



STATE OF WASHINGTON  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
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October 18, 2019

Parents  
[REDACTED]

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**RE: Tacoma School District**  
**OSPI Cause No. 2019-SE-0049 / 2019-SE-0076**  
**OAH Docket No. 04-2019-OSPI-00733 / 05-2019-OSPI-00778**

Dear Parties:

Enclosed please find the Findings of Fact, Conclusions of Law, and Order in the above-referenced matters. This completes the administrative process regarding these cases. 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 files (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,

Handwritten signature of Pamela Meotti in cursive.

Pamela Meotti  
Administrative Law Judge

cc: Administrative Resource Services, OSPI

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

IN THE MATTER OF

OSPI CAUSE NOS. 2019-SE-0049  
2019-SE-0076

OAH DOCKET NOS. 04-2019-OSPI-00733  
05-2019-OSPI-00778

TACOMA SCHOOL DISTRICT

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

A due process hearing in this matter was held before Administrative Law Judge (ALJ) Pamela Meotti on August 20, 21, 22, and 30, 2019, pursuant to notice mailed to the parties. The Mother of the Student whose education is at issue<sup>1</sup> appeared and the Parents were represented by Lara Hruska, attorney at law. The Father was present for the due process hearing on August 20, 2019, but was not present on August 21, 22 and 30, 2019. The Tacoma School District (District) was represented by Susan Winkelman, attorney at law. Also present was Malik Gbenro, Assistant General Counsel for the District. The following is hereby entered:

**STATEMENT OF THE CASE**

The District filed a Due Process Hearing Request (District Complaint) with the Office of Superintendent of Public Instruction (OSPI) on April 2, 2019, which was assigned Cause No. 2019-SE-0049. OSPI forwarded the District Complaint to the Office of Administrative Hearings (OAH) for assignment of an ALJ. A scheduling notice was entered April 4, 2019, which assigned the matter to ALJ Matthew D. Wacker. The Parents filed a Response to the District's Complaint on April 11, 2019.

The Parents filed a Due Process Hearing Request (Parents' Complaint) with OSPI on May 16, 2019, which was assigned Cause No. 2019-SE-0076. OSPI forwarded the Parents' Complaint to OAH for assignment of an ALJ. A scheduling notice was entered April 17, 2019, which assigned the matter to ALJ Wacker.

The two cases were subsequently consolidated for hearing, and the matter was reassigned to ALJ Pamela Meotti. The Parents were allowed to amend their complaint, and the District filed a Response to the Parents' Amended Complaint on August 1, 2019.

ALJ Wacker held prehearing conferences on April 15 and 29, May 6 and 15, and June 18, 2019. Prehearing orders were entered on May 20 and June 19, 2019. ALJ Meotti held prehearing conferences on July 22 and August 1, 2019, and entered prehearing orders on July 26 and August 5, 2019. An Order on Motion in Limine and for Briefing was entered on August 26, 2019. An Order Denying Request to Submit Revised Post-Hearing Brief was entered on September 30, 2019.

At the hearing on August 22, 2019, the Parents' attorney objected when the District questioned the District Assistant Director of Special Education concerning therapeutic learning

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<sup>1</sup>To ensure confidentiality, names of parents and students are not used.

center (TLC) placements within the District. The undersigned ALJ reserved ruling on this issue. Because the witness was present to testify, however, and in the interests of efficiency and ensuring an adequate record for appeal, the witness was permitted to give testimony on the issue, with the caveat that the testimony could be stricken depending on the ruling. The parties did not object to this procedure. The Parents' objection to the admission of this testimony is overruled because an ALJ "enjoys broad discretion" in fashioning relief in the event that a District has violated the IDEA and denied a student a FAPE. *Florence Grove School District. v. T.A.*, 510 U.S. 7, 15-16 (1993). Accordingly, evidence concerning the range of placements available in the District was relevant and admissible.

### **Due Date for Written Decision**

As set forth in the prehearing order entered on May 20, 2019, the due date for a written decision in Cause No. 2019-SE-0049 was continued to thirty (30) calendar days after the close of record on the District's motion. As set forth in the prehearing order entered on July 26, 2019, the due date for a written decision in Cause No. 2019-SE-0076 was continued to thirty (30) days after the close of record on the Parents' motion. During the hearing, the Parents moved that the ALJ enter a decision within 21 days of the close of record, rather than within 30 days of the close of record per the prior agreement of the parties. The Parents' motion was denied because this is a complex case with multiple issues that could not be properly addressed within an abbreviated timeframe. The record closed on September 20, 2019, when the parties timely filed their post-hearing briefs. Subsequently, the Parents' request to submit a revised post-hearing brief was denied. The Parents' revised post-hearing brief was not considered, but is included in the record for purposes of ensuring an adequate record in the event of an appeal. Accordingly, the due date for a written decision in both cases is **October 20, 2019**.

### **Evidence Relied Upon**

The following exhibits were admitted into evidence:

Joint Exhibits: J1 through J35.

Parent Exhibits: P1 through P7; P11; P13 through P18; P20; P22.

District Exhibits: D1 through D3; D6 and D7.

The following witnesses were heard, in order of their first appearance:

The Father;

Whitney Hutcheson, District School Psychologist;

Karen Harper, PhD, District School Psychologist;

Luisa Sanchez-Nilsen, PhD, Executive Director / Principal, Gersh Academy for Students on the Autism Spectrum – Cougar Mountain;

Katy Yu, Clinical Supervisor, Gersh Academy for Students on the Autism Spectrum – Cougar Mountain;

Suzanne Long, District Special Education Teacher;

Vince Blauser, District Principal;

Cynthia Horner, District Principal;

Noelle Boitano, District Paraprofessional;

Jim Stephens, District Paraprofessional;  
Elise M. Friedrich-Nielsen, District Assistant Director of Student Services;  
Cathryn Carini, District General Education Teacher;  
Ann Jones Almlie, District Administrative Consultant;  
The Mother;  
Lisa Murphy, BCBA, L.E.A.P.S. and Beyond;  
Lionel Enns, PhD, Licensed Psychologist;  
Lindy O'Keefe, District Behavioral Specialist.

### **ISSUES**

The issues for the consolidated due process hearing are set forth in the third consolidated prehearing order. During the hearing, the Parent sought to clarify several issues, to which the District did not object. Additions to the issue statement made during the hearing are underlined. Deletions to the issue statement made during the hearing are stricken.

- a. Whether the District's evaluation of the Student conducted on December 20, 2018~~9~~, was appropriate and, if not, whether the Parents are entitled to an independent educational evaluation consisting of a functional behavioral assessment at public expense?
- b. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
  - i. Failing to provide an appropriate individualized education program (IEP) during the 2017-2018 school year by not providing appropriate supplemental aids and services, namely, one-to-one behavior support provided by a skilled behavior technician under supervision of a board certified behavior analyst (BCBA), to effectuate the Student's inclusion in a general educational setting;
  - ii. Failing to implement the Student's IEP during the 2017-2018 school year by repeatedly isolating and segregating the Student from his peers;
  - iii. Failing to educate the Student in his least restrictive environment (LRE) during the 2018-2019 school year by:
    - A. Not providing appropriate supplemental aids and services, namely, one-to-one behavior support provided by a skilled behavior technician under supervision of a BCBA, to make a placement in the Student's neighborhood school successful;
    - B. Placing the Student in a specialized program, called NEST, that was generally inappropriate because staff was not appropriately trained to support the Student in furtherance of his accessing his FAPE;
    - C. Placing the Student in a specialized program, called New NEST, that was too restrictive and generally inappropriate because staff was not appropriately trained to support the Student in furtherance of his accessing his FAPE;

- D. Excessively and inappropriately excluding the Student from school and removing the Student from his LRE when disciplining the Student for manifestations of his disability;
  - E. Failing to revisit the Student's behavior intervention plan (BIP) following the Student's exclusion from school for a manifestation of his disability, and failing to meaningfully revise the Student's educational program in response to the Parents' request for a more robust Functional Behavioral Assessment (FBA) and behavioral support;
  - F. Not providing the Student with an interim alternative educational setting or other remedial supports after excluding the Student from school in excess of 10 days and finding that the behavior that led to exclusionary discipline was a manifestation of the Student's disability;
- iv. ~~Forcing the Student to leave school 30 minutes early and endure an unreasonably long bus ride during the 2018-2019 school year;~~
  - v. Failing to perform an evaluation before placing the Student in the NEST program in September 2018, thereby failing to afford the Parents a meaningful opportunity to participate in the decision-making process;
  - vi. Failing to afford the Parents an opportunity to participate in meetings by providing affirmative misinformation about the Student's placement options, the continuum of services available, and the appropriateness of his current educational programming as follows:
    - A. Providing misinformation during the 2017-2018 and 2018-2019 school years by stating:
      - i. that based on the LRE continuum, the Student could only be served in the NEST program during the 2018-2019 school year;
      - ii. that Grant Elementary School would be a temporary placement;
    - B. Providing misinformation during the 2018-2019 school year by stating:
      - i. that the Student did not elope from the school campus in January 2019;
      - ii. that the Student would be in the isolated New NEST program during a temporary trial program;
      - iii. that the Student was adequately included in the general education setting while he was in the New NEST program; and
      - iv. that the Student only left the general education setting to go to the New NEST program when it was his choice to do so.

