accept the Student.

77. As promised, the day after the meeting the special education director sent the Parents an e-mail with subject "Link." The body included a hyperlink to the state superintendent's list of approved non-public schools in Washington, Utah, Idaho and Kansas. Exhibit D64. She made no mention that she had received about 30 minutes earlier an e-mail from Heartspring with an acceptance letter. She made no mention that a Prior Written Notice (PWN) was being sent by certified mail regarding the decision made by the District's team members to change the Student's placement.

78. On October 17, 2014, the Parents received the PWN. The same day, the special education director sent the Parents an e-mail with subject "Placement Update," which did reference the PWN:

As you are aware, I have been working with a couple of residential schools to identify placement options for [Student]. Heartspring, one of the schools mentioned in the PWN sent out on October 15, 2014, via certified mail, has accepted our referral.

Heartspring, located in Wichita, Kansas, has a program that will meet [Student's] unique needs, providing planned schedules, a highly structure behavior intervention program, as well as small group instruction with highly trained staff. In addition, [Student] will receive supports from onsite occupational therapists, licensed psychologists,

developmental pediatrician, pediatric neurologist, and a child Psychiatrist.

I will support you through the enrollment phase, which can begin as soon as possible. As noted in the Prior Written Notice, [Student's] placement will begin on October 22, 2014.

Please contact Kristina Baker, Director of Admissions and Outreach at: [number]. Kristina will not know [Student] by name, so please mention my name and our school district.

Do not hesitate to call me if you have any questions about the process.

Exhibits D66, P17.

Prior Written Notice

79. The decision point for the principal was the realization that, if the District was unable to ensure staff and student safety in a school environment over which they had full control, they could not ensure staff and student safety in a home environment over which they had no control. The District members rejected an in-home option after about five to ten minutes of discussion without the Parents present.

80. The special education director had discussed with the District's transportation division about commute time from Selah to NWSOIL, and Selah to Lourdes. The District members rejected NWSOIL because of the long commute. The commute to Lourdes was about the same amount of time, but the District rejected Lourdes primarily because the Parents would need to request Lourdes as their preference. Lourdes is not on the state superintendent's website of approved non-public schools because it is sponsored by a religious organization. The special education teacher had not spoken to Lourdes about the Student or made any recent contact with Lourdes. She would have done so if she thought the Parents were interested in that facility. RP 348.

81. The District prepared a PWN which bears the date October 14, 2014. It was sent to Parents on October 15, 2014, by certified mail. Exhibit D66. The District proposed a change in the educational placement to a residential program effective October 22, 2014. A public school setting was found to not be the least restrictive environment (LRE) due to "extreme and dangerous behaviors, work refusal, and lack of progress with meeting IEP goals." The team considered and rejected the current public school placement, home placement, and out of district placement in a day treatment program. The PWN stated the District will pursue admission for a residential placement and provide further information to Parents once a placement to implement is identified. The notice indicated the special education director had researched possibilities for in-home staffing, but was unable to identify any available, qualified staff to facilitate this proposal. The PWN stated that the current residential programs being considered were Northwest Children's and Heartspring. Exhibit D63.

82. The special education director was aware of other local parents who sent their own children to Northwest Children's. She was not aware of the Parents' concern that the majority of children at Northwest Children's are in foster placement. RP 378-379. Based on her own research, the special education director considered the Heartspring program to be the

"Cadillac," offering everything from psychiatric care, around-the-clock services, and wraparound services continually. She believes Northwest Children's offers a good program and the Student could receive FAPE at either facility. RP 341.

83. The Parents challenge the reasoning of the PWN that the District's decision was based in part on "lack of progress with meeting IEP goals." The daily reports discussed at the October 14, 2014, meeting, reflected the Student made progress until October 2, 2014. The District is not able to reconcile the PWN with the subsequent IEP Report of Student Progress for first quarter 2014. The nine-page report bears the date October 31, 2014. Each page of the report described student progress toward objectives in a range from "little to no progress", "emerging skill", "sufficient progress", to "mastered." The October 2014 progress report stated the Student had progressed to "emerging skill" in using problem solving strategies an average of three times per week independently. For each objective below, the report stated the Student had mastered eight IEP objectives as measured by:

- using self-regulation strategies
- answering single digit division
- single digit multiplication problems
- summarize a 3rd grade reading passage
- publish seven writings (five hand written, one created on the computer, one created with the use of a scribe)
- participate in all social skills related activities 90% of the time once the social skills session had started,
- match eight of 20 social skill-specific vocabulary words/concepts to their definitions, and
- match 15 of 15 characters who personify social concepts with their descriptors on 8 of 10 days.

See Exhibit P1, pp. 137-145.

84. The Parents challenge the District's allegation that it researched possibilities for in-home staffing. The District did not make an inquiry to any neighboring school districts. The District employees who were personally asked (Student's special education teachers and paraeducators and other District employees) indicated they were unwilling to accept a home-based work assignment. The District did not advertise internally or externally for candidates for an in-home placement. Floyd, RP 189. During the 2012-2013 school year, the special education director had contacted other school districts about contracting for services for the Student. During the last school year, there was consideration about placing the Student at the District's intermediate or junior high school. Those options were not pursued again in October 2014. RP 188.

85. Following the issuance of the PWN, and after obtaining the TRO on October 21, 2014, the special education director sent the Parents an e-mail on October 22, 2014. She explained that, "The District members of the team determined that in-home placement could not provide FAPE because of the inability to provide consistent therapeutic supports and inability to ensure staffing." She did not mention the primary reason the District team members rejected in-home placement was due to concerns for staff and Student safety. She wrote further, "Although placement at Heartspring is available whenever you are ready, the District will not remove your

student from Washington State without your support and cooperation.” (Emphasis added). Exhibit D68.

