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OFFICE OF ADMINISTRATIVE HEARINGS

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October 15, 2016

Parent  
[REDACTED]

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In re: Tacoma School District  
OSPI Cause No. 2016-SE-0044  
OAH Docket No. 04-2016-OSPI-00056

Dear Parties:

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

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

Sincerely,

A handwritten signature in black ink that reads "Matthew D. Wacker".

Matthew D. Wacker  
Administrative Law Judge

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

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

OAH - SEATTLE

IN THE MATTER OF:

TACOMA SCHOOL DISTRICT

OSPI CAUSE NO. 2016-SE-0044

OAH DOCKET NO. 04-2016-OSPI-00056

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

A hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Tacoma, Washington, over four days on June 9, and August 15-17, 2016. The Parent of the Student whose education is at issue<sup>1</sup> appeared and was represented by Paul Alig, attorney at law with Team Child. Also present for the Parent was Sara Zier, attorney at law with Team Child. The Tacoma School District (District) was represented by Carlos Chavez, attorney at law. Also present for the District was Jonathan Bell, District director of student services. The following is hereby entered:

**STATEMENT OF THE CASE**

The Parent filed a due process hearing request (Complaint) on April 20, 2016. Prehearing conferences were held on May 3, 20, 25, and July 15, 2016. Prehearing orders were issued on April 26, May 6, 20, June 3, and August 4, 2016.

The due date for the written decision was continued to thirty (30) calendar days after the close of the hearing record, pursuant to a motion by the Parent. See Prehearing Order of August 4, 2016. The hearing record closed with the filing of post-hearing briefs on September 16, 2016. Thirty calendar days thereafter is October 16, 2016. Therefore, the due date for the written decision is **October 16, 2016**.

**EVIDENCE RELIED UPON**

The following exhibits were admitted into evidence:

Parent Exhibits: P1 – P4, P6 – P44, P46 – P47;

District Exhibits: D1 – D34.

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

Mark Pick, (former) District special education teacher;

The Parent;

Jonathan Bell, District director of student services;

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

Stephen Becker, PhD;  
Rob Vander Stoep, District assistant director of student services;  
Christine Brandt, District principal;  
Nancy Harris-Clement, District teacher on special assignment (TOSA); and,  
Michael McDonald, District math teacher.

## ISSUES

The issues for the due process hearing are:<sup>2</sup>

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) during the 2015-2016 school year by:
  - i. Failing to fully implement the Student's September 3, 2015 individualized education program (IEP);
  - ii. Denying the Student access to the District's Whole Child Initiative while the Student was participating in District general education classes, including:
    - a. Sixth-grade orientation camp;
    - b. Seventh- and eighth-grade peer mentors;
    - c. The school-wide positive behavioral intervention system;
  - iii. Failing to fully implement the Student's behavior intervention plan (BIP);
  - iv. Failing to review and update the Student's functional behavioral assessment (FBA) and BIP;
  - v. Failing to conduct a reevaluation of the Student prior to proposing to change his educational placement to a more restrictive environment;

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<sup>2</sup> The Complaint raises additional issues and remedies which are not included in the Statement of Issues and Remedies for hearing. For example, the Complaint raises the issue of whether the District's offer of compensatory education is insufficient to remedy any denial of FAPE that is established. That issue is not included because if any FAPE violation is established, the ALJ will determine the appropriate compensatory education award based upon the evidence of record from the due process hearing; it is not relevant what the District may have offered in terms of compensatory education to date. Another example is the conditions under which any compensatory education award would be provided to the Student. Appropriate conditions to provide any compensatory education award will be determined by the ALJ after consideration of the evidence of record. Finally, the Complaint seeks an order compelling the District to pay the costs and attorney fees incurred by the Parent. This ALJ has no authority to determine or award costs or attorney fees. If the Parent is the prevailing party at the due process hearing, the Parent may file an appropriate action in state or federal court to recover any such costs or fees.

- vi. Preventing the Parent from participating in the March 2016 IEP meetings when the team did not consider the Parent's suggestions for program accommodations and modifications in the Student's IEP;
- b. Whether the District must resume implementation of the Student's September 3, 2015 IEP;
- c. And, whether the Parent is entitled to the requested remedies:
- i. Declaratory relief that the District committed the above asserted violations;
  - ii. Immediate resumption of implementation of the Student's September 3, 2015 IEP;
  - iii. An independent educational evaluation (IEE) of the Student at District expense;
  - iv. District funding for the independent evaluator to attend the Student's IEP team or 504 team meeting(s) to develop a new IEP or 504 plan for the Student;
  - v. In the alternative to (c)(iii), above, reimbursement for an IEE already scheduled or obtained by the Parent;
  - vi. An award of compensatory education services for any denial of FAPE the Parent proves at the due process hearing, such services to address the social/emotional/behavioral and academic needs of the Student and to be delivered by a certificated special education teacher;
  - vii. Or other equitable remedies, as appropriate.

See August 4, 2016 Prehearing Order (with typographical errors corrected herein).

### **FINDINGS OF FACT**

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. A more detailed analysis of credibility and weight of the evidence may be discussed regarding specific critical facts at issue.

#### **2012-2013 School Year: General Background**

1. The Student was first determined eligible to receive special education and related services under the Individuals with Disabilities Education Act (IDEA) in February 2013, when he was in third grade in the District. The Student was evaluated and determined eligible under the other health impairment (OHI) category. At that time, the Student was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder (ODD), and mood instability. Exhibit P1p7. The Student retains those diagnoses through the present time. It was determined the Student required specially designed instruction (SDI) regarding his social and emotional behavior. Exhibit P1p9.

2. Although he has a disability which very significantly affects his social and emotional behavior, the Student is intellectually gifted and has been assessed with a composite IQ score as high as 133 (99<sup>th</sup> percentile). Exhibit P1p13. The Student participated in a program for highly capable students beginning in kindergarten. Testimony of Parent.

3. The Student has never been determined in need of any SDI regarding his academics. All of the Student's SDI to date has focused on addressing his behavior at school, where his inability to control his negative behavior significantly interferes with his learning and his relationships with other students and staff. By third grade the Student had already been suspended. On his first day back from suspension, the Student got upset over being asked to complete a work assignment. He overturned tables and file cabinets, ripped a phone off the wall, and threw objects. P3p2.

4. On March 4, 2013, the District conducted a functional behavioral assessment (FBA) of the Student.<sup>3</sup> Exhibits P2p2, D1p2.

5. Generally, an FBA is intended to determine the purpose or function of a particular behavior, typically a negative or undesirable behavior. Information from a variety of sources familiar with the target individual is gathered, along with observations of the target individual in a specific environment. Collectively, that information is then used to formulate a hypothesis to attempt to explain the purpose or function of the negative behavior. In the case of a student exhibiting negative behaviors at school, parents and teachers are often consulted to gather information and provide context for the negative behavior. Observations of the student in the school environment are typically conducted. Once the purpose or function of the negative behavior is identified, an FBA typically makes recommendations for interventions to reduce or extinguish the negative behavior. See generally, Exhibits P2p2, P23p4; Testimony of Pick and Becker.

6. The FBA conducted March 4, 2013 was the last FBA of the Student conducted by the District until a new FBA was conducted in January 2016, almost three years later. Exhibit P23p4.

7. In March 2013, the Student was transferred to a District therapeutic learning center (TLC) classroom because of his ongoing difficulty controlling his negative behavior at school. Exhibits P4p10, D3p2. The District's TLC classrooms serve students with more severe emotional and behavioral disabilities in a "self-contained" environment where there are no general education students in the classroom. TLC classrooms have a significantly higher ratio of teachers and staff to students than general education classes. Testimony of Pick. The Student completed third grade in the TLC classroom. Exhibit D3p2.

### **2013-2014 School Year: Northwest School of Innovative Learning**

8. The Student was transferred to a new TLC classroom at another District school to start fourth grade, the 2013-2014 school year. Exhibits P42p1, D3p2. However, the Student's negative behavior did not improve. The Student assaulted and injured a staff member on the

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<sup>3</sup> An FBA is also commonly known or identified as a functional behavioral *analysis*.

second day of school. Exhibit P41p1 (9/5/13 incident). In response to his escalating behavior, the District placed the Student at the Northwest School of Innovate Learning (SOIL) on October 14, 2013. Exhibits P11p1, D3p2. The Student completed fourth grade at SOIL.