- vii. Failing to hold IEP meetings during the 2017-2018 and 2018-2019 school years with all necessary team members in attendance;
- c. And, whether the Parents are entitled to their requested remedies:
  - i. Declaratory relief finding that the District violated the IDEA;
  - ii. Declaratory relief finding that the Student was denied FAPE by the District's actions;
  - iii. Compensatory education and supplemental services in the form of one calendar year at Gersh Academy from September 2019 to September 2020 to allow the Student to obtain the educational benefit that he would have received but for the District's violations of the IDEA and denial of FAPE; in the alternative, a 30 hour per week ABA program for up to 40 weeks, or 1200 hours, to be delivered in a placement in which the Student spends at least 80% of his time in a general education setting at one of the Student's neighborhood schools, namely, Crescent Heights, Browns Point, or Northeast Tacoma.
  - iv. Reimbursement to the Parents for the costs they have incurred providing the Student with services not provided by the District;
  - v. Prospective placement in the Student's neighborhood school with one-to-one behavior support provided by a skilled behavior technician under the supervision of a BCBA; alternatively, prospective placement at Gersh Academy.
  - vi. And/or other equitable remedies, as appropriate.

### **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 facts at issue.

#### *Background*

1. At the time of the hearing, the Student was 7 years old and in second grade. Exhibit P20, p1.<sup>2</sup>
2. On March 28, 2016, the District evaluated the Student for special education services. At the time, the Student was enrolled in a District preschool program. The evaluation team determined that the Student was eligible for special education services due to a developmental

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<sup>2</sup> Citation to the exhibits of record are by the party ("P" for the Parents; "D" for the District; "J" for joint exhibits) and page number. For example, a citation to P20, p1 is to the Parents' Exhibit 20 at page 1.

delay, and recommended specially designed instruction (SDI) in the area of social / emotional / behavioral. Exhibit J1, pp4-5.<sup>3</sup>

3. On December 8, 2016, the District completed a functional behavioral assessment (FBA) of the Student. The FBA recommended that the Student's IEP team consider a behavior intervention plan (BIP). Exhibit J2, pp3, 7.

4. On April 19, 2017, the Student's individualized education program (IEP) team met for an annual review of his IEP with the Mother in attendance. Exhibit J3, p3. In addition to discussing the remainder of the Student's preschool year, the IEP team also discussed the Student's services for the upcoming 2017-2018 school year, when the Student would be attending kindergarten at Browns Point Elementary School (Browns Point) in the District. With respect to the 2017-2018 school year, the IEP provided for 21 minutes, 5 times weekly, of SDI in social / emotional / behavioral to be provided in a special education setting. The IEP further provided that the Student would spend 94.17% of his time in a general education setting. Exhibit J3, p10.

5. As accommodations, the IEP provided: 1) an area for sensory breaks to enable the Student to calm down and become refocused; 2) a daily behavior report; and 3) a small group setting for testing. Exhibit J3, p8. The IEP also set the following measurable annual goal: "By 4/23/2018, when given an event triggering high emotion, [the Student] will use self-calming strategies, improving decreasing incidences of swearing, from 2-13 times/week, to 0 times/week during 6 consecutive data weeks, as measured by weekly special education data." Exhibit J3, p7.

6. On April 19, 2017, the IEP team also implemented a BIP focused on addressing the Student's pushing, kicking, scratching and hitting others, and swearing. Exhibit J4, pp1-4. The Mother thought the Student might have difficulty attending full-day kindergarten, and asked about half-day options. The then-principal of Browns Point informed her that the District did not offer half-day kindergarten. Mother T661.<sup>4</sup>

#### *2017-2018 School Year-kindergarten*

7. On September 11, 2017, the Student started attending Browns Point as a kindergarten student. Exhibit D6, p1. The IEP and the BIP approved on April 19, 2017 (preschool IEP and BIP) were in effect at that time. Exhibits J3 and J4.

8. During the 2017-2018 school year, Cynthia Horner was the principal at Browns Point. Horner T435. Suzanne Long was the Student's special education teacher. The Student received his special education services in a learning resource center (LRC). Long T340, 354. Jill Shelton was the Student's general education teacher. Horner T438. Karen Harper, who was employed by the

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<sup>3</sup> The issues in this case center on the 2017-2018 and 2018-2019 school years. This decision refers to the 2016-2017 school year to provide context and because the IEP in place when the Student started the 2017-2018 school year was developed in April 2017.

<sup>4</sup> Citations to the hearing transcript are to the name of the witness, except in the case of the Mother and Father, followed by the page number(s) on which the testimony appears. For example, a citation to Mother T661 is a citation to the Mother's testimony at page 661 of the transcript.

District a “floating” school psychologist, served as the school psychologist for Browns Point two days per week. Harper T209-210.

9. Ms. Horner did not recall the Parents ever requesting half-day kindergarten. Horner T454.

10. The Student is very smart and can be extremely sweet and funny. Long T341; Father T56. At times, however, the Student exhibited behaviors that made it difficult for him to focus and participate in a social group, and that were difficult for staff. Long T341; O’Keefe T958; Harper T211. Within his first few days at Browns Point, the Student was already swearing, taking off his clothes, kicking over a chair, banging his head and threatening to harm himself. Exhibit J5, p3; Mother T662-63. The LRC classroom at Browns Point had a space with pillows and bean bag chairs where the Student could de-escalate. Horner T445.

11. The Student also took frequent naps during the school day. The Mother told Ms. Horner that the napping was a side effect of medication prescribed by his pediatrician. Mother T708; Horner T457. Staff at Browns Point generally allowed the Student to sleep because he needed it. Horner T457. The Student took naps every day, which lasted one or two hours. The Student took naps in both the LRC and the general education classroom. Horner T453.

12. The napping was a side effect of the medication, but also a way for the Student to “check out” or escape. Mother T708, 944.

13. When asked, during cross-examination, how the Student could be spending 94.17% of his time in a general education setting as required by his IEP when he was napping an hour or two hours each day, Ms. Horner replied, “Well, he’s physically in there.” Horner T454.

14. During the first few weeks of school, the Mother met Ms. Shelton during a “meet the teacher” event. The Mother was concerned because Ms. Shelton was focused on the Student’s behaviors and stated “if [the Student] does one thing, he’s out of here.” Mother T666. The Mother reported the statement to Ms. Horner. Ms. Horner did not take any action because Ms. Shelton denied making the statement and it was a “she said, she said” scenario. Horner T456.

*Evaluation of the Student’s Academic Skills by the University of Washington Autism Center*

15. The Student was evaluated by the University of Washington Autism Center (UW) on September 6, 21, and 22, 2017. Exhibit J5, p1.

16. On October 6, 2017, the Parents learned the results of the UW evaluation, which determined that the Student’s behaviors met the criteria for Autism Spectrum Disorder (ASD).<sup>5</sup> Mother T942. At the Parents’ request, the UW evaluator prepared a letter, dated October 6, 2017, that the Parents could use to apprise the District of the diagnosis and a summary of the recommendations. Mother T942; Father T65; Exhibit J5. The Mother provided the letter to the District and requested an IEP meeting. Mother T669. The record does not establish precisely when she did so.

17. Subsequently in October 2017, the Parents provided the full UW evaluation to the District. Mother T669-71. The record does not establish the precise date that the Parents provided the

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<sup>5</sup> The hearing testimony and exhibits of record use the terms ASD and Autism interchangeably.



evaluation to the District. The District distributed the UW evaluation to Ms. Long; Ms. Shelton; Dr. Harper; Noelle Boitano, a one-to-one paraprofessional provided to assist the Student; and Elise Friedrich-Nielsen, Assistant Director of Student Services. Horner T440. The Parents anticipated that the District would have experts who could understand and apply the recommendations in the UW evaluation. Father T62.

18. The Mother recalled that after she provided the UW letter and evaluation to the District, the IEP team met in October 2017. Mother T668-70. The evidence on this point is conflicting. On the one hand, there are no documents in the record concerning an October 2017 IEP meeting. On the other hand, the Mother recalled that she provided the UW evaluation to Ms. Horner and Ms. Long at the meeting. Mother T668-70. In addition, an FBA from March 1, 2018 states "In October 2017, we assigned a paraprofessional to support [the Student.]" Exhibit J9, p6. Considering this evidence as a whole, I find it is more likely than not that the Mother and the District communicated about the UW evaluation in October 2017, but that no IEP meeting took place at that time.

19. The UW evaluation noted significant concerns regarding the Student's "emotional and behavioral regulation, as he has regular meltdowns at home and school related to unmet expectations or changes in routine." Exhibit J5, p6. The UW evaluation contained multiple recommendations for school and for home. Exhibit J5.