86. On November 3rd the special education director e-mailed the Parents to reaffirm the District's commitment to finding the most appropriate placement for the Student. She relayed that the District was willing to offer placement at Lourdes and asked the Parents to let her know if they were interested in scheduling an IEP meeting for that purpose. Exhibit D71.

87. The special education director continues to assert that Lourdes is a placement option which the District would support, if the Parents opted for Lourdes. She admits Lourdes does not have a certificated special education teacher on staff (although she later checked its website during the hearing and reported that Lourdes does have certificated teachers). She was not able to answer how a program at Lourdes could meet the Student's needs, given that he has been diagnosed with a learning disability. RP 185.

Manifestation Determination

88. The Parents were familiar with the District's procedures for determining whether the Student's conduct was a manifestation of his disability. The Student's IEP team had met before to conduct a manifestation determination. For example, manifestation determinations were conducted on October 1, 2012, and February 27, 2014. Exhibits D12; D41 – D43. While the team had not always found the conduct to be a manifestation of the Student's disability, the District did not dispute that the Student's October 2014 conduct was a manifestation of his disability. Floyd, RP 347.

89. The previously referenced e-mail of October 22, 2014, from the special education director to the Parents to encourage consideration of Heartspring and Northwest Children's, ended with a reference to manifestation review:

Finally, we can schedule a manifestation review at October 23, 2014 at 1:00 pm. Please let me know if that works for you or if we should reschedule.

Exhibit D68.

90. The Mother responded later that afternoon that the Parents could not make it tomorrow and asked to reschedule the manifestation determination meeting. The special education director replied with a request for available dates "that will work best for you – per [Father's] request, we are doing our best to expedite a Manifestation Meeting." The Mother replied on October 27, 2014, that their available dates were after school on November 5, 6 or 7. A manifestation determination was scheduled for November 7, 2014, the same day the parties scheduled to meet in mediation. Floyd, RP 345.

91. On Friday, October 31, 2014, the parties appeared before the superior court and the District prevailed in its request for an injunction. The following Monday, November 3, 2014, the Father sent an e-mail to indicate that following the superior court proceeding the Parents were not comfortable with the District's actions and would not be meeting on "October" 7th, a likely typographical error. The special education director responded on November 4 that the District was willing to hold a manifestation review meeting at any time. She hoped the Parents would contact the District if they would like to reschedule. Exhibits D69, D72.

92. The District is not willing to hold a manifestation review without parental participation. Floyd, RP 346.

Parents' Proposal

93. Pending this hearing, the Parents' had nearly completed preparations to empty the garage attached to their home. They are cleaning, painting, installing flooring, and designing the garage to be converted to a suitable home classroom. The Father described the space as 20' x 20', and educators and service providers would have separate access to the classroom through an exterior door and would not need to enter the private home. The space would be larger than the Student's current District classroom, with room for a safe room or safe area to which the Student could retreat if he needed to quiet or calm himself. The home sits in a cul-de-sac on the backside of an acre and a half lot in the country, and the property is fully fenced. The Father estimates it is about 100 meters from the house to the fence, and another quarter mile to the main road. RO 440-441. The Parents' design would comport with the recommendations in Dr. Johnson's February 2014 evaluation about the physical classroom in which the Student would likely do best:

- Low level of stimulation (noise, distractions)
- A predictable and routine environment
- A quiet, comfortable place where he can go to de-escalate when he feels overwhelmed (this should not be forced or presented as a punishment, but rather as a positive coping strategy), as his paraeducator indicated he seems to need time to be by himself and his parents/paraeducator indicated he does not like loud environments

Exhibit D39, p. 17.

Children's Village

94. The Student was first seen at Children's Village in June 2013. The autism specialist with Educational Service District (ESD) 105 was ill, and the ESD contacted the Behavioral Assessment Team (BAT) at Children's Village about consulting for the District. Terri Allen, a licensed mental health counselor, was employed by the Yakima Valley Farm Workers' Clinic, Behavioral Health Services branch, and stationed at Children's Village. She was a member of the BAT team. Allen, RP 96.

95. The Student has since been seen four times at Children's Village, twice by Diane Liebe, M.D., a pediatrician of 23 years who became board certified in 2004 in the subspecialty of developmental behavioral pediatrics. She has observed the Student with a Parent during office visits on October 2013 and February 2014, for about 110 minutes in total. Dr. Liebe supervises a nurse practitioner who works independently with patients at Children's Village. The nurse practitioner last consulted with the Student in August 2014. Exhibit P6; Liebe, RP 66.

96. Dr. Liebe understood from Parents that the Student can escalate quickly, and he was in the clinically significant range for aggressive behavior. RP 74.

97. About 60% of Dr. Liebe's patients are children with a diagnosis on the autism spectrum. She finds that it is not unusual for children with autism to show anxiety and struggle with changes and transitions. RP 51. She is accustomed to considering residential placements

for children with significant medical fragility and medical issues, or significant intellectual impairment in addition to behavioral concerns. She does not consider a behavioral problem in and of itself as a typical reason to seek residential placement. RP 59. She is of the opinion that the Student's behaviors will worsen given a significant transition to residential placement. She believes the Student likes being at home with his family and that home is his "comfort place." She believes that if the Student were to be taken from home and placed in residential placement it would be a "huge disruption" with the potential to exacerbate his anxiety. RP 60-61.

98. Dr. Liebe described a subset of the BAT team which provides Applied Behavioral Analysis (ABA) services, but the staff is limited. RP 62. Children's Village has a certificated special education teacher and provides educational services, but solely for children from birth to age three. RP 82.

99. Regarding whether the Student could benefit from attending a therapeutic day program if he could do so while living at home, Dr. Liebe did not have enough information. Regarding a program four hours away, she would need to know whether the Student would be living at home on the weekends, or coming home every night. RP 81. As a pediatrician, she provides medical treatment plans only with the support and cooperation of the patient. She is not accustomed to treatment plans which are contrary to the patient's wishes and cooperation. RP 55, 79.