9. SOIL is a private, self-contained, special education day school designed to help students who have significant behavioral disabilities. Students with IEPs can be placed at SOIL through a referral from their home school district. Attendance at SOIL is funded by the student's home school district. SOIL provides academic instruction, behavioral management, and therapeutic interventions to students who are emotionally or behaviorally unsuccessful in their home school district. There are no general education students at SOIL. See generally, Exhibit P8p8.

10. The Student initially continued to have significant difficulty controlling his negative behavior at SOIL, and was involved in multiple incidents resulting in discipline and suspension. At times the Student had to be physically restrained by SOIL staff. See generally Exhibits P12-P13, D3pp12-13. However, by the end of the school year the Student's behavior had significantly improved.

11. On January 8, 2014, a Behavioral Intervention Plan (BIP)<sup>4</sup> was created by the District for use with the Student at SOIL. Exhibits P2, P9.

12. Generally, a BIP will follow an FBA. Once the FBA identifies the purpose or function of an undesirable behavior, a BIP is created to help teach positive behaviors to replace the undesirable behavior. The BIP typically identifies what the positive behaviors are, how they will be taught, how long it will take to teach them, who will be responsible for teaching them, how the positive behaviors will be reinforced, what data will be used to determine if the plan is working, and any additional supports that may be necessary. See generally, Testimony of Becker, Pick, Bell.

13. The Student's BIP targeted two behaviors. The first behavior targeted to be decreased was "negative verbal conflicts, and other instigating behaviors when there is a disagreement with peers/staff." The BIP identified a number of intervention strategies:

Alternative/Replacement Behaviors to be Taught/Reinforced: Expressing his concerns without name-calling, raised voice, or threats; Pausing to think before speaking; Walking away from the situation.

Setting Change: Request personal time out in another area of the classroom or school.

Reinforcers: Positive verbal reinforcement; Classroom points, rewards and incentives; School wide rewards and incentives; Parent contact.

Consequences for Target Behavior: Verbal warnings; Loss of classroom points, incentives, and privileges; Timeout; Strategy room referral; Parent contact.

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<sup>4</sup> A BIP is also commonly known or identified as a behavioral *improvement* plan.

Exhibit P9p2.

14. The second behavior targeted to be increased was "increase use of appropriate classroom work related behaviors." The BIP identified a number of intervention strategies:

Alternative/Replacement Behaviors to be Taught/Reinforced: Staying in his seat during instruction; Begin working on his assignment when it is given to him; Remaining on task and completing classwork in the allotted time.

Setting Change: Preferential seating to avoid distractions.

Reinforcers: Positive verbal reinforcement; Classroom points, rewards and incentives; School wide rewards and incentives; Parent contact.

Consequences for Target Behavior: Verbal warnings; Loss of classroom points, incentives, and privileges; Timeout; Strategy room referral; Parent contact.

Exhibit P9p3.

15. The BIP identified "daily student behavior tracking data" as the data collection procedure to measure the Student's progress towards either decreasing or increasing the occurrence of the targeted behaviors. Exhibits P9pp2-3.

16. The January 8, 2014, BIP was the last BIP developed by the District for the Student until a new BIP was developed for the Student on January 8, 2016, two years later. Exhibits D21p3, P22p3; Testimony of Pick, Bell.

17. In June 2014, Daniel Tice, the Student's primary teacher at SOIL commented that:

[The Student] has displayed a dramatic drop in behavioral difficulties in the last quarter of school. Besides the dramatic decrease in time-outs (just about cut in half), the amount of redirection required has similarly decreased. When regularly taking his medication, [the Student] has become one of our most focused students. Hard work and consistent administration of ADHD medications have been responsible for this positive change. In my opinion, [the Student's] determination to improve his behavior has allowed him to become a viable candidate for transitioning back to districts (sic).

Exhibit P13p6.

18. The Student continued to attend SOIL during the summer of 2014. Mr. Tice remarked that:

We haven't seen a lot of [the Student] this summer, but what we have seen has mostly been great. He continues to make strides in his maturity level and does not exhibit disruptive nor antagonizing behavior nearly as often. I am proud of [the Student] for how far he has come in the past school year. I highly endorse his transition back to district this September.

Exhibit P11p4.

## 2014-2015 School Year: Home-Schooling

19. The Parent and the District disagreed about whether the Student should return to an educational placement in the District for fifth grade, the 2014-2015 school year. As a result, the Parent decided to home-school the Student for fifth grade, as she did not want the Student to return to SOIL. The Parent was concerned about the negative influence of peers at SOIL, and Mr. Tice had left SOIL. Exhibit D3p10; Testimony of Parent.

20. In October 2014, the Parent asked the District to conduct a reevaluation of the Student. The Parent wanted a reevaluation based upon the Student's behavioral progress at SOIL. The Parent was also concerned about the Student's math skills and the possibility of dysgraphia.<sup>5</sup> Testimony of Parent, Exhibit P14p2. The District ultimately decided to initiate a reevaluation in the areas of academics and social/emotional/behavioral. Exhibit P14p2.

21. The District's reevaluation of the Student was completed at a meeting held on January 6, 2015. Exhibit P15p1. The reevaluation team, including the Parent, determined the Student continued to be eligible to receive special education. The team determined the Student's disability was now best characterized as an emotional behavioral disability (EBD), as this most appropriately matched his behavioral challenges and needed supports. The Student would continue to receive SDI to address his behavior. Academic testing showed the Student's math and written language skills fell in the average range, and no SDI was recommended in those areas. Exhibit P15p2.

22. An IEP team meeting was held on February 25, 2015, to consider the results of the Student's reevaluation. Exhibit D5p2 (Vander Stoep email to Parent 2/4/15: "Since this is an IEP meeting..."). The team, with the exception of the Parent, determined the Student's educational placement should be continued at SOIL. Exhibits P16p1, D6p1. The Parent did not agree with the rest of the team and did not want to return the Student to SOIL. The Parent continued to home-school the Student through the end of fifth grade.

23. Although the Parent continued to home-school the Student in lieu of returning him to SOIL, she still wanted to return him to an educational placement in the District. As early as March 2, 2015, the Parent approached the District about re-enrolling him in a District school. Exhibits P43p2, D7p1. The Parent apparently filled out District enrollment paperwork in early March 2015. Exhibits P43pp13-14. The District denied the Student's enrollment. Exhibit P43p4.

24. Eventually the District's director of student services, Betsy Minor Reid, met with the Parent on April 17, 2015, and then again on July 29, 2015, to discuss the Student returning to the District.<sup>6</sup> Exhibit P43p20, p27, p43.

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<sup>5</sup> Dysgraphia is a learning disability that affects written expression.

<sup>6</sup> There may have been additional meetings between Ms. Reid and the Parent during the summer, but the series of emails (Exhibit P43, totaling 80 pages) is difficult to follow, and there was little direct testimony regarding the meetings.



25. After the meeting on April 17<sup>th</sup>, Ms. Reid initially offered to allow the Student to return to the District on a half-day schedule through the remainder of the school year. Exhibit P43p27. Finally at the meeting with the Parent on July 29, 2015, Ms. Reid agreed that the Student could return to a TLC classroom at the District's Jason Lee Middle School for sixth grade during the 2015-2016 school year. Exhibit P43p43.

26. The Parent completed paperwork to enroll the Student at Jason Lee Middle School and submitted it to the District on August 19, 2015. Exhibit P17.

### **2015-2016 School Year: Jason Lee Middle School**

#### The District's Whole Child Initiative

27. Jason Lee Middle School participates in the District's Whole Child Initiative (WCI) program. WCI is a positive behavior intervention support program designed to be used school-wide with all students at Jason Lee to build positive relationships for learning. All the staff at Jason Lee Middle School, including teachers, paraeducators, and lunchroom and custodial staff, receive WCI training, and all staff are expected to implement it. Testimony of Brandt, Pick.

28. Elements of WCI at Jason Lee included a three-day orientation for all incoming sixth-graders that took place during the week of August 17-21, 2015. Incoming sixth-graders, like the Student, are assigned to groups, and a seventh- or eighth-grade student is assigned as a mentor to each group. Orientation includes activities to familiarize the students with the physical layout of the school, "icebreaker" activities, and discussion of academic programs. WCI included use of a school-wide system of rewards for good behavior and academics. Testimony of Brandt, Pick.