20. With respect to school, recommendations included changing the Student's special education eligibility category to Autism and providing "direct instruction in social skills, emotional and behavioral regulation, and adaptive skills." Exhibit J5, p7. The UW evaluation emphasized that "[i]t is important that [the Student] be served in the least restrictive setting. [The Student] will be best serviced by a carefully planned program developed and implemented by a multi-disciplinary team, including education, communication, and social/behavioral specialists." Exhibit J5, p7. In addition, the UW evaluation recommended that if specific behaviors or difficulties interfered with the Student's "progress or school functioning, it is recommended that these be addressed by an identified person within or outside the school district with expertise in Autism spectrum disorders who can consult with his school staff." Exhibit J5, p7. The UW evaluation further recommended positive behavior support that continued use of Functional Behavior Analysis (FBA) with a behavior and education specialist (with expertise in ASD). Exhibit J5, p8. The UW evaluation did not specifically recommend applied behavioral analysis (ABA) services in a school setting. Exhibit J5, pp6-7, 9.

21. With respect to home, recommendations expressly included obtaining ABA services, as well as individual and family therapy and using sleep hygiene strategies. Exhibit J5, pp10-11. In response to the UW evaluation, the Parents attempted to obtain in-home ABA services for the Student but found that the waitlist for such therapy was several years and that there were complications concerning insurance coverage. Father T64; Horner T452.

22. In addition to getting on the waitlist for home ABA services, the Parents attended family therapy. After approximately five meetings, however, the family felt that the progress was slow and stopped going. The Mother looked into individual therapy for the Student, but that did not occur until meaning 2019. Mother T674.

23. On October 16, 2017, the Mother provided Ms. Long with a consultation request form for the UW Autism Center in Tacoma, which had told the Mother that it could assist in providing in-

school support for the Student if the District submitted a consultation request. Mother T675-76; 900. Ms. Long filled out the form, and the Mother faxed it to UW on October 18, 2017. Exhibit P11; Mother T901.

24. Neither Ms. Horner nor Ms. Long recall receiving a call from UW in response to submitting the form. Long T346; Horner T457. When the Mother contacted UW, she was told they had not received a call from the District. Mother T676-77; Mother T901. The Mother believed that the District did not contact UW because it did not want to pay for outside services, testifying that “they went back and forth about who pays for it . . .” She could not recall who was involved in such discussions, however. Mother T901-903. She also recalled the IEP team indicating that the District would provide its own ABA therapist, but again she could not recall who made this statement. The evidence in the record is not sufficient to support a finding as to why there was no contact between the District and UW following the submission of the consultation request form.

#### *Behavioral Supports for the Student During the Fall of 2017*

25. During October 2017, the District asked Lindy O’Keefe, a behavior specialist employed by the District, to serve as a behavioral consultant with respect to the Student. O’Keefe T955; Harper T213. The record does not establish precisely when this occurred.

26. Ms. O’Keefe has a Master’s Degree in Special Education with an emphasis in severe disabilities and Autism. O’Keefe T954. In addition to working for the District part time, Ms. O’Keefe also works as a private consultant providing behavior intervention services and training for families and school districts. Ms. O’Keefe has been in private practice for approximately 31 years, and has focused on behavioral issues throughout that time. O’Keefe T955. Ms. O’Keefe uses ABA strategies, but is not a BCBA. O’Keefe T996.

27. Ms. O’Keefe is trained in the TEACCH methodology, which is under the umbrella of ABA. O’Keefe T1005-06. Typically, Ms. O’Keefe determines the function of a student’s behavior and then considers interventions to directly teach a replacement behavior for the function. She uses ABC data, which refers to antecedent, behavior, consequence data, to assess a student’s progress over time. O’Keefe T957.<sup>6</sup>

28. During October 2017, the District hired Noelle Boitano as a one-to-one paraeducator for the Student. Horner T439; Boitano T461. The record does not establish precisely when Ms. Boitano started in this position. Prior to working with the Student, Ms. Boitano had taken several Autism and de-escalation classes offered by the District. T462, 483-84.

29. Ms. O’Keefe trained Ms. Boitano to take ABC data about the Student’s behavior. O’Keefe T959-60. Boitano T478-79. Ms. Boitano used a form to record how often a behavior escalated, the antecedent to the behavior, and how long it took to de-escalate the Student. It is unclear which behaviors Ms. Boitano was tracking. After collecting the data, Ms. Boitano turned in the forms to Ms. Long or Ms. O’Keefe. Boitano T466-67.

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<sup>6</sup> Ms. O’Keefe is familiar with the Student’s brother and regularly used the brother’s name, rather than the Student’s name, during her testimony.

30. Ms. Boitano started collecting ABC data in October 2017. Boitano T478-79, 483; O’Keefe T960.

31. Ms. O’Keefe also provided guidance to Ms. Boitano with respect to strategies to address the Student’s behavior by modeling what interventions would look like. O’Keefe T960-62. If a strategy was not working, Ms. Boitano would go to Ms. Long or Ms. O’Keefe. Boitano T466. If Ms. O’Keefe was present when the Student was having a behavioral episode, Ms. O’Keefe walked Ms. Boitano through de-escalation steps. Boitano T463; O’Keefe T963. When Ms. Boitano reached out to Ms. O’Keefe by phone or e-mail, Ms. O’Keefe would walk her through scenarios and offer suggestions for addressing various behaviors. Boitano T464.

32. In addressing the Student’s behavioral issues, the Student’s teachers were guided by the preschool IEP and BIP, communications from the Mother, and by finding a strategy that worked. Long T345. Ms. Long and Ms. Boitano employed “anything and everything” they could think of in terms of strategies and behavioral interventions. Long T356. The Student loved social stories, so they would take a picture of him and work it into a social story about him. If he was mad, they tried to teach him to vocalize that emotion. Long T356. In addition, they employed the “Zones of Regulation” method, which was a school-wide program aimed at teaching children to recognize their feelings. A student having a fantastic day would be in the green zone. A student who is kind of sad would be in the yellow zone. An angry Student would be in the red zone. Long T357. The team was using an ABA intervention when it used Zones of Regulation instruction, which is an interventional social-emotional behavior program. O’Keefe T1007-08.

33. Ms. Boitano often found communication to be effective in working with the Student. For example, if the Student was becoming angry, she would say, “I see that you’re in the red zone . . . How can we get you back down to the green zone, where you’re feeling confident and comfortable?” Boitano T464. If the Student was feeling upset, removing him from the situation was often effective, as was taking breaks by going to the playground, or the hallway, or the LRC. Offering two choices was also effective. Boitano T464-66. Because the Student was so bright, she had to “switch it up and get creative.” Boitano T466. With respect to the Student’s napping, Ms. Boitano would try to wake him up after a certain amount of time. For example, if the Student had a class that he liked to attend, such as music or physical education, she would rub his back and say, “time to get up. It’s time for music.” Sometimes the Student would get up, but other times he continued to sleep. Boitano T473-74.

34. Ms. Boitano had good rapport with the Student, was very good at working with him, and was with him the majority of the day. Long T356; Horner T442. Ms. Boitano sometimes observed the Student’s social / emotional SDI. Long T358. The social / emotional lesson would focus on teaching the Student strategies for dealing with behavioral triggers, such as avoiding certain situations, teaching strategies to handle anger, and teaching him to talk with a buddy. Long T358.

35. Dr. Harper, who has observed registered behavior technicians (RBTs)<sup>7</sup> providing one-to-one support for students at other schools in the District, thought Ms. Boitano was more skilled than the RBTs she had observed, and was “just as good, if not better, and had the patience and the resilience that was effective with him.” Harper T213, 215.

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<sup>7</sup> In order to become a registered behavior technician (RBT), one must take a 40-hour training in ABA and pass an exam given by the Behavior Analyst Board. Yu T312-13.

36. When asked if there was a “formalized data-driven plan that informed her work with the Student in October and November and December,” Ms. Boitano replied that there was, that she and Ms. Long met and discussed the Student’s behaviors. Boitano T482.

37. During the first few months of school, the Student did not spend a lot of time in the LRC. By January or February, the Student was in the LRC multiple times per day to do his classwork. His visits there ranged from 15 minutes to an hour. Boitano T482.

38. Every day, the Student checked in at the LRC before he went to the general education classroom. At the end of the day, the Student checked out at the LRC. Boitano T468.

39. Ms. Boitano wanted the Student to view the LRC as a safe place. Initially, the Student did not like to go to the LRC classroom and did not want to be away from the general education classroom. Ms. Boitano tried to encourage the Student to see the LRC as a reward so that if his behavior was escalated, he would have a place to go where he felt safe and comfortable. Boitano T465.

#### *Academic Evaluation of the Student*

40. In November 2017, the District sought to evaluate the Student in the areas of reading, writing and math. Exhibit J7. The Parents consented to the evaluation on November 15, 2017. Exhibit J7, pp3-4.

41. Dr. Harper recalled that the Parents requested an FBA at some point, although she could not recall when. Harper T231. Ms. O’Keefe recalled that the Parents requested an FBA in October 2017. O’Keefe T997. Based on their testimony, I find that the Parents requested an FBA during October 2017.

42. Subsequently, Dr. Harper administered the Woodcock Johnson-IV Tests of Achievement (WJ IV) to evaluate the Student’s academic achievement in the areas of math, writing and reading. Exhibit J7, p5. Dr. Harper has a Doctorate as well as a Master’s Degree in Counseling Psychology. She has been certified as a school psychologist since 2004. She was trained in ABA twenty years ago, but her training is not current. Harper T212, 228.