100. Dr. Liebe has seen no evidence of parental neglect, and has no reason to suspect the Parents would exaggerate symptoms of autism to get attention for themselves. RP 63.

Family Counseling & Autism Consulting

101. Ms. Allen is no longer a member of the Children's Village BAT, as she began a private practice with a specialty working with children with autistic disorders. She was contacted in January 2014 by the District's special education director, to talk about the possibility of behavioral consultative services. When she is seated at her office computer and receives a call, she opens a Word document and begins to take notes. She is not a great typist but tries to capture phrases or the gist of what she hears. RP 92. She typed notes regarding the special education director's request. Exhibit P5, p.2. She recognized she had consulted with the District for this family in 2013 when she was a member of the BAT. She agreed to contract and sent a contract draft to the special education director who approved it without change. RP 98.

102. On March 6, 2014, Ms. Allen conducted a classroom observation of the Student. She saw him lag in response to who, where, and why sorts of questions and prompted behavior specialist Brooks to not jump in but wait to see how long it would take before he answered, if he answered. It took the Student 27 seconds to respond. RP 109. She explained adults may feel ignored or that a child is not paying attention and presenting challenging behavior, when really the event is a symptom of response lag. She suggested to the special education director that she be allowed to do an Assessment of Lagging Skills and Unresolved Problems (ALSUP), but was frustrated when she had not received a reply. RP 110. After contracting for about five weeks, by March 20th she had decided would be more effective if she worked with the family directly. She informed the District of her decision. RP 104.

103. Ms. Allen has provided individual and family counseling to the Student and his family. She has attended manifestation determination and IEP meetings at the invitation of the Parents. She has provided the team with information about choice theory psychology and aspects of

collaborative problem solving. The Student had progressed using collaborative problem solving in Oregon. RP 98.

104. Ms. Allen has visited the Student in the family home about 40 times. Exhibit P4, p. 11. She finds the Parents to be loving and concerned, not neglectful or abusive, with routines at home to stay consistent. She described the Student as "really challenging" and that the Parents were doing a "bang-up job" with him. RP 104. She has never seen the Parents do anything to escalate the child. She has no concerns the Mother is trying to get attention for herself. RP 105. She has been impressed by the efforts of the Parents to participate in the IEP process. RP 107. The Student has displayed at home hitting, fighting and fleeing. She has only recently felt she had gained the trust of the Student, describing the progress as a long journey. She recalled a difficult session in her office in March 2014 in which the Student's behavior included throwing a pillow at his Mother and banging a door into a couch even after he was asked to stop. She had mistakenly assumed she would have rapport with the Student based on past encounters. By comparison, she described the Student's recent visit to her office in which he was able to regulate his conduct. RP 111-112.

105. The Mother informed Ms. Allen that the Student attempted to flee from home in April, July and September 2014. After the Mother blocked his path at the fence line, his behavior escalated and led to an intense and "long-lasting meltdown." RP 142. Ms. Allen cannot predict if he would flee a home-based educational program, and confirmed that flight is a behavior he demonstrates when he is frustrated. RP 143.

106. Ms. Allen distinguishes the site at which education occurs from the educational process. She believes the Student may not have to cope with the stress of being at school if he is educated at home. She is not an educator. As a counselor, she had observed that counseling the Student in the home was much more effective and worked much better than alternatives. RP 144.

107. Ms. Allen encouraged the family to develop a home safety plan in spring 2014. The Parents did not complete the installation of locks and other recommendations for several weeks. RP 145. The plan called for avoiding engaging the Student verbally, removing from reach anything that he could throw, placing him in appropriate holds, and taking care not to confine him. RP 147-148. The fact the Parents did not immediately implement the plan is a concern for the District regarding its ability to provide services in the home in a safe environment over which it would have no control.

108. Ms. Allen believes it would be "devastating" to place the Student in a residential placement. She opined it would be detrimental to his well-being. RP 117. She is willing to continue to provide services in the Student's home, but she has only done so when a Parent was also in the home. RP 121, 144. Since school has been an aversive stimulus, a hypothetical was put to Ms. Allen about what would happen if he was not allowed to leave school to go home. She explained the Student experiences relief when he avoids the difficulties at school and is allowed to go home, and staying at school without the option of going home has not been tested. She could not say whether the behavior would reduce if he was allowed to exhaust himself while school staff waited him out. RP 128-129.

109. To support the Parents, Ms. Allen contacted former colleagues at Children's Village and learned about the occupational therapy and speech pathology services offered. She contacted Elmview, a local agency which trains and refers staff to contract with school districts

and others for school-based and home-based services. Exhibit P4, p. 10. While Elmview does have four paraeducators trained in autism, none are currently available. Newly hired paraeducators are available for contract, but not trained in autism disorders. Allen, RP 121.

110. The District is familiar with Children's Village and Elmview. Its primary concern with the Parents' approach is that it is piecemeal. There is a high turnover of paraeducators which results in lack of consistency for students.

111. The Parents did not identify certified teachers or special education teachers who were willing to contract to provide a home-based education to the Student. They allege the difficulty in finding service providers is not due to providers' lack of interest. They believe teachers and providers are unwilling to express definite interest absent contract terms from the District.

112. Paraeducator Paulson recalls attending a meeting sometime in the 2013-2014 school year during which she alleges the Mother said there was gun in the home but that the Student was unaware of the gun's location. She cannot recall the exact context in which the Mother's comment was allegedly made, perhaps during a team meeting to brainstorm concerns related to the Student's behavior. She cannot identify the meeting or date or the identity of others present during the meeting. RP 505-505. The District has not provided meeting notes or minutes or any other document which recorded a reference to a weapon in the home. The Parents deny they have had or currently have any guns in the home.