29. The Student did not participate in the three-day orientation because he was then not yet enrolled at Jason Lee Middle School. Testimony of Brandt. But the Student went to Jason Lee prior to the start of the school year and was given a tour of the building by Mr. Pick. There were peer mentors assigned to Mr. Pick's TLC classroom. But after one activity in the TLC classroom with the mentors, it was determined by Ms. Brandt and Mr. Pick that there were safety issues for the mentors, and the mentors were discontinued in Mr. Pick's TLC classroom. Testimony of Brandt, Pick.

30. The Parent was not aware of WCI until sometime after the Student began attending Jason Lee Middle School, only later reading about it on the District's website. But the Parent was aware that both Michael McDonald, the Student's general education math teacher, and Michael Knuckles, the vice-principal, conducted interventions outside of the TLC classroom with the Student consistent with the principals of WCI. Testimony of Parent.

#### September 3, 2015 IEP Meeting

31. The District recognized as early as August 6, 2015, that the Student would need a new IEP in order to return to a placement at Jason Lee Middle School. Exhibit P43p43 ("An IEP meeting will need to occur before school starts on September 9<sup>th</sup>."); Exhibit P43p48 ("Looking at [the Student's] IEP...It appears to be expired since Jan..."). An IEP team, including the Parent, was finally scheduled to meet on September 3, 2015, to develop an IEP to return the Student to the TLC classroom at Jason Lee Middle School. Exhibits P18p1 D8p1.

32. Prior the IEP team meeting, Mark Pick, the District's special education teacher assigned to the TLC classroom at Jason Lee Middle School and the Student's IEP case manager, prepared a draft IEP for the team's consideration. In preparing his draft, Mr. Pick had no information about the Student from his year at SOIL, and it is unclear how much information about the Student from his year of home-schooling. Mr. Pick did have the Student's reevaluation from January 2015 and the Student's FBA from March 2013.

33. The Student's IEP met on September 3, 2015, and developed an IEP that placed the Student in the TLC classroom at Jason Lee Middle School. Exhibits P18, D8. The Student's IEPs had only two goals, both identified as "Social Emotional/Behavioral":

By 08/23/16, when given assignments and direct instruction in the classroom [the Student] will increase his ability to demonstrate appropriate classroom behaviors (such as sitting in seat, beginning work when requested, completing work, etc.), improving study habits and social skills, from 45% compliance to 95% compliance over the course of 8 consecutive school weeks as measured by daily observation, daily classroom data sheet.

By 08/23/16, when given potentially negative social interaction with a peer or adult, [the Student] will self-manage and choose not to engage in verbal conflict or instigation, improving self-management skills and regulation, from effectively self-managing his behavior 25% of the time to...effectively self-managing his behavior 90% of the time, as measured by daily student behavioral tracking data.

Exhibit P18p7. The Student's progress towards reaching his two goals was to be reported every quarter through a written progress report. Exhibit P18p7.

34. The IEP provided the following Accommodations and Modifications: Tests administered in small group setting; Frequent breaks during testing; Behaviorally-related breaks when frustration level escalates; Behaviorally-related clear expectations for behavior; Behaviorally-related positive reinforcement for appropriate behaviors; and Behaviorally-related preferential seating. Exhibit P18p8.

35. The IEP placed the Student in the special education TLC classroom for 1300 minutes per week (70.2% of the school day) and placed the Student in the general education setting for 550 minutes per week (29.7% of the school day). Exhibit P18p10.<sup>7</sup> The Parent signed the IEP along with the other members of the team. The Parent has not challenged the appropriateness of the September 2015 IEP.

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<sup>7</sup> The Special Education and Related Services matrix of the Student's IEP (Exhibit P18p10) reflects two periods of time: September 3, 2015, through September 7, 2015, and then September 9, 2015, through August 23, 2016. The record is not well developed with respect to why the matrix reflects these two periods of time. The IEP meeting was held on September 3<sup>rd</sup>, and the first day of school was September 9<sup>th</sup>. But why the IEP would identify a period of time prior to commencement of the school year is unclear. For purposes of this Final Decision, only the matrix beginning with the first day of school on September 9, 2015, is considered.

36. In order to provide the Student with all 1300 minutes per week (260 minutes per day) of his social/emotional/behavioral SDI in the TLC classroom, the Student would be limited to one period of general education in a six-period school day. The remaining five periods of the school day would be in the TLC classroom. Testimony of Bell.

37. The District asserts that it consented to the Student returning to the District in the TLC classroom at Jason Lee Middle School as a "trial" of his readiness to return to a TLC classroom environment. Ms. Reid told the principal of Jason Lee Middle School, Christine Brandt, that it was a trial placement. Testimony of Brandt. Mr. Pick was given the "impression" by Ms. Reid that it was only a trial placement. Testimony of Pick. The IEP itself is devoid of any mention or identification of the Student's placement in the TLC classroom as in any way being a "trial" placement. There appears to have been some limited discussion of this issue at the IEP meeting on September 3, 2015, as the Parent stated that she did not understand why the placement in the TLC was a trial placement, and there was no discussion of any duration of the trial placement at the IEP meeting. Testimony of Parent.

38. A Prior Written Notice (PWN) was provided to the Parent at or after the September 3, 2015 IEP meeting. Exhibit D9.<sup>8</sup> The PWN proposed changing the Student's placement from SOIL to the TLC classroom at Jason Lee Middle School, rejecting placement in a more restrictive setting because it was not appropriate to meeting the behavioral needs of the Student at that time. Exhibit P18p13.

39. The PWN reflected the IEP team's decision to review and update the Student's IEP, along with his FBA and BIP due to the Student's change in placement from SOIL to the TLC classroom at Jason Lee Middle School. *Id.* Mr. Pick wanted time to get to know the Student before reviewing and updating his FBA and BIP.<sup>9</sup> The team determined the Student's FBA and BIP would be reviewed six to eight weeks after school started. Testimony of Pick, Bell.

40. As of September 3, 2016, the Student's most recent FBA was the FBA developed in March 2013 when he was in third grade, and the Student's most recent BIP was the BIP developed in January 2014 when he was in fourth grade. Exhibits P2p2, D1p2, P9p1, D2.

#### The TLC classroom at Jason Lee Middle School

41. The first day of school for the District was September 9, 2015, and the Student attended school in the TLC classroom at Jason Lee Middle School as an incoming sixth-grader. Exhibit D34p2.

42. Mr. Pick was the Student's special education teacher in the TLC classroom. Mr. Pick had a paraeducator, Larissa Marks, in the TLC classroom along with him. Mr. Pick also had available a District behavior specialist/interventionist, Kathleen Larson, to assist him with any

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<sup>8</sup> The PWN is dated August 25, 2015. That date, however, is an artifact of the software program which produced the PWN. The PWN is associated with the September 3, 2015 IEP meeting. Testimony of Bell.

<sup>9</sup> The Parent's expert witness, Dr. Becker, agrees that it is important for the individual who conducts an FBA to know or be familiar with the subject of the FBA. Testimony of Becker. Dr. Becker's education, training and experience appear at Exhibit P46, and will not be repeated in the body of this Order.

issues or concerns in the TLC classroom. Ms. Larson frequently visited Mr. Pick TLC classroom. This was Mr. Pick's first full year at Jason Lee Middle School. Testimony of Pick, Brandt.

43. The record is unclear how many special education students were in Mr. Pick's classroom. Estimates ranged from a low of 3-5 students (Testimony of Pick) to a high of 8-10 students. (Testimony of Brandt, McDonald).

44. The record is somewhat unclear regarding the Student's class schedule. Mr. Pick believes the Student began the school year "full-time" in his TLC classroom except for sixth period. Mr. Bell believes the Student began the school year with 5 periods in the TLC classroom and one general education guitar class outside the TLC. This is supported by a report from the Student's guitar teacher dated October 2, 2015. Exhibit P43p53. The Parent's testimony on this point was uncertain, but she generally understood the Student would start in the TLC classroom with 1 or 2 general education classes outside the TLC. Testimony of Pick, Bell, Parent. After considering all the evidence on this point, it is found as fact that the Student began the school year spending 5 periods in the TLC classroom with Mr. Pick, and one period in a general education guitar class.