43. On January 4, 2018, the evaluation team met to review the results of the evaluation. The Mother, Dr. Harper, Ms. Shelton, Ms. Long, Ms. Boitano, and Ms. Friedrich-Nielsen attended. Exhibit J7, p7.

44. The evaluation indicated that the Student was reading at a second grade level and performing in the high-average to superior range in math and writing. Harper T230. The Student was not evaluated in the area of social / emotional / behavior because “[s]ocial emotional / behavior data is current. [The Student] qualified for specially designed instruction in this area 03/28/2016. The resource teacher and [the Student’s] one-to-one para take data daily in this area.” Exhibit J7, p6.

45. The team also considered the UW evaluation and recognized that the Student had been diagnosed with ASD. The team noted that it could not change the eligibility category at that point, and that this would occur “on his next three-year evaluation.” Exhibit J7, p6. The prior written notice (PWN) entered after the January 4, 2018 evaluation meeting stated: “Prior to this academic

assessment, [the Student] was observed as having egregious behavior compared to same age/grade peers, i.e., inability to focus, leaving the classroom at will and yelling and screaming profanity down the halls.” Exhibit J7, p8. The PWN further stated: “The special education liaison complimented the team on what interventions they have in place and noted that she would be discussing the outcome with the principal. Staff and parent were all grateful for the support. The psychological evaluation from the UW Autism Center recommended parents to get an ABA therapist for home.” J7, p8. The PWN does not mention or incorporate any of the recommendations in the UW evaluation with respect to school, and the IEP team did not make any changes to the IEP. The District’s evaluation did not incorporate the UW evaluation.

#### *Changes in the Student’s Behavior Following Winter Break 2017*

46. After winter break, the Student started to experience more incidents of “crisis” behavior that were longer in duration. O’Keefe T970. For example, on January 10, 2018, the Student became upset on the way to the lunchroom and ran away from his class and Ms. Boitano. The Student started screaming and swearing, and threatened to kill staff and to harm himself. Exhibit P14, p4.

47. In response, Ms. O’Keefe altered interventions and incentive programs and increased the use of peer models. O’Keefe T971.

48. On January 17, 2018, the Student became upset after library. In the classroom, he tossed over chairs, ripped things down from the walls, and threatened to harm his peers. Exhibit P14, p4.

49. During January 2018, the Mother started getting daily reports from the Student’s teacher that his behaviors had escalated and they were having problems with him in the classroom. Mother T679. It is unclear precisely when the Mother started receiving these reports. At one point during January, Ms. Horner called the Mother and stated “Come and get the Student now.” Mother T697.

50. On or about January 25, 2018, the Student was suspended for one day for assaulting staff, kicking a student in the lunch room, kicking and throwing water bottles at staff, swearing, and threatening to kill staff. Exhibit J8, p1; Exhibit D6.

51. When the Student’s behavior became escalated, Ms. Boitano sometimes found it effective to let him know that she understood he was angry, and other times found it better to give him some space to cool down. When the Student was escalated, either he would be guided out of the classroom or the other students would be evacuated from the classroom. Boitano T474.

52. The Student was never alone in a room without an adult and neither Ms. Long nor Ms. Boitano ever found the need to use any physical restraints with the Student. Long T360; Boitano T474-75.

#### *The Student’s Seating Assignment During January 2018*

53. During the third week of January 2018, the Student’s Mother visited the classroom and saw that the Student’s desk had been moved to a location separate from the other children. Mother T680-81. After she left the classroom, the Mother mentioned her concerns to the Father,

who asked her to return and take photographs. The Mother returned the same day, and took photographs without Ms. Shelton or Ms. Boitano noticing. The Student was asleep at his desk when the Mother returned. Mother T682.

54. Originally, the Student had been sitting in close proximity to four other students. The four students were seated at two rectangular tables that had been pushed together. The Student and Ms. Boitano sat at a third table, which was placed at the end of other two tables. Ms. Shelton later moved the Student's table approximately four feet away from where he had been sitting, separating him from the other students. Ms. Boitano continued to sit at the table with the Student. The Student's table was positioned against a partition or cupboard that extended about one foot above his desk. Black construction paper covered some of the items in the cupboard. Boitano T469-70; 471, 476, 492. When the Student first saw the new arrangement, he said, "Whoa, whoa, why is my desk over here?" The Student did not say he wanted to go back, and Ms. Boitano responded, "I think we're trying something new. We're going to see how this works." Boitano T493. Ms. Boitano recalled that the new arrangement lasted approximately three weeks, whereas Ms. Horner believed it was in place for one or two days. Boitano T470-71; Horner T443. The Student spent approximately 25% of his time at his desk because the kindergarten students moved around in the classroom a lot. Boitano T471.

55. There were two chairs at the Student's table. When the Mother visited the classroom, the Student sat down in a chair that was facing the wall. In that seat, he needed to turn the opposite direction to see the teacher and the board. Mother T936-37. Ms. Boitano described the Student as sitting in a chair that faced the teacher, but in order to see the teacher, he needed to look over the partition and needed to sit up straight to do so. If he had his head on his desk, he would not be able to see the teacher over the partition. The Student's back was facing some of the students. Ms. Boitano testified that when the teacher stood up in front of the class addressing the students, the teacher could see the Student. Boitano T471, 476, 492.

56. Where the testimony of Ms. Boitano, the Mother, and Ms. Horner conflicts, I afford most weight to Ms. Boitano's testimony because she sat at the table with the Student throughout the time period in question, whereas the Mother observed the arrangement only on the date that she visited the classroom.<sup>8</sup> Ms. Horner had no reason to focus on this issue until after the Mother brought it to her attention. Accordingly, I find that for approximately three weeks in January 2018, the Student's seat was separated from other students by approximately 4 feet; a partition stood between the Student and the teacher; the Student needed to be sitting up straight to see the teacher over the partition; and, on the day that the Mother visited, the Student was sitting in a chair that was facing away from the teacher and the board, meaning he had to turn around to see the teacher.

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<sup>8</sup> The Parents sought to admit two photographs of the Student's seating arrangement into evidence. The District objected on the ground that the photographs had not been disclosed as part of the exhibits that were going to be presented five days prior to the hearing. The Parents claimed that because the photographs had been included in the Parents' complaint, the District was aware of them and did not suffer any prejudice. The District's objection to the admission of the photographs on the ground that the Parents had not complied with the 5-day rule was sustained and they were not admitted as exhibits. WAC 392-172A-05100(2)(a). Because the photographs were part of the Parents' complaint, however, I permitted the Mother to refer to them for the limited purpose of demonstrating what she saw when she took the photographs. I give no weight to the photographs, however, because the Mother's testimony described what she saw on the date in question.

57. The Mother called Ms. Horner because she felt that the Student was being segregated from the rest of the group. Ms. Horner then went to investigate and found that “indeed, there was a table that was set apart from a group.” Horner T443. Ms. Shelton told Ms. Horner that the Student needed a lot of room to work and became stressed when other students touched his things. Horner T443. Ms. Horner told Ms. Shelton that the arrangement was upsetting to the Mother because she felt that the Student was segregated, after which they repositioned the Student’s table to be closer to his peers again. Horner T444.

58. After the Mother took photographs of the Student’s seating arrangement, she felt that it changed the relationship with the team and that “everything beyond that was beginning to feel retaliatory.” Mother T683-84; 693. The Mother believed the team felt threatened by the photographs, which had not been her intent. Mother T694. Her intent was to let the team know that the seating arrangement was not acceptable and needed to be corrected. Mother T694. The Mother also felt the District was being retaliatory when it called Child Protective Services (CPS) to make a report about the Father in late January or early February 2018. Mother T696, 943. The report was based on the Student’s statement, during a circle time session for students to discuss their moods, that he was upset because his father sat on his brother’s head. Mother T695.<sup>9</sup> The Mother also felt that after she took photographs of the Student’s seating arrangement, the District started raising the idea of placing the Student in a different school. Mother T819. In the Mother’s view, the District was “working on forcing [the Student] out” of Browns Point. Mother T821.

#### *Changes to the Student’s IEP*

59. On January 25, 2018, immediately following the Student’s one-day suspension, the District proposed an FBA. At that time, the preschool BIP was still in place. The Parents consented to an FBA that same day. Exhibit J9, pp1, 17.

60. Before the FBA could be completed and implemented, however, the team was working on a daily basis to try to find ways meet the Student’s needs, to get him to engage with the other students, and to prevent him from sleeping for an hour, two hours a day. Harper T217. Dr. Harper could not recall if staff at Browns Point were following the preschool BIP. Harper T217.

61. During February 2018, “a trial of increased time in the LRC was attempted. The focus of this time was to offer additional break times paired with an adjusted reward system. This intervention in the LRC classroom was not successful. [The Student] was often triggered by the offer of a break in LRC communicating that “it is too far, I want to stay with my class.”” Exhibit J9, p6.