Prior Psychological Evaluations

113. The Student's educational records include psychological evaluations completed between 2009 and 2014. They include information about the Comprehensive Autistic Disorders Evaluation Team (CADET) assessment in 2009 (Exhibit D1), a neurocognitive and psychological assessment that was completed by Brian R. Campbell, Ph.D., Clinical, Forensic and Neuropsychology, at Spokane Psychology and Neuropsychology, P.S., in 2011 (Exhibit D2). As noted above, the most recent psychological evaluation was completed in February 2014, by Dr. Johnson, of the University of Washington Autism Center. Exhibit D39. None of these reports address the impact that removal from his home and family to a residential placement may have on the Student's psychological, emotional, mental or social functioning.

114. Dr. Johnson's evaluation of the Student's executive functioning found significant difficulty managing behavior and emotions, especially at school. Particular executive functioning difficulties were found with respect to his skills in adjusting to changes in routine or task demands and modulating emotions. The evaluation suggested significant problem-solving rigidity combined with emotional dysregulation. Children with this profile have a tendency to lose emotional control when routines or perspectives are challenged and/or flexibility is required. "In order to develop a better understanding of [Student's] difficulties, further examination of the situational demands that result in such a loss of emotional control would likely be helpful." Exhibit D39, p. 10.

115. Dr. Johnson's recommendations did not expressly address flight from school or church. The recommendations for school included:

- To have exposure to typically-developing peers as much as possible, and continued involvement in general educational classrooms (with appropriate support as needed) as much as possible
- A multi-disciplinary team including Educator, Special Educator, Paraeducator, Speech/Language Pathologist (for pragmatic communication skills, possibly for literacy skills), Occupational Therapist (for motor and sensory processing), and Autism/Behavior Specialist to develop and implement a coordinated and Individualized Education Plan (IEP). Depending on their expertise, Student's behavior/emotion regulation and executive functioning skills could be addressed by the OT, SLP, Educators, and/or Paraeducator with direct and consistent support by the Autism/Behavior Specialist.

Exhibit D39, p. 16-17.

116. Dr. Johnson's report ended with 26 recommendations plus a list of additional references for parents, school personnel, and others involved in the Student's care. Exhibit D39, pp. 16-23. The District's special education director was disappointed with the report because the recommendations were similar to what the District was already providing. She hoped the report would have offered new recommendations. Exhibit P1, p. 117.

117. The assistant principal expects that the Student's educational progress has regressed because he has not been in school since October 7, 2014. Regarding the monthly costs for Heartspring, she acknowledged it would be possible financially for the District to invest that money into developing a local program to meet the Student's educational needs. RP 376. However, she believes the Student would not benefit from a piecemeal approach and high staff turnover.

118. There is no evidence regarding staff turnover rates at Heartspring, Northwest Children's, NWSOIL, or Lourdes.

CONCLUSIONS OF LAW

The IDEA

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

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

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably

calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

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

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

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

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

4. For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley*, 458 U.S. at 200 - 201. An IEP must be "reasonably calculated to enable the child to receive educational benefits." *Id.*, 458 U.S. at 207. "Under the 1997 amendments to the IDEA, a school must provide a student with a 'meaningful benefit' in order to satisfy the substantive [FAPE] requirement[.]" *M.M. v. Lafayette School Dist.*, ____ F.3d ____, ____ 2014 U.S. App. LEXIS 18979, 64 IDELR 31 (9th Cir. 2014) (internal citation and quotation marks omitted).

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

Procedural Compliance with the IDEA

6. Procedural safeguards are essential under the IDEA:

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

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

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

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

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

Parents' Right to Participate in Evaluation, IEP Team, and Placement Decisions

8. The IDEA requires that parents be given the opportunity to actively participate in their child's education, both in the formulation and review of the student's IEP. WAC 392-172A-03040, -03050, -03095, -03100, and -03115. The appendix to the Federal Regulations gives further definition to the parents' role in the process:

The parents of a child with a disability are expected to be equal participants along with school personnel, in developing, reviewing and revising the IEP for their child. This is an active role in which the parents (1) provide critical information regarding the strengths of their child and express their concerns for enhancing the education of their child; (2) participate in discussions about the child's need for special education and related services and supplementary aids and services; and (3) join with the other participants in deciding how the child will be involved and progress in the general curriculum and participate in State and district-wide assessments, and what services the agency will provide to the child and in what setting.

64 Federal Register 12406, 12473 (Appendix A)(1999).

The importance of parental participation in the special education process was discussed at length by the Ninth Circuit Court of Appeals in *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001). The Court of Appeals stated:

Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA. An IEP which addresses the unique needs of the child cannot be developed if those people who are most familiar with the child's needs are not involved or fully informed. In *Target Range*, for example we held that the Target Range School District "failed to fulfill the goal of parental participation in the IEP process and failed to develop a complete and sufficiently individualized educational program according to the procedures specified by the Act. 960 F.2d at 1485. Because Target Range had developed the IEP without the involvement of the child's parents, his teacher, or the school in violation of 20 U.S.C. §1401(a)(19), its decision to place the child in its special education class did not take into consideration the recommendations from those who best knew the child. *Id.* at 1484. We therefore held that Target Range's refusal to include the child's parents in the IEP process denied the child a FAPE and that his parents were entitled to reimbursement for the cost of providing an appropriate education *Id.* at 1485-86.

Id. at 892. In *Amanda J.*, the Court of Appeals ultimately determined that the school district's failure to provide the parents with information on the student's previously unknown diagnosis of

autism resulted in a denial of FAPE because it infringed upon the parents' ability to meaningfully participate in the IEP process. *Id.* at 892-894.

However, when a parent refuses to participate or cooperate with the District, it is necessary for the school district to continue to act in compliance with the requirements of the IDEA. See *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1523-1524 (9th Cir. 1994).

Did the District violate the IDEA failing to provide notice to Parents of an IEP meeting on October 14, 2014?