45. As early as September 15, 2015, the Student was approved to move into Michael McDonald's fourth-period general education math class. Exhibit P43051. But it is unclear when the Student actually began attending Mr. McDonald's math class. The math class replaced the Student's general education guitar class.

46. By at least November 6, 2015, the Student's class schedule had him spending four periods in Mr. Pick's TLC classroom and two periods in general education classes; Mr. McDonald's fourth-period math class and David Olson's sixth-period science class. Exhibit D12.

#### Implementation of the Student's January 2014 BIP

47. Mr. Pick was aware that the Student had an "older" BIP: the BIP that was developed in January 2014 for use at SOIL. Exhibits D2, P9p1. Mr. Pick did not implement the January 2014 BIP because he believed it was no longer valid. Mr. Pick wanted to take time to get to know the Student before developing a new BIP for the Student. Testimony of Pick. This is consistent with the PWN (Exhibits P18p13, D9), and the IEP team's decision to wait six to eight weeks before reviewing and updating the Student's FBA and BIP.

48. While Mr. Pick did not implement the January 2014 BIP, he did provide the Student with behavioral interventions. These included positive reinforcement with participation in a token economy within the TLC classroom, use of a behavior rating scale, allowing the Student to take self-directed time-outs in the hallway, allowing the Student to use "fidgets to reduce his anxiety, rewards for positive behavior like on-task performance, allowing the Student to leave the TLC classroom for the hallway if the Student was anxious, and allowing the Student to listen to music on his tablet while he was working. Mr. Pick used behavioral interventions when the Student's behavior was not appropriate, including having him removed from the TLC classroom, documenting the inappropriate behavior ("writing him up"), and calling and emailing the Parent at home. Testimony of Pick. The Parent was aware that Mr. McDonald provided positive intervention with the Student outside of the TLC classroom. The Parent believed Mr. Knuckles may have also provided positive interventions for the Student as well. Testimony of Parent.

49. While the TLC classroom did not have a "strategy room"<sup>10</sup> (See January 2014 BIP, Exhibits D2p2, P9p2) for the Student to use as a consequence for demonstrating poor behavior, Jason Lee Middle School had an in-school suspension (ISS) room available, as well as the use of Ms. Brandt's or Mr. Knuckles' office. Testimony of Pick, Brandt.

#### Mr. Pick's Daily Point Sheets

50. Mr. Pick drafted the two behavioral goals in the Student's September 3, 2015 IEP. Each of those goals required the use of a "daily classroom data sheet," or "daily student behavioral tracking data." Exhibits P18p7, D8p7. Mr. Pick used a "Daily Point Sheet" (the Sheet) to record the data necessary to measure the Student's progress towards the two goals in his IEP. Exhibits P24, D31. Mr. Pick obtained the Sheet form from another teacher at a different school. Mr. Pick was unable to modify the format of the Sheet because he did not have it in an electronic (i.e. Word or PDF) format. The Sheets used a scale of 1 (good or compliant behavior) to 5 (poor or noncompliant behavior) to rate a student's behaviors, including following directions, staying on task, respecting others, completing work, and staying in class to problem-solve rather than being removed from class. See e.g. Exhibit P24p1 – Evaluation Scale. A rating of 3 out of 5 is equivalent to a student exhibiting good or compliant behavior during 60% of a given class period. Testimony of Pick.

51. Mr. Pick did not begin using the Sheet until September 23, 2015, because he took the time to speak with all of the students in this TLC classroom about the point system. Mr. Pick used the Sheet for all of his students in his TLC classroom. The Sheet was not individualized or specific to the Student or the Student's IEP goals. Testimony of Pick.

52. Between September 9, 2015, the first day of school, and January 15, 2016, the last day for which there is a Sheet, the record reflects 33 Sheets for the Student.<sup>11</sup> Exhibits P24pp1-33, D31pp1-33. Over that same period of time there were 77 school days. Exhibit D34p2. Of those 77 school days, the Student was suspended at least seven days. See generally Finding of Fact 55. This means that a Sheet was used, though not necessarily thoroughly completed or signed, on 47% of the school days the Student was present in school through January 15, 2016.

53. The Parent's expert witness, Dr. Becker, reviewed the Sheets and the Student's IEP goals. It is Dr. Becker's opinion that the Sheets are not a valid or reliable means by which to gather the data necessary to determine whether the Student was making progress towards his IEP goals. Data collection methods like the Sheet are typically used as part of a token economy or token system, which is a very effective and researched-based classroom intervention designed to motivate students to improve their behavior. The Sheet records the number of

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<sup>10</sup> There is little to no evidence of record regarding the details of what the "strategy room" at SOIL consisted of or how it was used with the Student.

<sup>11</sup> Mr. Pick testified that after January 15, 2016, he discontinued his use of the Sheet because he was training to use an alternative method to gather data; an on-line software program called "Review 360". However, the District produced no other independent evidence substantiating or corroborating Mr. Pick's use of any alternative to the Sheets. It is found as fact that the District failed to establish it continued to collect data regarding the Student's IEP goals after January 15, 2016.

points earned in a given period, but it does not *measure behavior*. It is Dr. Becker's opinion that there is no connection between the Student's behavioral goals in his IEP and the points measured by the Sheet. After careful review and consideration of the evidence of record, it is found as fact that Dr. Becker's opinion is more logically compelling than the evidence offered by the District on this point. It is found as fact that the Sheets are not a valid or reliable means by which to gather the data necessary to determine whether the Student was making progress towards his IEP goals.

IEP Progress Reports

54. The Student's September 2015 IEP required quarterly written progress reports regarding the Student's progress towards his IEP goals. Exhibit P8p4. The Parent credibly testified that she never received any written progress reports regarding the Student's IEP goals during the 2015-2016 school year from Jason Lee Middle School. The District failed to produce any IEP progress reports for the due process hearing. It is found as fact that the District never provided the Parent with any written progress reports regarding the Student's IEP goals during the 2015-2016 school year.

The Student's Behavior at Jason Lee Middle School

55. The following is an abbreviated chronology of the Student's behavioral difficulties at Jason Lee Middle School:

DATE	EVENT	EXHIBIT
9/10/15- 9/26/15	Student picked on one student, calling him a "fat bitch" and calling his mother a "hooker."	D20p1
9/17/15	<u>Short-Term Suspension:</u> Student suspended for two days for fighting with another student in cafeteria during lunch.	D10, D30p14, D32p1, P29p7
9/24/15	<u>Conduct Referral Reports:</u> Student engaged in disruptive conduct, received a "student conference." But Student was both offender and victim.	D30p1-2, P38pp1-2
9/29/15	<u>Conduct Referral Reports:</u> Student involved in harassment/intimidation with another student. Student was bullying another student, calling student a "fat bitch," and calling student's mother a "hooker."	D30p14, D30p3, P38p3
10/1/15	<u>Conduct Referral Report:</u> Student bullying another student in class, talking about his mom and calling him a "loser," "retard," "faggot bitch," "fucking bitch". Student tries to punch another student and refused direction to leave the room. Student received in-school suspension (ISS). Student refused to comply when told to stay in ISS.	D20p1,D30p4-5, D30p14, P38pp4-5
10/2/15	Student's Guitar Teacher/Orchestra Dir. reports Student is off-task and disrespectful to her and the other students, throwing his pack down the hallway.	P43p53