#### *Completion of the FBA – March 1, 2018*

62. On March 1, 2018, the District held a meeting to review the completed FBA. The Mother, Dr. Harper, Ms. Long, Ms. O’Keefe and Cindy McNally, a District Representative, attended. Exhibit J9, pp4, 18.

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<sup>9</sup> The school also called CPS on the first day of school when the Student threatened to harm himself. Horner T449.

63. Ms. Shelton, the Student's general education teacher, was not invited to the March 1, 2018 meeting, and did not attend. Exhibit J9, pp2, 18.

64. The District contends that the Mother signed a form excusing Ms. Shelton from the March 1, 2018 FBA meeting. Exhibit J9, p19. The form on which the District relies, however, refers to a meeting on March 21, 2018, and was signed by the Mother on March 21, 2018. Exhibit J9, p19. It is unclear how this form excuses Ms. Shelton from a meeting on March 1, 2018, or why it is part of an exhibit that pertains to a meeting on March 1, 2018. Because Exhibit J9, p19 is dated March 21, 2018, and because Exhibit J9, pages 2 and 18 do not list Ms. Shelton as invited to the meeting, I find that the form on Exhibit J9, p19 did not excuse Ms. Shelton from the March 1, 2018 meeting.

65. Dr. Harper and Ms. O'Keefe drafted the FBA predicated on data collected by Ms. Long and Ms. Boitano between September 2017 and February 2018. Harper T217-18; O'Keefe T964. The data for September was based on interviews Ms. O'Keefe conducted, although the record does not indicate who she interviewed. Ms. Boitano started collecting data in October 2017. O'Keefe T965.

66. During the hearing, the Parents' attorney questioned multiple witnesses about why the FBA had taken so long. It is unclear why the District did not propose an FBA until January 2018, and did not complete the FBA until March 2018, if the District truly had been collecting data for the purpose of creating a BIP since September, 2017. In Dr. Harper's view, three to six months is a reasonable amount of time to collect data for an FBA. Harper T216. In Ms. Long's view, it can take six to eight weeks, at least, of data and interventions that "you're trying to work [on] with the Student." Long T345. Ms. O'Keefe thought that a five month period to complete the FBA was reasonable because "during that time, we were doing trial interventions and talking with parents about the trial interventions and how they were going. It's a process. It's not just one observation and completion of a document." O'Keefe T996-98. With respect to why it took a month after the FBA to get a BIP in place, Ms. O'Keefe explained that they were working to ensure that all team members were on board. Ms. O'Keefe emphasized that "the preventative and educative interventions were in place. The meeting was held later. But the behavior support process" was in place. O'Keefe T1000-1001.

67. Katy Yu is employed by Gersh Academy for Students on the Autism Spectrum – Cougar Mountain (Gersh), as a Clinical Supervisor. Gersh specializes in serving students who have high-functioning Autism. Ms. Yu has a Master of Arts in Psychology and a Master's Degree in Special Education with an emphasis on ABA. She is a BCBA. Yu T300. Ms. Yu performs FBAs and develops BIPs. In her experience, an FBA is typically drafted in one or two weeks, which provides adequate data to analyze the behavior and develop an understanding. The FBA is a foundation for creating a BIP. Yu T304.

68. Considering the testimony of Dr. Harper, Ms. Long, Ms. O'Keefe and Ms. Yu, I find that an FBA reasonably takes between two and eight weeks to complete. The District did not complete an FBA until March 1, 2018, which was approximately six months after it started collecting data about the Student's behaviors. I therefore find that the FBA was not completed within a reasonable amount of time.

69. When asked whether an FBA was warranted earlier in the school year, Ms. Horner explained that she thought that they were trying to give Ms. O'Keefe a chance for her strategies



to work. She acknowledged that it probably would have made sense to do an FBA earlier in the year. Horner T451.

### *The March 2018 FBA*

70. The FBA completed on March 1, 2018 summarized the data collected between September 2017 and February 2018, and divided the Student's behaviors into three levels—mild agitation (level 1), moderate agitation (level 2) and crisis (level 3). Exhibit J9, pp4-6. The FBA also recorded the frequency and duration of the Student's behaviors.

71. The Student's level 1 behaviors included verbal protest, refusal to follow directions, refusing to start or stop an activity and interrupting the teacher. Exhibit J9, p4.

72. The Student's level 2 behaviors included refusal to follow teacher directions, verbal protests that sometimes included profanity, getting out of his seat and refusing to return, running through the classroom and climbing on top of furniture or underneath it, tearing items from the walls, and spitting at staff and peers. Exhibit J9, p7.

73. The Student's Level 3 behaviors included profanity and threats to harm staff, peers or himself, throwing or flipping over items such as computers, tables and chairs, hitting, scratching, attempting to bite and elopement, or attempts to escape from the classroom or school. Exhibit J9, p11.

74. Level 2 and 3 behaviors tended to occur during transition times, when the Student wanted to engage in an activity that was not available, was fixated on a preferred task, or sought to continue engaging in a preferred task. Exhibit J9, p8.

75. Between October 2017 and February 2018, the Student's level one and level two behaviors decreased in terms of the number of occurrences per day and the duration of each occurrence. Exhibit J9, pp4-5.

76. With respect to level 3, however, these crisis-level behaviors continued to occur up to 5 times per month and the duration of occurrences increased from up to 1 hour per episode to between 45 minutes to 1.5 hours per episode. Exhibit J9, pp5-6.

77. The FBA listed: 1) prior interventions that had been used to address the Student's behaviors and the extent to which those had been successful; 2) a description of the environmental conditions when the target behaviors were likely to occur (setting description); 3) events that preceded the target behavior (antecedent events); 4) a hypothesis concerning the factors that contributed to the target behavior and the primary function of the behavior; and 5) recommendations to the IEP team. Exhibit J9, pp6-14.

78. As identified in the FBA, the primary function of the Student's behavior was to communicate a need or a want and to gain highly preferred activities. The secondary function of the Student's behavior was to escape unwanted task demands or situations. O'Keefe T980, 990, 1014; Exhibit J9, pp9, 13. The FBA recommended that the IEP team: 1) consider a behavior intervention plan (BIP); 2) teach the Student to communicate his feelings and needs and follow a self-calming routine as a replacement for the target behaviors; and 3) employ setting event

strategies, antecedent strategies, teaching strategies and consequence strategies. Exhibit J9, pp10, 13-14.

79. On March 1, 2018, in addition to holding a meeting to review the completed FBA, the District proposed a reevaluation of the Student in the area of social / emotional / behavioral because the IEP team was considering a change in the Student's placement and to change his eligibility category from Developmental Delay to Autism. Exhibit J10, pp1, 5. The Mother consented that same day. Exhibit J10, p3.

80. On March 20, 2018, the District completed a reevaluation of the Student in the area of social / emotional / behavioral and held an evaluation team meeting. The Mother, Dr. Harper, Ms. Shelton, Ms. O'Keefe and Ms. Long attended. Exhibit J10, p8. The team determined that the Student was eligible for special education under the eligibility category of Autism. The team further recommended that the Student continue to receive SDI in the area of social / emotional / behavioral. Exhibit J10, p6. A PWN issued after the March 20 reevaluation meeting indicates that the team had reviewed the UW evaluation and was considering placing the Student in the District's Autism program to meet the Student's academic and behavior needs. Exhibit J10, p16.

81. By the spring of 2018, the Student's behavior had escalated to the point that it became difficult for anyone to work with him. O'Keefe T960-61. To address the Student's escalated behavior, Ms. O'Keefe prepared scripted interventions so that if Ms. Boitano was not present, the teachers would also know the script. For example, the script might say, "I see that you're feeling upset. Let's take a break and build some blocks here, or let's do our ABCs." The Student loved numbers, ordering or sequencing, so Ms. O'Keefe and Ms. Boitano used these as calming strategies or to offer the Student a break. O'Keefe T961.

82. Although there were many strategies in place, including scripting, picture schedules and social stories, the strategies were not working to improve the Student's behaviors. Horner T453.

83. On April 19, 2018, the Student's IEP team convened for his annual IEP review. The Mother, Ms. Horner, Ms. O'Keefe, Ms. Shelton, Dr. Harper, Ms. Long, and Ms. Almlie attended. The team considered the Student's behavior and noted that his "behaviors impede both [the Student's learning] and his peers learning. He is receiving behavioral support interventions to support teaching self-regulation skills . . . within all settings of the school. He has a daily behavior chart and a log that helps him stay focused to his daily goals. He is using Zones of Regulation strategies and terminology which is a school wide initiative. [The Student] has a FBA and a BIP in place." Exhibit J11, p5. At this point, however, although Ms. O'Keefe was working on a new BIP, the BIP in place was the preschool BIP. Exhibit J4. The new BIP would not be implemented until April 26, 2018, with only 35 school days remaining in the school year. Exhibit J14; Exhibit D6.

84. The IEP team set goals with respect to self-regulation of crisis-level and moderate-level behaviors, and social communication. The goal for crisis-level behavior indicated that by April 19, 2019, the Student would use self-calming strategies to decrease these behaviors from "up to 5x times /month to 0-1 times/month during 2/3 consecutive months as measured by Daily behavior report." Exhibit J11, p10. The IEP goals further provided that by April 19, 2019, the Student would use "appropriate language and voice . . . decreasing incidents of verbally abusive comments, threats, profanity, and property destruction from up to 3 times/daily to 1-3 times/week during 6 consecutive data weeks, as measured by Daily behavior report." Exhibit J11, p10.