9. The District's notice to Parents of an IEP meeting on October 14, 2014, was inadequate. The Parents receipt of the notice by e-mail was less than 24 hours before the scheduled start time of the meeting. The e-mail did not use the term "IEP." The e-mail expressly stated the meeting was per the Parents' request. The Parents' request was in response to the conference encouraged in the expulsion letter. The statement that the District would like to "reconvene the team" to "discuss plans to continue [Student's] education" is not language which would cause a reasonable person to conclude that an IEP meeting was being identified. It could refer to his education during (or despite) the expulsion. The District's assertion that the Father's act of copying persons who typically attend IEP meetings demonstrated an understanding of the meeting's purpose is not supported by the findings and is rejected. The Parents have established the District did not give Parents notice of the IEP meeting which resulted in the District's lack of compliance with procedural requirement of the IDEA.

Did the District's procedural violation regarding the IEP meeting notice amount to a denial of FAPE?

10. The failure to give the Parents notice of the IEP meeting significantly interfered with the Parents' opportunity to participate in the decision making process regarding FAPE for the Student. The lack of notice interfered with the Parents' opportunity to be fully informed. The fact that the Parents stayed at the meeting and actively engaged in the discussions is not determinative. The Parents were deprived of the opportunity to review in advance the daily tracker and aversive restraint reports from the October 3 and 7, 2014, incidents. The Parents were deprived of the opportunity to invite Ms. Allen to inform the group about the Student's emotional and social needs and offer recommendations and suggestions. The agenda's discussion points referred merely to changes to enable the Student to continue to receive services in his current placement. The discussion points did not mention residential placement. The District may not rely on the content of the agenda distributed at the meeting to cure the violation, and the contents were insufficient to inform the Parents' decision to stay and participate in the discussion. The lack of notice deprived the Parents of the opportunity to fully investigate and discuss the details of the District's proposed options, including plans for safe transportation of the Student, and whether further psychological evaluation was needed to assess the impact of residential placement on the Student's functioning. The lack of notice interfered with the Parents' ability to address any concerns about lack of progress meeting IEP goals, as they had not yet received the IEP progress report covering the period August 25, 2014, through October 7, 2014. The progress report was not prepared by the District until after the IEP meeting. The lack of notice was exacerbated by the lack of information from the District about the various programs, beyond the identity of the facility locations. Educational needs are to be construed to include not only a student's ability to score well on a test, but also

"the...child's academic, social, health, emotional, communicative, physical and vocational needs." *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996). The result of the lack of notice to Parents was a significant interference with their ability to participate in educational decision-making. is a deprivation of educational benefits.

11. It is concluded the Parents have established that the District's procedural violation of IDEA regarding IEP meeting notice requirements resulted in denial of FAPE to the Student.

Did the District deny the Student FAPE by predetermining placement without Parental involvement?

12. A District may research and gather information about placement options without violating the Parents right to participate in decisions about the Student's placement. The District must keep an open mind and be willing to consider the Parents' proposals. *R.L. v. Miami-Dade County Sch. Bd.*, 757 F3rd 1173 (11th Cir. 2014); *Deal v. Hamilton County Bd. Of Education*, 392 F.3rd 840 (6th Cir. 2004).

13. The Parents point to a series of events which considered together allegedly show predetermination. The Parents' raise suspicions and cast doubt on whether staff, particularly the special education director, had predetermined placement. Examples include the special education director's failure to log access to the Student's educational records and the manner, timing and content of her communications to NWSOIL prior to the October 7th expulsion, which they view in context of her decision not to immediately convene a manifestation determination meeting. That the District failed to give notice of an IEP team meeting for the purpose of considering residential placement is alleged to demonstrate predetermination because lack of notice prevented the Parents from being prepared to present meaningful options. The Parents also showed the special education director had begun preparations for the TRO paperwork the day prior to the IEP meeting. While the Parents have cast doubt, the evidence also establishes that the District team members actually did consider the Parents options. That the discussion was held without the participation of the Parents and constituted a violation of IDEA, does not negate that the fact a discussion amongst the District members did occur. The principal described how District staff considered safety in a home environment and how he came to the realization that residential placement was best even if it presented "heartbreaking" choices for the Student and his family.

14. It is concluded the Parents have not established that the District predetermined the placement recommendation. The Parents have not proven the District violated IDEA and denied FAPE for the Student regarding the determination of placement options.

Did the District deny the Student FAPE by removing him from his current educational placement for more than ten days without conducting a manifestation determination?

15. The decision of the District to pursue civil remedies in superior court is not addressed here. It is concluded only that the fact the District prevailed in its request and the Student was restrained and enjoined from returning to school at the District, did not relieve the District of obligations under IDEA to conduct a manifestation determination and provide an appropriate placement in the least restrictive environment.

16. A school district may suspend or expel a student eligible for special education just as it may suspend or expel any other student. It is only *after* a student eligible for special education is suspended or expelled that the IDEA imposes additional legal duties on school districts. See 20 U.S.C. §1415(k); WAC 392-172A-05140 through -05175; 34 CFR §§ 300.530 through 300.536.

17. The District asserts that the Student was not removed from his current educational placement for more than ten days. The District asserts the PWN notifying the Parents of the District's proposed change in placement was effective October 22, 2014. The 10th school day following the disciplinary expulsion was October 21st. The District asserts the Student's new current placement was pursuant to the PWN as of October 22nd and therefore he was not excluded from school for more than 10 consecutive school days. The District also asserts that an MDT meeting was unnecessary as there was no dispute that the Student's conduct on October 7, 2014, was a manifestation of his disabilities. These assertions are contrary to the plain meaning of WAC 392-172A-05145(6)(c).