10/8/15	<u>Conduct Referral Report</u> : Student yelling at classmate, calling him a "faggot bitch" and a "whore". Student threatened to punch him in face, and called his mother a "whore". Student was asked to go to office and he refused. Profane with staff. Student suspended for one day for disruptive conduct, vulgar and profane language.	D11, D20p1, D30p6, D30p14, P29p6, P38p6
10/28/15	Student harassing classmate, being profane and refusing to follow directions.	D20p1
11/3/15	Student being very disrespectful to staff in class unplugged all of staff computers and took stuff off of their desks.	D20p1
11/9/15	<u>Short-Term Suspension</u> : Student suspended for two days for calling teacher a "Bitch" and saying "fuck you," would not follow staff directives, threatened to hit another student with a chair.	D13, D30p14, D30p7, D32p1, P38p7, P29p5
11/13/15	<u>Conduct Referral Report</u> : Student shot rubber band at staff, cursed at staff, unplugged the whiteboard and poured cleaning fluid on it.	D20p1, D30p8, P38p8
11/17/15	<u>Notice of Suspension</u> : Student suspended 3 days starting 11/18/15-11/20/15 for cursing at staff, coloring on staff property, moving aggressively toward staff in class, flipping over desks and monitors, and running at staff	P29p4, P38p9
12/1/15	<u>Conduct Referral Report</u> : Student asked to go to his seat and refused, began to swing a mouse at a projector, cursing at staff. Student grabbed his backpack and walked out. Student receives single-class suspension.	D20p1, D30p10, P38p10, D30p14
12/2/15	Student refused to participate in class activities, disrespectful to staff, cursed at staff.	D20p1
12/3/15	Student is <u>emergency expelled</u> for throwing chemicals on his science teacher. Student is emergency expelled 12/3/15 – 12/9/15. Placed on reduced school-day for remainder of December.	D30p11, D30p14, D32pp2-3, P29p3, P38p11
12/15/15	Student threw pencil at another student.	D20p1
1/5/16	<u>Conduct Referral Report</u> : Student throws pencils, bottle of hand-sanitizer at another student in Mr. McDonald's general education math class.	D30p12, D30p14, P38p12
1/21/16	Student <u>emergency expelled</u> for incident with substitute librarian.	P29p2, D23p1, D30p13-14, P38p13

56. A manifestation determination team (MDT) meeting was convened by the District on December 9, 2015, to address the Student's conduct and emergency expulsion on December 3, 2015. Exhibit D17. The Parent attended as part of the team. The team concluded the Student's conduct was a manifestation of his disability. The team decided the Student's last

FBA, by then almost 3 years old, and his last BIP, by then almost 2 years old, should be reviewed after the holiday break in January 2016. Testimony of Pick, Parent.

57. On January 8, 2016, a meeting was held to review the Student's new FBA and BIP conducted and developed by Mr. Pick. Exhibits D20, D21p3.<sup>12</sup>

58. Mr. Pick had wanted to review the Student's FBA earlier in November 2015, once he had time to get to know the Student. But given all of the Student's behavioral issues, Mr. Pick believed a team could not be assembled any earlier than January 2016. Testimony of Pick.

59. On January 21, 2016, the Student was emergency expelled from Jason Lee Middle School following an incident with a substitute librarian. Exhibit P29p2.

60. On January 25, 2016, the Student's IEP team made a request that the Student be provided 10 hours of tutoring per week while he was excluded from Jason Lee. The team requested that Mr. Pick provide the tutoring. Exhibit P43p58.

61. On February 1, 2016, an MDT meeting was held regarding the Student's conduct on January 21<sup>st</sup> that led to his emergency expulsion. The MDT determined the conduct for which the Student was expelled had a direct and substantial relationship to his disability. Exhibit P25p4.

62. Despite the MDT finding that the conduct for which he was emergency expelled on January 21<sup>st</sup> was a manifestation of his disability, the District would not allow the Student to return to his educational placement in the TLC classroom at Jason Lee Middle School.<sup>13</sup>

63. On February 8, 2016, the emergency expulsion was converted by Principal Christine Brandt to a long-term suspension which would end on February 29, 2016. Exhibit P29p1. It was not Principal Brandt's intent to suspend the Student after the MDT determined his conduct on January 21<sup>st</sup> was a manifestation of his disability. Rather, Principal Brandt incorrectly

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<sup>12</sup> The issue for resolution regarding the new FBA and BIP is whether the District violated the IDEA and denied the Student FAPE by failing to review and update the Student's FBA and BIP. See August 4, 2016 Prehearing Order. A reasonable corollary of that issue is whether the Student was denied FAPE over a period of time during which the FBA and BIP *should have been* reviewed and updated, but were not. In her Prehearing Memorandum and Closing Argument, the Parent seeks to expand this issue to include a challenge to the *appropriateness* of the January 2016 FBA and BIP. See Parent's Prehearing Memorandum, p. 17; Parent's Closing Argument, p. 22. It is concluded that such expansion of the issue conflicts with the prehearing statement of the issues. Both parties had the right, notice, and opportunity to object and seek amendment of the statement of the issues, but did not. As the statement of the issues controls the issues to be decided herein, the issue of whether the January 2016 FBA and BIP were procedurally and/or substantively appropriate under the IDEA will not be adjudicated.

<sup>13</sup> The Parent attended the MDT meeting on February 1, 2016. The District has asserted that at the meeting the Parent requested the Student be placed in a TLC classroom in a new school. This issue was addressed in the Order Granting Parent's Stay-Put Motion entered May 6, 2016, and will not be revisited herein. During all times material to resolution of the issues herein, the Parent never agreed to any change in educational placement or location for the Student, wanted the Student to return to his TLC classroom at Jason Lee Middle School, and communicated her desire to the District.



believed the Student would be unenrolled from Jason Lee if the District's attendance system showed him to be absent for more than four days. Testimony of Brandt.

64. The District continued to exclude the Student from his TLC classroom at Jason Lee Middle School from January 1, 2016, until May 9, 2016. The District permitted the Student to return to Jason Lee Middle School only after ordered to do so by this Tribunal on May 6, 2016.

#### March 2016 IEP Meetings and the District's Proposed Placement for the Student

65. The Parent attended two IEP meetings with the District, on March 1 and March 31, 2016. Exhibits P30p1, P31. There is little documentary evidence of record regarding what occurred during these meetings. No new IEP was developed for the Student at either of the two meetings.

66. At the March 1, 2016 IEP meeting the Parent requested a peer-mentor be assigned to the Student, that music be made available for him to help him deescalate at school, that he be provided structured time-outs, and that she or the Student's grandmother be called as necessary. When the Parent found out that the District had placed the Student's name on a waiting list for a placement at the ReLife School, a private day school serving students with significant emotional and behavioral challenges through referrals from school districts, she believed the District had predetermined the Student's placement and left the meeting. Testimony of Parent.

67. Jonathan Bell, the District's director of student services also attended both March IEP meetings. Mr. Bell confirmed that the purpose of the March IEP meetings was to get the Parent to "buy in" to placing the Student in a separate day school. Testimony of Bell.<sup>14</sup> He recalls the Parent asking for other interventions for the Student at the March 1<sup>st</sup> IEP meeting.

68. The Parent attended the March 31<sup>st</sup> IEP meeting with her attorney. Along with her Attorney, the Parent identified all the modifications and accommodations she was requesting for the Student. The team discussed the Student returning to Jason Lee Middle School. Testimony of Parent. The Parent suggested not giving the Student options to avoid power struggles, and having a "go to" person for the Student. Testimony of Pick. The team, with the exception of the Parent, agreed the Student's educational placement should be changed to a self-contained school for students with significant behavioral needs. Exhibit P32p1.

69. On April 1, 2016, the District issued a PWN to the Parent. Exhibits P33p3, D28. The PWN proposed to change the Student's educational placement "consistent with the recommended services contained in his most recent special education eligibility evaluation, which was completed on January 6, 2016. An educational placement consistent with the recommended services contained in his most recent special education eligibility evaluation is a separate day school." The PWN informed the Parent that the action would be initiated on April 11, 2016. Exhibit P33pp3-4.

70. On April 20, 2016, the Parent filed the Complaint.

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<sup>14</sup> See Transcript of due process hearing (Tr.) at 756.

71. At no time prior to proposing to change the Student's placement to a separate day school did the District reevaluate the Student. Testimony of Harris-Clement, Bell.

72. The District did not conduct a reevaluation before proposing to change the Student's placement because the placement in the TLC classroom at Jason Lee Middle School was a tentative or trial placement, and the Student's last reevaluation (January 2015) was "fairly current" and indicated the Student needed a more restrictive environment. Testimony of Harris-Clement. The District also had "data" that supported the placement in the TLC classroom at Jason Lee Middle School was not appropriate. Testimony of Bell.

73. The District also did not amend the Student's IEP from September 2015, which placed him in the TLC program at Jason Lee Middle School before issuing the PWN on April 1, 2016. Testimony of Bell.