85. The IEP team offered accommodations including: daily use of a visual schedule/communication book; small group setting for testing; daily behavior reporting; preferential seating in the general education classroom; an area for sensory breaks to calm down and become refocused; social stories with visual models of the Student; video modeling of behaviors for social groups; and visual modeling of behavior. Exhibit J11, p11.

86. The IEP provided for the Student to spend 62.5% of his time in a general education setting and to receive 45 minutes, 5 times weekly, of social / emotional / behavioral SDI by the special education teacher in a special education setting. The IEP further provided 90 minutes, 5 times weekly, of social / emotional / behavioral SDI from the special education staff in a special education setting. Finally, the IEP provided a full-time one-to-one paraeducator for the Student. Exhibit J11, p14.

87. A PWN issued after the meeting on April 19, 2019, notes that “serious consideration was given by all team members to meet [the Student’s] social-emotional needs at Browns Point.” Exhibit J11, p17. The PWN further noted that the team recognized that the Student is one “with academic potential whose educational performance is adversely impacted by his social-emotional/behavior.” Exhibit J11, p17. The team decided to wait until the end of the school year to determine an appropriate placement for the Student for the 2018-2019 school year. Exhibit J11, p17.

88. On April 25, 2018, the Student was emergency expelled from school for disruptive conduct, swearing and physically assaulting staff. Exhibit J12, p1; Exhibit P14, p4. The emergency expulsion was converted to a short-term suspension, and the Student returned to school on May 1, 2018, after having been excluded from school for five school days. Exhibit J12, p1.

*Implementation of a BIP - April 26, 2018*

89. Based on the data and analysis from the FBA, Ms. O’Keefe prepared a draft BIP for the Student. O’Keefe T972. On April 26, 2018, the Student’s IEP team met to implement the BIP for the Student and to discuss his social / emotional / behavioral goals. Exhibit J13, p3. Ms. O’Keefe attended the meeting. O’Keefe T999. Because the record does not contain a sign-in sheet, it is unclear who else attended the meeting.

90. The BIP refers to four categories of target behaviors: 1) verbal protests, refusal to follow directions and out of seat/runs; 2) crisis protest-behaviors endangering self or others; 3) pushing, kicking, scratching and hitting others; and 4) swearing. For each category, the BIP indicates when the behaviors tend to occur, antecedents to the behaviors, what behavior the Student engaged in, the function or purpose of the behavior, and intervention strategies for the behavior. Exhibit J14, pp5-15.

91. Strategies listed in both the FBA and BIP included: use of a daily written schedule; break cards updated with input from the Student; peer buddy time during transitions; eating lunch with peers in a small group; video modeling of the Student and other students engaged in replacement behaviors; designated break areas; preteaching and rehearsing with the Student as to how to take self-calming breaks; reviewing upcoming choices and rehearsing appropriate choice responses; providing social stories that depicted the Student making appropriate and positive

choices; teaching the Student how to use calming and de-escalation strategies from the Zones of Regulation curriculum; modeling, coaching and practice sessions to increase use of replacement behavior responses; using a reward system when the Student asked for a break or help; providing alternative choices for difficult transition situations; directing the Student to take a break or to use a self-calming routine; using a “reinforcement” chart to reinforce use of replacement behaviors; following a de-escalation routine; reinforcing positive behaviors with verbal praise from the teacher; telling the Student “Breathe with me. You can handle this”; and teaching the Student to use appropriate words to express his wants/needs in place of swearing. Exhibit J14, pp7-8, 10-15; Exhibit J9, pp10, 14.

92. With respect to crisis behaviors, the BIP recommended separating the Student from other students and other staff so that the Student could use self-calming techniques, with assistance and coaching as necessary. Exhibit J14, pp8, 11, 13, 15.

93. In practice, when the Student became physically aggressive, Ms. Long, as the LRC teacher, and Ms. Boitano, as the Student’s one-to-one paraprofessional, would assist. Ms. Horner, as the principal, sometimes was called to assist. At times, they would need to evacuate a classroom and wait for the Student to de-escalate. Sometimes the behavior would occur on the playground or in the hallway. Staff would try to move the Student to the LRC classroom so he would not cause disruption in the hallways with children passing. Horner T444.

94. By the time the BIP was implemented, the team had discussed the possibility of changing the Student’s placement and the Mother “felt like they’re kind of setting everything up to shoo us out” of Browns Point. Mother T700-01.

95. Ms. Boitano was familiar with the FBA and the BIP, although she did not work directly from these documents. Rather, Ms. Long and Dr. Harper worked from the documents and she followed what they were doing. Boitano, T480.

#### *Manifestation Meeting following April 25 Expulsion*

96. On May 2, 2018, the District held a manifestation determination meeting regarding the Student’s expulsion on April 25, 2018. The Mother, Ms. Shelton, Ms. Long, and Ms. Almlie attended. The team determined that the Student’s conduct was a manifestation of his disability. Exhibit J16, pp3-5.

97. The record does not contain reliable evidence with respect to the complete number of days that the Student was expelled or suspended from school during the 2017-2018 school year.<sup>10</sup> The manifestation determination indicates that the Student had been suspended four days prior to the April 25<sup>th</sup> expulsion, for a total of nine days of exclusionary discipline, but it does not provide any details as to the precise nature of the prior discipline or when it occurred. Exhibit J16, p4, The parties do not dispute that the total number of days was less than ten days. PB p.23.

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<sup>10</sup> Exhibit P14 was admitted without objection. Pages 3 and 4 are entitled “Sample Incidence Report” and list the dates on which various behaviors occurred and the District’s response. Because there is no testimony as to who prepared this document or what information formed the basis for the document, I did not consider it in making my decision.

### *Evaluation in Area of Social / Emotional Pragmatics*

98. On May 2, 2018, the Student's Mother consented to an evaluation of the Student by a speech pathologist in the area of social / emotional pragmatics. Exhibit J15, pp2, 4.

99. On June 13, 2018, the Student's evaluation team met to review the pragmatic language evaluation.<sup>11</sup> Exhibit J15, pp5-9. Attendees included the Mother, Ms. Horner, Dr. Harper, Ms. Shelton, Ms. Long, Ms. Almlie, Ms. Friedrich-Nielsen, and a speech and language pathologist. Exhibit J15, p8. The team concluded that the Student did not qualify for communication services in the area of pragmatics "but may benefit from periodic inclusion in lessons promoting how to be in a group," as well as lessons on perspective taking. Exhibit J5, p6. The Student's pragmatic score was 81, which is 1.3 standard deviations below the mean. A score of 2.0 deviations below the mean is required to be eligible for communication support services. Exhibit J15, p9. The team recommended that a speech-language pathologist consult with the Student's educational staff to provide social/emotional intervention strategies and that the Student be invited to join social skills intervention groups. Exhibit J15, p9.

### *IEP Meeting to Discuss the Student's Placement for 2018-2019*

100. The Student's IEP team also met on June 13, 2018, to review the Student's IEP and placement for the 2018-2019 school year. Exhibit J17, pp1, 16. The team reviewed the UW evaluation and evaluations by the school team. The team also considered data concerning the Student's behavior and academics collected by teachers and Ms. Boitano, as well as information provided by the Student's family. Exhibit J17, p16. In addition, the team considered all of the placement options that were available to the Student, starting with the least restrictive. Friedrich-Nielsen T582-83; Long T361.

### *Placement Considerations*

101. With respect to the Student's placement, there were "mixed feelings on the team." Some team members believed that the Student needed a more restrictive placement, whereas other team members thought the Student should be given "another chance" in a less restrictive program. Almlie T641-42.

102. The team considered whether the Student's needs could be met at Browns Point. In considering that option, the concern was not about the training of the paraprofessional who had been assigned to the Student, because Ms. Boitano was very good with the Student. Rather, the concern was whether the Student needed more support than was available at Browns Point. Almlie T657.

103. The team also considered the programs available at Browns Point, which included: a developmental classroom, which is for students who have significant cognitive disabilities and physical disabilities; and an LRC, which provides reading and math support. The IEP team discussed these placement options. Horner T445. The team also discussed a therapeutic learning center (TLC) placement, but concluded that it would be too restrictive. Horner T445. The TLC discussed was an intensive behavior classroom for students with severe behavioral issues, rather

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<sup>11</sup> Although the meeting notice states that the meeting was scheduled for May 2, 2018, the meeting actually occurred on June 13, 2018. Exhibit J15, pp1, 8.

than a developmental program. Horner T446, 454. When a student is placed in a TLC placement, the goal is to stabilize the Student's behaviors so that they may return to the general education program. Horner T446.

104. The team also considered a program that provides additional support for students with high functioning Autism called the NEST program. This program is offered at Lyons Elementary School (Lyons) and Grant Elementary School (Grant). O'Keefe T969. The NEST is a specialized classroom, that is the equivalent of a learning resource room. The main difference between the NEST and the District's LRC settings is that teachers and staff in the NEST have training to work with children who have Autism. Hutcheson T206-07; Horner T457; O'Keefe T1019. Students can go to the NEST for social-emotional support and sensory breaks. They spend the majority of their day with general education peers. Hutcheson T142.