18. When a school district seeks to expel a student or suspend him from school for more than ten days for violation of a code of student conduct, a review must be conducted, within ten days of the decision, to determine whether the misconduct is a manifestation of the student's disability. WAC 392-172A-05145(f)(a). If it is determined that a student's misconduct was not a manifestation of his disability, the student is subject to the same sanctions for misconduct as a child without a disability. WAC 392-172A-051569(3). However, the student must continue to receive educational services that allow him to participate in the general education curriculum and to progress toward meeting the goals in his IEP. WAC 392-172A-05145(4)(a). These services may be provided in an interim alternative educational setting (IAES). WAC 392-172A-05145(4)(c). If it is determined that the student's misconduct was a manifestation of his disability, the IEP team must either conduct a FBA and implement a BIP for the student or, if a BIP has already been developed, review the BIP and modify it as necessary to address the behavior. WAC 392-172A-05145(6)(a) and (b). The student must also be returned to the placement from which he was removed unless the parent and the school district agree to a change of placement. WAC 392-172A-05145(6)(c).

19. The District emergency expelled the Student on October 7, 2014. The District did not hold an MDT to review the Student's existing BIP and modify it as necessary to address the behavior. In the absence of three special circumstances (drugs, weapons, serious bodily injury), IDEA requires the District to return the Student to the placement from which he was removed unless the Parents and District agree to a change of placement as part of the modification of the BIP. WAC 392-172A-05145(6)(c). There does not appear to be a precedential decision which squarely addresses the situation where special circumstances are absent, the Parents and District are unable to agree to a change in placement, the District obtains civil relief which prevents the Student's return to school, and the District does not seek to implement an interim alternative educational placement pending hearing. However, neither IDEA nor courts since entry of a civil injunction in *Honig v. Doe*, 484 U.S. 305 (1998), provide authority for District to fail to review the BIP and modify it as necessary to address the behavior.

20. The District's assertion that a meeting was not necessary because it conceded the Student's conduct was a manifestation of his disabilities ignores the requirement for review of the BIP when necessary. Here, it is undisputed that some of the behaviors the Student exhibited on October 7, 2014, were behaviors not previously seen at school and would have

been appropriate topics for discussion about modification.

21. The Student has been out of school since October 7, 2014. It is concluded the Parents have established that the District denied the Student FAPE when it removed him from his current placement for more than ten days without conducting a manifestation determination and reviewing and updating his BIP.

Did the District deny the Student FAPE by offering a change of placement which was not in the least restrictive environment?

22. A student's right to placement in his/her LRE is both a procedural and substantive right. School district failures to provide a student FAPE in the least restrictive environment have routinely resulted in determinations that a placement was not appropriate. See *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).

23. The IDEA requires a school district to implement an eligible student's IEP in his or her least restrictive environment. Inclusion in the general education classroom is presumed to be the least restrictive environment available. State regulation defines LRE as placing a student in the general education environment to the maximum extent appropriate, and only providing instruction in a special education environment "if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily." WAC 392-172A-02050. Likewise, the law requires that a district have a continuum of placements available in which to place a student, ranging from the general education environment, to instruction in hospitals and institutions, if appropriate. WAC 392-172A-02055. Therefore, although general education is presumed to be the least restrictive environment, the appropriate LRE for a student must be considered in light of the continuum of placement alternatives.

24. The following regulation discusses procedures for placement, and the following factors must be considered in a placement decision:

- (a) The student's IEP;
- (b) The least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070, including this section;
- (c) The placement options(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and
- (d) A consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

WAC 392-172A-02060(2). A student is not to be removed from the regular education classroom, if all that is needed is a modification of the general education curriculum. WAC 392-172A-02060(4). And, unless the student's IEP requires some other arrangement, the student shall be educated in the school that he or she would attend if non-disabled. WAC 392-172A-02060(3).

25. A school district may propose an out-of-state residential placement over a parents' objection provided the placement is appropriate to meet the Student's educational needs and is in the least restrictive environment. An out-of-state residential placement over parent's objection was approved in *Department of Education, State of Hawaii*, 51 IDELR 262

(SEA HI 2008). The state of Hawaii had no residential facilities. There, the IEP team discussed the entire array of placements available to the student. The student needed a more restrictive environment and was making minimal progress in his current setting. By comparison, here the District and Parents did not discuss the entire array of placements available to the Student. The District lacked information about the impact of its proposed residential placements on the Student's social and emotional needs. The District lacked information about the effect of the Student's disabilities on his ability to travel. The District clouded the placement decision when it assured the Parents it would not pursue an out-of-state placement without their consent and cooperation.

26. The Ninth Circuit Court of Appeals has addressed the issue of LRE in several cases. In *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F. 3d 1398 (9th Cir. 1994), *cert denied*, 114 S. Ct. 2679 (1994), the court of appeals reviewed the district court's order placing Rachel H., an 11 year old, moderately mentally retarded child, in the general education classroom. In making its decision to affirm the lower court, the court of appeals applied the district court's four-part test to determine the appropriateness of a general education placement: (1) the educational benefit to the student; (2) the non-academic benefits to the student; (3) the effect on other students; (4) the cost to the school district. *Id.* at 1401. The court rejected the district's proposal for a special education classroom for academic subjects and regular class for non-academic subjects such as art, music, lunch and recess (which would have required six classroom changes each day).

27. The factor of educational benefit was weighed in Rachel's favor due in great part to her teacher's testimony that Rachel was a full participant in the class and was making progress on her IEP goals and objectives. *Id.* at 1401. The district court concluded that Rachel's IEP could successfully be implemented with an aide and modification of the curriculum. *Id.* Non-academics benefits also weighed in Rachel's favor because of her improved social and communication skills, as well an increase in her self-confidence. *Id.* Rachel's teacher also testified about her excitement about school, learning and friendships with her classmates. *Id.*

28. In applying the factor of the student's effect on the classroom, the court looked at two factors: (1) potential disruption, and (2) need of the general education teacher's time. *Id.* Again, the court found this factor to weigh in Rachel's favor, because Rachel could follow directions, was well-behaved, and was not a distraction of class. *Id.* The general education teacher also testified that teaching Rachel did not interfere with her ability to teach the other children, so long as Rachel had a part-time aide.