74. The District issued a second PWN to the Parent on April 1, 2016. Exhibit P33p1. This PWN proposed to initiate compensatory education services for the Student. It stated in part:

The Student was not in an educational placement consistent with the recommended services contained in his most recent special education eligibility evaluation from...September 9, 2015 through April 1, 2016. The District is offering compensatory education to provide the Student with the benefit if (sic) the services that he did not receive during that time.

Exhibit P33p1.

#### Tutoring Provided by the District

75. Since January 21, 2016, when the Student was excluded by the District from his placement at Jason Lee Middle School, the District has provided approximately 68 hours of tutoring to the Student. Testimony of Bell. The tutoring began with Mr. Pick tutoring the Student at a high school library sometime during late January or early February 2016. Later, the tutoring was taken over by Julie Cowens and provided at least in part at the Student's home. Testimony of Pick, Parent. But there is very little evidence of record regarding the nature, duration, or frequency of the tutoring.

#### Dr. Becker's Testimony Regarding Compensatory Education

76. Based upon his evaluation (Exhibit P47) and knowledge of the Student, it is Dr. Becker's opinion that the Student requires both therapeutic and academic services to place him the position he would but for any denial of FAPE by the District. Dr. Becker opines that the Student should receive therapeutic intervention or counselling services twice a week for one hour each session by a Masters-level school psychologist or school counselor. The therapeutic intervention or counselling should include teaching the Student self-management and self-control regarding his behavior, self-identification of his stress level, and how to use words rather than undesirable behavior to achieve his goals. Dr. Becker opines that the Student needs academic instruction in the areas of math, science, social studies, and reading as part of any compensatory education, but could not provide more specific recommendations with respect to the quantum or amount of such academic instruction. Testimony of Becker.

## 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. "[A] school must provide a student with a 'meaningful benefit' in order to satisfy the substantive [FAPE] requirement[ ]." *M.M. v. Lafayette School Dist.*, 767 F.3d 842, 852 (9<sup>th</sup> Cir. 2014) (internal citation and quotation marks omitted).

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

#### **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 (9<sup>th</sup> Cir. 2001).

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

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

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

#### **Substantive Compliance with the IDEA**

8. Material failures to implement an IEP violate the IDEA. On the other hand, minor discrepancies between the services a school provides and the services required by the IEP do not violate the IDEA. See *Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9<sup>th</sup> Cir. 2007).

"[S]pecial education and related services" need only be provided "*in conformity with*" the IEP. [20 USC §1401(9)] There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education.

...  
We hold that a *material* failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.

*Van Duyn, supra*, 502 F.3d at 821 and 822 (italics in original).

#### **Denial of Access to the District's Whole Child Initiative**

9. The Parent asserts the District violated the IDEA and denied the Student FAPE when it failed to access to the District's Whole Child Initiative (WCI) while the Student was participating in general education classes at Jason Lee Middle School. Specifically, the Parent asserts the Student was denied FAPE because he did not participate in the August 2015 three-day orientation, was not assigned a peer mentor, and was denied the benefit of WCI's school-wide

positive behavioral interventions. The Parent cites to WAC 392-172A-02025 and 392-172A-02035<sup>15</sup> as the legal authority to support her assertion.

10. WAC 392-172A-02025 provides:

(1) Each school district must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the student's IEP team; to provide nonacademic and extracurricular services and activities in the manner necessary to afford students eligible for special education an equal opportunity for participation in those services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the school district, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available.

Similarly, WAC 392-172A-02035 provides:

Each school district shall ensure that its students eligible for special education have available to them the variety of educational programs and services available to nondisabled students in the school district's area, including art, music, industrial arts, consumer and homemaking education, and vocational education.

11. As an initial matter, the applicability of either of these two administrative rules to the facts in this case is unclear. Whether WCI is correctly characterized as a nonacademic service or educational program/service is equally unclear. The list of nonacademic and extracurricular services and activities in WAC 392-172A-02025(2) is not exhaustive. 71 Fed. Reg. 46,583 (2006).<sup>16</sup> And the language of WAC 392-172A-02035 ("*including* art, music, industrial arts...") implies the same for list of educational programs/services. But assuming for the sake of analysis that WCI falls under either of these two rules, the Parent still does not prevail on this claim.

12. While the Student did not participate in three-day orientation prior to the start of the school year, the Student received a tour of the building with Mr. Pick before school started. Peer mentors were assigned to the Student's TLC classroom, but due to safety issues were quickly discontinued for *all* the students in the TLC classroom. And staff did in fact use positive interventions with the Student outside the TLC classroom. Findings of Fact 29-30. It is concluded that the Student received at least some of the benefits of WCI while at Jason Lee Middle School. And it is clear that neither the Student's IEPs before or after commencement of the 2015-2016 school year or his BIP from January 2014 required WIC in order to provide FAPE to the Student.

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<sup>15</sup> See 34 CFR 300.107 and 34 CFR 300.110 for the corresponding federal authorities.

<sup>16</sup> This authority cites to the equivalent federal regulation at 34 CFR 300.107(b).

13. The Parent acknowledges the speculative nature of her assertion that the Student was denied FAPE because he was denied access to WCI. As the Parent conceded in her Closing Argument, had the Student “been permitted to participate in the orientation *it may have aided* his transition to Jason Lee Middle School. Parent’s Closing Argument, p. 16, emphasis added. “Had [the Student] been permitted to work with a peer mentor, *it may have aided* his transition to Jason Lee Middle School.” Parent’s Closing Argument, p. 16, emphasis added. “Had the substitute librarian interacted positively with [the Student] in accordance with the Whole Child Initiative expectations, he *may not have reacted* in a manner that led to his emergency expulsion.” Parent’s Closing Argument, p. 17, emphasis added. There is simply insufficient evidence of record to conclude that any failure by the District to provide the Student access to WCI had any material impact on the Student’s receipt of FAPE during the 2015-2016 school year at Jason Lee Middle School. The evidence identified by the Parent in the record is too speculative to establish any reasonable causal relationship between any lack of access to WCI and any denial of FAPE. It is concluded that the Parent has failed to establish by a preponderance of the evidence that the Student was denied FAPE due to any failure of the District to allow him access to WCI.

#### Preventing the Parent from Participation in the March 2015 IEP Meetings

14. Parental participation is among the most important procedural safeguards under the IDEA. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d, 877, 882 (9<sup>th</sup> Cir. 2001). The IDEA requires that parents have the opportunity to “participate in meetings with respect to the identification, evaluation, and educational placement of the child.” WAC 392-172A-03100; 34 CFR §300.322. To comply with this requirement, parents must not only be invited to attend IEP meetings, but must also have the opportunity for “meaningful participation in the formulation of IEPs.” *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed. Appx. 342, 48 IDELR 31 (9<sup>th</sup> Cir. 2007).

15. A district violates this procedural requirement if it predetermines a student’s placement or services, meaning that it “independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9<sup>th</sup> Cir. 2003). Likewise, a district “may not enter an IEP meeting with a ‘take-it-or-leave-it’ approach.” *Id.*

16. Here, the facts support a conclusion that the District predetermined the Student would not return to the TLC classroom at Jason Lee Middle School prior to the March 2015 IEP meetings with the Parent. Despite the MDT decision that the conduct for which the Student was emergency expelled on January 21, 2016, was a manifestation of his disability, the District did not allow the Student to return to his IEP placement in the TLC classroom for a period of months. Mr. Bell confirmed the purpose of the March IEP meetings was to get the Parent to “buy-in” to placing the Student in an out-of-district placement at a separate day school. Finding of Fact 67. When that failed, the District issued the April 1, 2016, PWN, placing the Student in a separate day school. Finding of Fact 69. Accordingly, it is concluded that the District violated the IDEA and denied the Parent a meaningful opportunity to participate in the decision-making process regarding the Student’s educational placement during the March IEP meetings.

Failing to Reevaluate the Student Prior to Proposing to Change his Educational Placement to a more restrictive environment

17. On April 1, 2016, the District proposed changing the Student's educational placement from the TLC classroom at Jason Lee Middle School to a separate day school. Finding of Fact 69. Prior to that proposal, the Student had last been reevaluated by the District in January 2015. The District did not conduct a new reevaluation of the Student prior to proposing to change his educational placement because the placement at Jason Lee Middle School was a tentative or trial placement, the January 2015 reevaluation was fairly current and indicated the Student required a more restrictive placement, and the District believed it had data that supported the Student's placement in the TLC classroom was not appropriate. Finding of Fact 72.