105. Although Browns Point has an LRC, staff do not have the same specialized training as the NEST program staff. Horner T455-56. The NEST program also has a higher ratio of staff to students. O'Keefe T969.

106. The Mother told team members she wanted the Student to remain at Browns Point. Horner T447. Her objection was not to the Student's placement in an Autism program, but that she felt it was wrong for the team to choose a placement other than Browns Point prior to trying everything possible to ensure success at Browns Point. Mother T822.

107. Ms. Horner, Ms. Long, Ms. Almlie, and Ms. Friedrich-Nielsen believed that a placement in the NEST program was the least restrictive environment for the Student. Horner T447; Long T351, 361; Almlie T645; Friedrich-Nielsen T582. Although Ms. O'Keefe was not present when the team decided on the Student's placement, she agreed with the team's decision. O'Keefe T1026. Because Ms. Shelton did not testify at the hearing, it was not possible to determine whether she agreed with the placement decision.

108. Dr. Harper did not agree with the IEP team's decision to place the Student in the NEST program. She recommended a self-contained behavioral program, or TLC placement. Harper T221. Dr. Harper did not believe that all of the Student's behavioral issues could be attributed to his diagnosis of ASD. Harper T218, 221, 227.

109. Ultimately, the team considered the services that the Student needed and rejected the option of having the Student remain in his current placement at Browns Point based on its review of the UW evaluation and data collected by Ms. Boitano and teachers. Exhibit J17, p16. Over the Parents' objection, the team decided to place the Student in the NEST program for the 2018-2019 school year. Exhibit J17, p16.

110. The team did not change the goals, accommodations or services provided by the Student's IEP. Compare Exhibit J17 with Exhibit J11.

111. During the last few weeks of summer in 2018, the Mother and Ms. Almlie went to visit Grant. During the visit, Ms. Almlie was trying to encourage and comfort the Mother, stating that the placement at Grant wasn't "necessarily permanent," which led the Mother to believe "we're going to get [the Student] back home where he belongs, you know. I feel like my children, you know, I want them around me. And having them across town, in my mind, you know, was having him not with his family and the supports and part of the community." Mother T704-705; 946, 948.

### *The Student's Progress During his Kindergarten Year*

112. Ms. Long prepared special education progress reports for the Student, and the Parents did not dispute that they received them, but those progress reports are not part of the record. Ms. Long could not recall whether the Student made progress on his goals at Browns Point. The Student had "little gains," which she celebrated, but overall, he struggled and had significant behavioral concerns." Long T351.

113. Ms. Shelton prepared general education progress reports for the Student through the 2017-2018 school year. In her comment attached to the Student's progress report at the end of 2017-2018 school year, Ms. Shelton observed that the Student "has had a rocky school year," and that "[h]is explosive behavior gets in the way and it is hard for him to calm down without harming self and others and needs adult intervention when this happens." She also wrote: "I do feel that [the Student's] needs are very complex and he does need more evaluation, support and direction to help him succeed in a school setting. He does need to visit the area of his behavior IEP so that he can then become successful in the academic area." Exhibit D1, p3. Ms. Friedrich-Nielsen acknowledged that the level of support for the Student at Browns Point was not sufficient. Friedrich-Nielsen T600.

114. The Parents did not believe that the Student derived any benefit from his kindergarten year. Father T72.<sup>12</sup>

### *First Grade - 2018-2019 School Year*

115. The Student attended first grade in the NEST program at Grant. The 2018-2019 school year started on September 17, 2018. D7, p1.

116. Although Grant is located within the District, it is approximately 13 miles from the Student's home, and traffic conditions often led to a lengthy bus ride that lasted up to one and one-half hours. Sometimes the Student would not reach home until 5:20 p.m. Mother T727; 921. The bus ride was difficult for the Student, and when he got off the bus at school in the morning "you could see his shoulders were slumped, his head was down, he was . . . tired and not really ready . . . to focus on school." Stephens T522. The Student did not have behavioral issues on the bus. Mother T907; 927.

117. During the 2018-2019 school year, Vince Blauser was the principal of Grant, and Whitney Hutcheson was the school psychologist. Blauser T369; Hutcheson T139-41. The Student's

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<sup>12</sup> After the Father testified about the Student's behaviors at home, the District asked questions pertaining to where the Father resided. The Parents objected that this line of questioning was beyond the scope of the hearing and prejudicial. They then moved to rescind the Father's testimony about observations of the Student's behavior in the home, stating, "We unequivocally do not want to go down this line of questioning." Father T126. The District did not object, and the Father's testimony concerning the Student's behavior at home and any observations about how the Student acts at home was stricken and was not considered. Father T126-27.

general education teacher was Cathryn Carini. Carini T611. Samantha Elder<sup>13</sup> was the Student's NEST teacher and special education teacher. Carini T617.

118. As provided in his IEP, the Student was assigned a one-to-one paraprofessional. Exhibit J17, p13. The paraprofessional, Jim Stephens, has taken two classes offered by the District concerning Autism and high functioning Autism. Stephens T523. Mr. Stephens did not have ABA training when he started working with the Student, but he later completed some ABA training "as part of trying to obtain a different job over the school year." Stephens T524. While he was taking the ABA training, Mr. Stephens commented to Ms. Elder that many of the strategies they used with the Student during the 2018-2019 school year were exactly the same as the strategies he learned during his ABA training. Stephens T524, 551.

119. Ms. Elder did not testify at the hearing, but Ms. Hutcheson, Mr. Blausner and Ms. O'Keefe believed Ms. Elder had ABA training. Ms. O'Keefe said Ms. Elder told her she had "training in BCBA" but was not a certified board analyst. O'Keefe T1019-20. Ms. Hutcheson believed Ms. Elder had ABA certification but did not know if she is a BCBA. Hutcheson T171-72. Mr. Blausner believed Ms. Elder has ABA certification because she had practiced in a hospital setting and used that therapeutic technique. Blausner T385. Ms. Almlie believed that Ms. Elder "had a lot of training working with students with Autism. I don't know exactly what the training was. But . . . her background was working with children with Autism." Almlie T. 643. The record supports a finding that Ms. Elder has significant experience working with students with Autism as well as ABA training, but it does not support a finding as to the extent of Ms. Elder's ABA training or the nature of her credentials.

120. Ms. O'Keefe did not train or work with Mr. Stephens, as she had with Ms. Boitano. Ms. Elder trained and coached Mr. Stephens. O'Keefe T1018-19. Mr. Stephens spoke with Ms. Elder about working with the Student every day. Stephens T504. Mr. Stephens was "very calm" with the Student and "helped him to be back on track." Carini T619.

121. At the beginning of the school year, the Student's behavior was "very on point with everything." Stephens T505. During the first few months of school, the Student spent most of the morning in the general education classroom. Carini T621. The Student also spent time in the morning working with Ms. Elder. Carini T621; 633.

122. When the Student went to the NEST, Mr. Stephens went with him. The amount of time that the Student spent in the NEST depended on his mood. Sometimes the Student would leave class before his scheduled time to go to the NEST because he was not interested in what was being taught in the general education classroom or just wanted to leave. Sometimes the Student wanted to go to the NEST because there were rewards there, such as coloring books or activities that he liked to do. Stephens T503.

#### *IEP Meeting at the Start of First Grade*

123. On September 28, 2018, the tenth day of school, the Student's IEP team met to review his IEP. The team felt that the Student was "settling in really well," and determined that increasing the SDI provided in the general education setting would support inclusion. Hutcheson T144;

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<sup>13</sup> Throughout the hearing and in the exhibits, Ms. Elder is sometimes referred to as "Sam," "Ms. Doucette Elder" or "Ms. Doucette." This order refers to her as Ms. Elder.



Exhibit J18, p16. The Mother, Ms. Hutcheson, Ms. Carini, Ms. Elder, and Mr. Blauser attended the team meeting. Exhibit J18, p3.

124. Following its review, the IEP team increased the Student's time in the general education setting from 62.5% to 91.67%. Exhibit J18, p13. The Student continued to have full-time support from a one-to-one para educator. The IEP reduced the Student's social / emotional / behavioral SDI to 30 minutes, 5 times weekly in a special education setting by special education staff, and to 15 minutes, 2 times daily in a general education setting by special education staff. Exhibit J18, p13. Previously, the IEP provided 45 minutes, 5 times weekly, of SDI in a special education setting by a special education teacher, and 90 minutes, 5 times weekly, of SDI in a special education setting by special education staff. Exhibit J11, p14.

125. The Mother made it clear to the IEP team that "our goal is to get [the Student] back home," meaning at the Student's neighborhood school. At each IEP meeting during the 2018-2019 school year, the Mother said, "How do we get home?" Mother T707.