29. Finally, the court reviewed the issue of cost, and rejected the school district's argument that the cost of keeping Rachel in the general education classroom was prohibitive. *Id.* In doing so, the court concluded that many of the alleged costs would need to be prorated between other students who might benefit as a result of the expenditures for a classroom aide and sensitivity training. *Id.* at 1401-1402.

30. Later the same year, in *Clyde K. ex rel. Ryan K. v. Puyallup School District*, 35 F.3d 1396 (9th Cir. 1994), the court applied the same four-part test and found that the least restrictive environment for Ryan was a self-contained special education classroom. Unlike the student in *Rachel H.*, Ryan, a student with Tourette Syndrome and attention deficit hyperactivity disorder (ADHD), was frequently disruptive to the class, engaged in name-calling, sexually

explicit profanity, as well as kicking and hitting classroom furniture. *Id.* at 1398. Ryan had also been involved in two violent confrontations and removed from the regular education classroom. *Id.* In applying the educational benefit factor of the *Rachel H.* test, the court concluded that Ryan's behavior largely prevented him from learning, and that an aide would not have made a meaningful difference. *Id.* at 1401. Looking at the non-academic benefit to Ryan, the court determined that he did not model his behavior on that of his non-disabled peers, he was socially isolated and suffered a great deal of stress from teasing by the other students. *Id.* Ryan's presence in the regular education classroom had an overwhelmingly negative effect on teachers and other students, interfering with their ability to learn. *Id.* at 1401-1402. The court further states that, "disruptive behavior that significantly impairs the education of other students strongly suggests a mainstream placement is no longer appropriate." *Id.* at 1402, citing 34 CFR § 300.552, Comment.

31. The Ninth Circuit Court of Appeals again reviewed the issue of LRE, in the case of *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115 (9th Cir. 2003), *cert. denied*, 544 U.S. 928 (2005). The case involved G, a child with Down's syndrome who tested in the mildly mentally retarded range. *Id.* at 2. The court ultimately concluded that a temporary plan to place G in special education for academics and in general education for classes such as music, PE and tutoring, was the least restrictive environment appropriate for G.

32. In applying the first of the four parts of the *Rachel H.* test, the court determined that the evidence did not demonstrate that G would make satisfactory academic progress in the general education classroom. *Id.* at 59. In coming to this conclusion, the court considered how G's program was a "fully individualized special education academic curriculum," and that there was evidence that G "would not perform well academically in a regular education classroom because her math and written language skills were about three years behind comparable general education students." *Id.* at 58.

33. With regard to the second factor, the court concluded that G would gain non-academic benefit from general education exposure in the areas of social relationships and self-esteem. *Id.* at 59. The court also noted the benefit G would receive from being able to model her language and behavior on non-disabled students. *Id.*

34. In looking at the third factor, the court determined that although G did not have the behavior problems demonstrated by Ryan in *Clyde K.*, her placement in the general education classroom would have taken a substantial amount of the teachers time and effort. G was new to the school district, and had come from an alternative school in a much larger district than Vashon Island School District. Because Vashon Island could not duplicate the alternative setting G had been in, staff testified that it needed more information about G before it could tailor its general education curriculum to suit G's needs. *Id.* at 10 and 11. Because developing the appropriate special education curriculum for the general education environment would have been cumbersome to the district, the court concluded this factor weighed in favor of the temporary special education placement. *Id.* at 60. Cost was not argued as a factor for the District and was therefore weighed in favor of mainstreaming.

35. The District here made two placement options, both out-of-state residential facilities. One (Heartspring) is not currently available. An offer of multiple placements is not invalid per se. An offer of choices for a special day class preschool at one of three sites, or one of two full-inclusion preschool programs, each located at a different site, was upheld in *Glendale*

Unf'd SD v. Almasi, 122 F. Supp. 2d 1093 (C.D. CA 2000), which was followed in *A.K. v. Alexandria City Sch. Bd.*, 484 F.ed 672, 680-681 (4th Cir. 2007).

36. A school district may propose an out-of-state residential placement over a parents' objection provided the placement is appropriate to meet the Student's educational needs and is the student's least restrictive environment. An out-of-state residential placement over parent's objection was approved in *Department of Education, State of Hawaii*, 51 IDELR 262 (SEA HI 2008). The state of Hawaii had no residential facilities. There, the IEP team discussed the entire array of placements available to the student. The student needed a more restrictive environment and was making minimal progress in his current setting. By comparison, here the District and Parents did not discuss the entire array of placements available to the Student. The District lacked information about the impact of its proposed residential placements on the Student's social and emotional functioning. The District lacked information about the effect of the Student's disabilities on his ability to travel. The District clouded the placement offer when it assured the Parents that despite the wording of the PWN, it would not pursue an out-of-state placement without their consent and cooperation.

37. The unwillingness of District staff to work in the Student's home does not relieve the District of its obligation to search for placement options on the entire continuum of placement options. The District's efforts were insufficient to the extent it failed to consider how to address the Student's social and emotional needs along the continuum. The District did not have access to current information from the Student's private counselor regarding her experiences providing counseling in the home environment. The District's inquiries made in the past two years to other area districts and service providers, did not inform about the availability of services for this Student now. The Student is not medically fragile. The Student is not cognitively impaired. The Student was showing progress toward his IEP goals and objectives until his expulsion. The Student is socially and emotionally attached to his family and the physical environment of his home. These facts do not support a determination that residential placement is the least restrictive environment for the Student.

38. For the reasons described above, it is concluded the Parents have established that the District's offer of residential placement is not in the least restrictive environment. The District denied the Student FAPE by offering a change of placement which was not in the least restrictive environment.

Did the District deny the Student FAPE by failing to provide services to the Student after he was removed from the school for more than 10 school days?

39. The Student has been out of school since October 7, 2014. The TRO and the injunction restrain and enjoin the Student from attending or being on the grounds of the District's Robert Lince Elementary School. Exhibits P16, P19. The court did not limit the parties' consideration of other District facilities or community facilities in which to provide the Student with educational services. The court did not relieve the District of the obligation to provide the Student with a FAPE.