18. Case law clearly establishes the proposition that prior to any substantial or material change in a student's educational placement, a school district should conduct a reevaluation, particularly when the new placement is a more restrictive placement. *Board of Educ. of City of White Plains*, 20 IDELR 1475 (SEA NY 1994); *Brimmer v. Traverse City Area Pub. Sch.*, 22 IDELR 5 (W.D. Mich. 1994); *Central Valley Sch. Dist.*, 115 LRP 17348 (SEA WA 2014); *Tacoma Sch. Dist.*, 2016-SEA-0047 (SEA WA 2016). This is also the position of the Office of Civil Rights (OCR). *Kelso (WA) Sch. Dist. No. 4*, 20 IDELR 1003 (OCR 1993); *Mobile County Sch. Dist.*, 19 IDELR 519 (OCR 1992). In *Kelso*, OCR remarked that the Office of Superintendent of Public Instruction (OSPI) for Washington State also investigated the same issue OCR investigated pursuant to a state citizen's complaint. OSPI "determined that the [Kelso School] District failed to comply with certain State special education requirements, including failing to evaluate the students prior to changing their placements." *Kelso*, supra.

19. As an initial matter, it is concluded that changing a student's educational placement from a self-contained classroom at a public school, where the student's IEP calls for him to spend at least one period per day in general education, to a private day school which serves only students eligible for special education and has no general education classes, is a change in placement to a more restrictive environment.

20. The District's reasons for not conducting a reevaluation of the Student prior to proposing to place him in a separate private day school are manifestly unreasonable. Arguing the Student's January 2015 reevaluation supports such a change in placement without a reevaluation is simply disingenuous. On the one hand, the District conveniently ignored the January 2015 reevaluation when Betsy Minor Reid, the District's then-director of student services agreed to place the Student in the TLC classroom at Jason Lee Middle School.<sup>17</sup> Then, after allowing the Student to remain at Jason Lee Middle School in what the District characterizes as a "trial" placement for the better part of five months (September 2015 to late

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<sup>17</sup> The unilateral decision of Ms. Reid to return the Student to the TLC classroom at Jason Lee Middle School as even a "trial" placement in all likelihood constituted another violation of the IDEA, as that decision was not based upon an evaluation which supported such a placement and was not made by the Student's IEP team. But that issue was not raised by the Parent, likely because the Parent wanted the Student returned to an in-district placement. However, even if the Parent agreed to a change in placement that violated the procedural requirements of the IDEA, this does not excuse the District from its independent legal duty to reevaluate a student prior to a change in educational placement and convene a student's IEP team to make the placement-change decision.

January 2016), the District just as conveniently wishes to use the January 2015 reevaluation to justify returning the Student to a more restrictive placement. With respect to any "data" the District believed it had to support returning the Student to a separate day school, the record is clear that the District predetermined the Student would be returned to a more restrictive placement prior to the March IEP meetings with the Parent.

21. Furthermore, the facts in this case clearly support the need for a reevaluation of the Student at the time the District proposed placing him back in a separate day school. By April 2016, the January 2015 reevaluation was 15 months old, and much of that evaluation was based upon review of older assessments of the Student. It was conducted while the Student was being home-schooled. This is a very different environment from either a separate day school or a TLC classroom. And the District concedes the Student's behavior at Jason Lee Middle School had substantially deteriorated during the 2015-2016 school year.

22. It is concluded the District violated the IDEA by failing to reevaluate the Student prior to proposing to return him to a separate day school with the April 1, 2016, PWN. It is concluded that this procedural violation impeded the Student's right to a free appropriate public education, significantly impeded the Parent's opportunity to participate in the decision-making process, and deprived the Student FAPE.

#### Failing to Fully Implement the Student's September 2015 IEP

23. The Parent raises multiple arguments supporting her position that the District failed to fully implement the Student's September 2015 IEP. Each will be considered in turn.

24. The Parent argues that the Student was placed in more general education classes than his IEP permitted, and this in turn resulted in the Student not receiving all the SDI called for in his IEP. Mr. Bell confirmed that in order to receive all the SDI in his IEP, the Student would be limited to one general education class and spend the remaining five periods in the TLC classroom with Mr. Pick. Finding of Fact 36. The Student began the school year spending five periods in the TLC classroom and one period in a general education guitar class. The guitar class was later replaced by a general education math class. And then by at least November 2015, the Student was attending two general education classes; math and science. Findings of Fact 44-46. Given the SDI required in his IEP, it must be concluded that by placing the Student in more than one general education class without first amending his IEP, the District did not fully implement the SDI in the Student's IEP. It is concluded that this was a substantive violation of the IDEA.

25. The Parent argues that the District failed to report the Student's progress towards his IEP goals. This is correct. The Student's IEP required quarterly written IEP progress reports on the Student's goals, but the District never provided any such reports to the Parent. And there is no evidence such reports were ever created even for internal use at the District. Finding of Fact 54. It is concluded this was a procedural violation of the IDEA. The Parent argues that without access to such reports, it was impossible to know if the Student was making any progress towards the goals in his IEP, and that she was precluded from any meaningful participation in the implementation of the his IEP. A district is obligated under the IDEA is to measure annual progress toward IEP goals in both academic and functional goals. See generally WAC 392-172A-03090(1)(a)-(c); 34 CFR § 300.320(a)(3). A district's failure to provide progress reporting data can be a procedural violation that results in a denial of FAPE. M.M., supra, 767 F.3d at



855-856 (9th Cir. 2014). It is concluded that the Parent's argument is compelling on this point. Without any IEP progress reports, the Parent was more likely than not precluded from meaningfully participating in the decision-making process regarding the Student' education. This is a procedural violation that warrants a remedy.

26. The Parent argues that Mr. Pick's Daily Point Sheets were not valid or reliable to measure the Student's progress towards his IEP goals. This Tribunal agrees. Without questioning Mr. Pick's good intent, it is clear the Sheets were generic and not in any way individualized to measure the Student's progress towards his IEP goals. Mr. Pick used this same form with all the students in his TLC classroom. Dr. Becker cogently explained how the form was unreliable to measure the Student's behavioral compliance with his IEP goals. It is concluded that use of the Sheet to track or measure the Student's IEP goal progress was a procedural violation of the IDEA. Without any valid and reliable measure of the Student's progress towards his IEP goal, it is concluded this procedural violation impeded the Student's right to FAPE, and more likely than not caused a deprivation of educational benefit for the Student because it would have been impossible to, for example, determine if the Student's goals or SDI should have been amended.

27. The Parent argues that Mr. Pick used behavioral interventions with the Student that were not identified in his IEP. The September IEP identified a number of accommodations and modifications for the Student. Finding of Fact 34. Many of these were essentially behavioral interventions, e.g. behaviorally-related breaks when the Student's frustration level escalated, clear expectations for behavior, and behaviorally-related positive reinforcement. Mr. Pick identified the behavioral interventions he provided the Student. Finding of Fact 48. When considered globally, the interventions Mr. Pick provided are substantially similar to the behavioral interventions identified in the Student's IEP. It is concluded the Parent has failed to establish any *material* failure on the part of the District to implement the behavioral interventions in the Student's IEP.

28. The Parent argued that the District failed to implement the Student's IEP from January 21, 2016, when he was emergency expelled from school, and May 9, 2016, when he returned to the TLC classroom pursuant to the Stay-Put Order in this matter. This Tribunal agrees with the Parent. From his expulsion until his return under the Stay-Put Order the Student received some amount of tutoring, first in a high-school library and then at his home. This is clearly and materially at odds with the Student's IEP. It is concluded that the District failed to implement the Student's IEP from January 21, 2016, through May 6, 2016. This is clearly both a procedural and substantive violation of the IDEA, and denied the Student FAPE.