40. The alternate offer of placement at Lourdes in Richland is not a placement offer the District can legally extend, since Lourdes is not on the state superintendent's list of approved schools. Rather, the District's offer was more properly an offer to fund the placement if the Parents were interested in pursuing that option themselves. The offer of Lourdes was

made without a detailed plan for the Student's transportation. A transportation plan would be vital to the plan given the District's knowledge of the Student's disabilities and the recent behavior involving transportation in the police car and his Mother's car on October 3 and 7, 2014. Since the District did not review the Student's BIP as part of a manifestation determination, no discussion or consideration was made of the Student's behavior in a vehicle.

41. It is concluded the Parents have established that the District has denied the Student FAPE by failing to provide services to the Student after he was removed from the school for more than 10 school days. By October 21st (the 10th school day following expulsion), the District knew the Parents objected to the residential placements offered, and knew the Student would likely regress if he did not receive any educational services.

Did Parents establish in-home placement is the appropriate least restrictive environment for the Student?

42. The Parents have not addressed the issue of flight from the home environment. Ms. Allen's experience of providing counseling in the home has been with a Parent present. The description of the distance from home to fence line, and then to the main road, is insufficient to address the concern given the Student's flight across campus to the adjacent city park. The presence of three, four or more adults were needed at school to balance keeping the Student in sight when in flight without escalating him, or for a hold when his conduct was intense and lasting more than a few minutes. Parents have not shown that the Student would be able to stay in the garage/classroom, and it is unknown how the educators and service providers could keep him safe he if left and entered the home area. It has not been shown that confinement to the garage/classroom area without access to the home when educators and service providers were present would be something the Student could tolerate. The Parents have not established that an in-home placement is the appropriate least restrictive environment for the Student.

Remedies

Compensatory Education

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

44. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra*, 401 F.3d at 524. Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the

IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994).

45. The Parents have proven violations of the IDEA which resulted in a denial of FAPE to the Student. Pursuant to the IEP, the Student was entitled to 900 minutes per week, which equates to 180 minutes per day consistent with his half-day schedule. Between October 22, 2014, the 11th school day following expulsion, and the date of entry of this order on January 6, 2015, there were 57 school days. Thus, the Student was entitled to approximately 171 hours of instruction. This Student was already receiving one-on-one instruction for most of his schedule under his IEP, and has likely regressed. While ordinarily an hour-for-hour award is unusual, in this case the evidence supports such an award. It is concluded that an award of 171 hours of compensatory education is appropriate, and using this same formula an award is made for each school day starting January 7, 2015, in which the Student is out of school pending implementation of this order.

46. Although Parents have proven violations based on the District's failure to give proper notice of an IEP meeting and conduct a review and modification of his BIP, the Parents have not met the burden of proving that the proposed in-home placement is the appropriate least restrictive alternative. Accordingly, that remedy cannot be awarded.

47. It is not generally appropriate to delegate to an IEP team matters which are before the ALJ. Here, however, the ALJ does not have sufficient information to determine the appropriate least restrictive environment. Washington law does not authorize the ALJ to order an interim placement for diagnostic purposes only, to assess the impact of a residential placement on the Student's emotional and social functioning. An order for collaborative problem solving or a safe room does not address the fundamental problem of what is to be done on a day to day, hour by hour basis, when the Student throws objects with sufficient force to cause injury to persons or harm to property, or when the Student takes flight. These are matters beyond the knowledge of the ALJ and the evidence offered. None of the psychological evaluations or assessments directly addressed the issue of Student flight directly, or beyond safe holds once the Student has escalated. These are matters properly to be considered by the IEP team, with notice and opportunity to be prepared in the decision-making.

48. The ALJ will order the District to convene the IEP team within 10 school days of the date of this order. The team shall consider whether an independent psychological evaluation is needed to address the Student's flight behavior, and the impact on the Student if the opportunity to leave the confines of the classroom is removed (whether at school or other facility or garage-classroom). The team shall develop an interim placement pending any evaluations, in order to provide for the Student's education and related services which must begin by the 10th school day following issuance of this decision, and determine the date and timing of the provision of the compensatory education awarded above. The compensatory education hours must be provided within twelve calendar months from the date of entry of this order.

49. The Parents' request for approval of a long-term placement is denied.

Rejection of all other arguments

50. All arguments made by the parties have been considered. Arguments that are

not specifically addressed have been duly considered but are found to have no merit or to not substantially affect a party's rights.


ORDER

1. The Selah School District violated the IDEA and denied the Student FAPE by failing to convene an manifestation meeting to review and update the Student's Behavioral Implementation Plan, and by failing to provide Parents with notice of the October 14, 2014, IEP meeting. As a direct result of these violations, the District decided a placement for the Student which was not in the least restrictive environment, and has failed to provide services to the Student after he was removed from school for more than 10 school days.

2. The Selah School District shall provide the Student 171 hours of compensatory education in the form of tutoring pursuant to Conclusion of Law 45, above. In addition, the Selah School District shall provide additional compensatory education in accord with the same formula for each school day starting January 7, 2015, for which the Student is out of school pending implementation of this order.

3. The Selah School District shall convene the IEP team within 10 school days of the date of this order. The team shall consider whether an independent psychological evaluation is needed to address the Student's flight behavior, and the impact on the Student if the opportunity to leave the confines of the classroom is removed (whether at school or other facility or garage-classroom). The team shall develop an interim placement pending evaluation, at which services must begin by the 10th school day following issuance of this decision. The team shall determine the date(s) and scheduling of the provision of the compensatory education hours awarded above, pursuant to the current IEP or such future IEP as may be adopted by the IEP team, provided that the compensatory education hours must be provided within twelve calendar months from the date of entry of this order.

Signed at Yakima, Washington on January 6, 2015.


Johnette Sullivan
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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

Parents



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