#### Failing to Fully Implement the Student's January 2014 BIP

29. Mr. Pick was aware the Student had an "older" BIP, the January 2014 BIP that was developed for the Student while he was at SOIL. Mr. Pick did not implement that BIP because he believed it was no longer valid, and wanted time to get to know the Student before he developed a new BIP for the Student. Findings of Fact 47-48. The SOIL BIP required the use of "daily student behavior tracking data" to monitor the Student's progress towards the behaviors targeted in the SOIL BIP. Finding of Fact 15. Mr. Pick's use of his Daily Point Sheet did not fulfil the BIP's requirement for daily student behavior tracking data for the same reasons discussed above with respect to the Student's goals in his September 2015 IEP. While the Parent raised additional arguments in support of the District's failure to implement the January

2014 BIP, it is not necessary to consider those arguments given the District's failure to track the Student's behavior in a valid and reliable manner. This material failure to implement the Student's January 2014 BIP is particularly egregious given the fact that the only SDI the Student received related to his behavior at school, which interfered with both his learning and likely the learning of other students during those times which he could not control his disruptive and assaultive behavior at school. It is concluded that this material failure to implement the January 2014 BP more likely than not impeded the Student's right to FAPE and caused a deprivation of educational benefit to the Student.

#### Failing to Review and Update the Students' FBA and BIP

30. Prior to the Student returning to the District to start sixth grade in the TLC classroom at Jason Lee Middle School in September 2015, the District's IEP team had already identified the need to review and update the Student's FBA and BIP. Finding of Fact 39. By the time the Student returned to the District in September 2015, his existing FBA was from March 2013 when he was in third grade, and his existing BIP was from January 2014 when he was in fourth grade at SOIL. It was Mr. Pick's plan to review and update the Student's FBA and BIP after he had the opportunity to get to know the Student. Ultimately, it was not until December 2015 before the MDT met and agreed to review and update the Student's FBA and BIP in light of the Student's deteriorating behavior at school. Mr. Pick did not complete the new FBA and BIP until January 2016.

31. It was not unreasonable for Mr. Pick to wait *some* period of time to review and update the Student's FBA and BIP so he could become more familiar with the Student. But it is clear from the record of the Student's deteriorating behavior at Jason Lee Middle School, beginning almost immediately in September 2015, that the District had more than sufficient notice the Student quickly needed to have a new FBA and BIP in place.<sup>18</sup> It is not necessary to determine by what specific date the District should have initiated a new FBA and BIP. The evidence of record clearly supports a conclusion that by waiting until January 2016 to develop a new FBA and BIP the District denied the Student FAPE.

#### Denial of FAPE Post-April 11, 2016

32. The District argues it did not deny the Student FAPE after April 11, 2016, the effective date of the April 1, 2016 PWN which offered the Student a placement at a separate day school. This Tribunal respectfully disagrees with the District's argument. The evidence of record is woefully undeveloped to reach a conclusion that the District's proposed placement at ReLife, which the District has identified as the separate day school it was proposing for the Student's educational placement, is in fact an appropriate placement for the Student. And this Tribunal will not presume placement at ReLife would be such an appropriate placement for the Student.

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<sup>18</sup> This Tribunal must respectfully disagree with the parties' opinion that, in terms of the Student's behavior, the school year started out reasonably well for the Student. The Student's record of poor behavior and discipline (See Finding of Fact 55) included a two-day suspension for fighting during only the second week of school. By October 1, 2015, the Student had multiple Conduct Referral Reports. And the Student was suspended twice again by mid-November.

## Remedies

33. The Parent requests as a remedy declaratory relief that the District committed the violations asserted in the Parent's Complaint. This Order provides that remedy to the extent it has been determined that the District violated the IDEA and denied the Student FAPE pursuant to the above Conclusions of Law.

34. The Parent requests as a remedy the immediate resumption of the Student's September 2015 IEP in the TLC classroom at Jason Lee Middle School. That remedy is denied.

35. The evidence is clear that there remain significant questions to be resolved regarding what an appropriate educational placement for the Student would look like at the present time. This Tribunal is not convinced that even had the Student's January 2014 BIP been implemented with fidelity in conjunction with his September 2015 IEP that a TLC classroom at Jason Lee Middle School, or any other TLC classroom in the District, would constitute an appropriate educational placement and provide the Student FAPE going forward.

36. In light of this, the District is ordered to immediately commence a new reevaluation of the Student. The reevaluation shall comply with all the requirements pursuant to WAC 392-172A-03015 through WAC 392-172A-03040. Once the reevaluation is complete, the District shall convene an IEP team and develop a new IEP for the Student, including the determination of an appropriate educational placement for the Student.

37. Until such time as the new reevaluation is complete and the new IEP is developed, the Student shall remain in his stay-put placement: a TLC classroom in the District. This does not require the District to maintain the Student in the TLC classroom at Jason Lee Middle School. The record does not support a conclusion that the physical location of the Student's educational placement is so critical that a change in physical location would constitute a change in the Student's educational placement.

38. The Parent's requested remedy of an independent educational evaluation (IEE) of the Student at the District's expense is denied. Upon completion of the new reevaluation ordered pursuant to the above Conclusion of Law, the Parent may request an IEE at public expense if she disagrees with the results of the new reevaluation.

39. As the Parent's requested remedy of an IEE has been denied, the Parent's associated remedy for District funding for the independent evaluator to attend IEP meetings is denied.

40. The Parent's requested remedy for reimbursement for an IEE already scheduled or obtained is denied. The Parent did not raise as an issue the appropriateness of the District's last reevaluation in January 2015. Accordingly, there is no District evaluation with which the Parent disagrees or believes is inappropriate, and therefore no rationale for ordering reimbursement for an IEE scheduled or obtained by the Parent at this time.

## Compensatory Education

41. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005).

Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra*, 401 F.3d at 523-524.

42. 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.

43. In light of the above Conclusions of Law finding the District violated the IDEA and denied the Student FAPE from September 9, 2015, through May 6, 2016, an award of compensatory education is appropriate.

44. As is too often the case in the experience of this Tribunal, the evidence of record to determine what an appropriate award of compensatory education would look like is unclear. The Student received no SDI for academics. Nevertheless, it is clear that his behavior more likely than not compromised any academic benefit he may have received during the 2015-2016 school year. And it is equally clear from the Student's behavior that he received little benefit from his social/emotional/behavioral SDI during the school year. This makes it exceedingly difficult to identify the type and quantum of compensatory education is necessary to place the Student in the position he would have been but for the District's denial of FAPE, which is the hallmark or standard for an award of compensatory education.

45. The best evidence of record regarding an appropriate award of compensatory education comes from Dr. Becker's testimony. Finding of Fact 76. Based primarily on that evidence, the District is ordered to pay for two hours per week of therapeutic services from a Masters-level school psychologist, school counselor, or other similarly qualified individual. There were approximately 37 weeks of school during the 2015-2016 school year. See Exhibit D34p2. Therefore, the District shall pay for a total of **74 hours of therapeutic services** for Student.

46. Dr. Becker was unable to provide detailed or specific opinion evidence regarding the Student's need for academic services as part of any compensatory award apart from the subjects that should be covered: math, science, reading, and social studies. The Student has never received any SDI in academics. Therefore, any compensatory education award regarding academics should be related to whatever period of time the Student was excluded from school during the 2015-2016 school year. The Student was excluded from school from January 21, 2016, until May 6, 2016. This is a period of approximately 14 weeks. The District is ordered to provide the Student tutoring by a fully certificated teacher in the identified academic subjects for a total of **105 hours** (14 weeks X 5 days/week X 1.5 hours/day).<sup>19</sup> The Tutoring shall take place outside of the school day so as not to interfere with the Student's ongoing in-school instruction. The tutoring shall be completed within one calendar year of entry of this order.

47. The Parent and the District shall establish a regular schedule for both the academic and

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<sup>19</sup> The District may deduct from the 105 hours any hours of tutoring provided to the Student since his removal from Jason Lee Middle School on January 21, 2016. The District shall provide confirmation of the tutoring provided to the Parent upon request of the Parent.

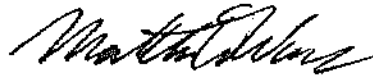
the therapeutic compensatory education services. Except in the case of emergencies, the Parent shall provide the District with 24-hours advance notice when the Student will be unable to attend a regularly scheduled session. If such advance notice is not provided, the scheduled session shall count towards fulfillment of this compensatory education award.

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

### ORDER

1. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate education pursuant to the above Conclusions of Law.
2. The Parent is awarded the remedies at Conclusions of Law 36, 37, 45, and 46.

Signed at Seattle, Washington on October 15, 2016.



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Matthew D. Wacker  
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. *MDD*

Parent



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cc: Administrative Resource Services, OSPI  
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