#### *Changes in the Student's Behavior*

126. Every day, Mr. Stephens and Ms. Elder kept data about the Student's behaviors. Stephens T508. Ms. Elder recorded and tracked the data using a program called Review 360. The tracked behavior categories included: 1) verbally threatens peers and adults; 2) leaving area (elopement); 3) hitting, kicking or throwing items directly at staff or students; 4) climbing on furniture; and 5) destroying property. Exhibit P15, pp1-5; Stephens T508.

127. Ms. Elder also kept a monthly account of how many days the Student was present, how many minutes the Student slept in class per month, and the percentage of the school day spent asleep. Exhibit P15, p7. The Mother was concerned because the Student slept excessively at Grant but did not do so at home. Mother T944-45. The Mother asked the staff at Grant to try and wake the Student up and to try and engage him in something. Mother T944.

128. Approximately three or four weeks into the school year, the Student gradually started to want to leave his general education classroom more frequently. Although the Student enjoyed math, he did not like reading and writing activities and would leave class when he did not like an activity. Stephens T506.

129. Staff "were always trying to keep [the Student] in class. We would go and we would give him little opportunities to draw or do something that he would like to do for a little bit, and then we would try to redirect him back to class." Stephens T506. "It was hard to get him back engaged, unless I was allowing him to be able to come up and share something when he would want to." Carini T627.

130. When the Student went to the NEST in place of the general education classroom, his activities in the NEST varied. "Sometimes he would be tired, and he would go sit on the beanbag and rest a little bit. Sometimes he would come in and want to do one of the reward activities, like coloring in a coloring book. Sometimes we would do math problems on the white board. It was . . . mostly . . . the reward activities that he would want to do in order to avoid what he should have been doing." Stephens T517. During the due process hearing, Mr. Stephens acknowledged during cross-examination that permitting the Student to engage in these activities in the NEST may have

reinforced the Student's behaviors, which were aimed at avoiding work he didn't want to do. T525-26.

131. In October 2018, the Student started refusing to go to the specialized general education classes, such as physical education and music. He also started sleeping more in order to avoid activities. Stephens T506-07.

132. As behavioral supports, staff used reward systems. Exhibit J14, p7. Mr. Stephens also used positive praise as a behavioral support. Stephens T504. These supports are strategies recommended in the BIP. Exhibit J14, pp7, 13. Mr. Stephens was the person who was most likely to address behavioral issues. Carini 632.

133. Ms. Elder would change the reward system when the Student outgrew or lost interest in the existing system. At the beginning of the year, they used a coin system. When the Student earned enough coins for good behavior, he would earn a reward, such as going to the library, which was "one of his favorite things to do." Stephens T504. Another reward system allowed the Student to earn money to buy rewards for positive behavior. This was called "Student Bucks." If the Student reached a certain level, he could buy rewards, such as a piece of candy, extra break time, or coloring time. Stephens T514; Hutcheson T168.

134. When necessary, Ms. Hutcheson supported Ms. Elder and staff concerning behavioral interventions to support the Student. Hutcheson T141; Carini T631. In addition to the reward system, behavior supports used by the staff included: a de-escalation routine, sensory tools and breaks, visuals on the board to identify choices, visual schedules of tasks and options to choose tasks. Hutcheson T168.

135. Ms. O'Keefe did not have much involvement with the Student during the 2018-2019 school year, particularly during the first half of the year. O'Keefe T981. Ms. Carini did not recall working with Ms. O'Keefe. Carini T632. In addition, Ms. O'Keefe did not attend any IEP meetings at Grant and did not communicate with the Parents at all while the Student was at Grant. O'Keefe T1015.

#### *Reevaluation of the Student – November 2018*

136. On November 1, 2018, the District proposed a reevaluation of the Student. Exhibit J19, p1. On November 2, 2018, the Mother consented to a reevaluation of the Student in the following areas: review of existing data; general education teacher report; cognitive; communication; fine motor; medical-physical; and social / emotional / behavioral. Exhibit J19, p3. The IEP team discussed the areas for evaluation and the Parents did not request adding additional areas. Hutcheson T146.

137. Ms. Hutcheson has been employed by the District as a school psychologist for approximately eight years. Although Ms. Hutcheson has not taken specific classes on working with students who have Autism, her experience includes using the Social Thinking Curriculum, evaluating students with Autism, and consulting with teachers to provide behavioral interventions and strategies for calming or de-escalating. Hutcheson T140, 170. Ms. Hutcheson is familiar with ABA, but does not have ABA training. Hutcheson T170-71.

138. Kissy Rose, an intern working under the supervision of Ms. Hutcheson, conducted the reevaluation. J19, p11. Ms. Rose did not testify at the hearing. There is no evidence in the record

concerning her education, experience, training or qualifications. In supervising Ms. Rose, Ms. Hutcheson “observed her giving tests and I reviewed her work before it was submitted.” Hutcheson T145.

139. In addition to observing the Student in his general education setting, Ms. Rose administered the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) to evaluate the Student’s cognitive functioning. J19, pp11-14. One of the reasons why Ms. Rose and Ms. Hutchison chose the WISC-V was because it is fast to administer. This was important because the Student’s attention span and willingness to work with them was limited. Hutcheson T149. From the cognitive assessment, Ms. Rose concluded that the Student “is a very highly capable child who benefits from differentiated instruction and being challenged.” Hutcheson T149.

140. Ms. Rose used two assessment tools to measure the Student’s behavior and social/emotional development: the Behavior Assessment System for Children-Third Edition (BASC-3) and the Behavior Rating Inventory of Executive Function (BRIEF). Exhibit J19, pp15-16. The Student’s teachers and Mother completed BASC-3 behavior rating scales. Exhibit J19, p15. Although Ms. Rose followed the testing protocols in administering both tests, Ms. Hutcheson had some validity concerns due to inconsistencies in the Mother’s behavior rating scales. Hutcheson T151-52. For example, the Mother indicated at one point that the Student sometimes lies, but at another point indicated that the Student never lies to get out of trouble. Similarly, the Mother indicated that the Student never has good coping skills, but also indicated that the Student sometimes recovers quickly after a setback. Hutcheson T152. Ultimately, Ms. Hutcheson considered the teacher results to be valid, but had concerns about the validity of the Mother’s responses due to the inconsistencies. Exhibit J19, p15. Given Ms. Hutcheson’s education, training and experience, I find this conclusion valid.

141. Overall, the Student’s behavioral symptoms index in the school setting, as measured by his general education teacher and special education teacher, was “within the limits of significant difficulties.” Exhibit J19, p15. The results indicated that the Student continued to need social / emotional / behavioral supports, and that his behaviors were impacting his engagement in the classroom and with his peers. Hutcheson T154.

142. Heidi Gallup, a District speech and language pathologist, administered the communication assessment of the reevaluation. The assessment indicated that the Student had typically-developed language skills but “professional observation of his ability to carry over pragmatic language skills into his everyday environment indicates a discrepancy.” Exhibit J19, p22; Hutcheson T154. Based on the Student’s overall needs, the team decided to add supplementary aids and services in pragmatic language. Exhibit J19, p22, 28; Hutcheson T156.

143. Heather Juan, a District occupational therapist, administered a fine motor assessment, which indicated that the Student needed occupational therapy services to support fine motor, visual motor and sensory process skills. Hutcheson T156; Exhibit J19, p23.

144. On December 20, 2018, the District completed the reevaluation and held an evaluation team meeting to review the reevaluation results. Exhibit J19, p9; Hutcheson T156. The Mother, Ms. Hutcheson, Ms. Rose, Mr. Blausen, Ms. Carini, Ms. Elder, Ms. Gallup, and an occupational therapist attended. Exhibit J19, p9.

145. The team concluded that it was appropriate to continue providing SDI in the area of social / emotional / behavioral, to add occupational therapy services to work on fine motor, visual motor and sensory process skills, and to add supplementary aids and service with respect to pragmatic language skills. Hutcheson T157; Exhibit J19, pp6-7. The Parents did not raise any concerns about the adequacy of the evaluation or the conclusions. Hutcheson T158.

146. The December 2018 evaluation did not include an FBA because an FBA had been performed in March and a BIP developed in April of 2018 and because the Parents and the team did not discuss the issue. Although the “social-emotional-behavioral” box had been checked on the reevaluation notification form, an FBA is a separate evaluation that requires separate consent. The Parents had not requested an FBA or consented to one. Hutcheson T174-76.

147. When asked, “How would a parent know that they weren’t requesting an FBA if the box is checked for social / emotional / behavioral, Ms. Hutcheson responded, “Good point. But I can also say that within our discussion, that the language of ‘I want a functional behavioral assessment with this evaluation’ was never stated. If it were, it would have been documented and done.” Hutcheson T175-76.

#### *Changes in the Student’s Behavior after the 2018 Winter Break*

148. The Review 360 data recorded by Ms. Elder and Mr. Stephens each day indicated that between September 2018 and February 2019, the Student’s behaviors were gradually escalating in all of the tracked categories. Blauser T373; Hutcheson T182. These upward trends were consistent with Mr. Stephens’s recollection of the Student’s behaviors. Stephens T539-41.

149. After winter break, which ended January 2, 2019, the Student’s “avoidance escalated. We started having more violent episodes, where he would go to the NEST and throw anything he could get his hands on. Overturn chairs. And we really needed – we needed to get other students out of the NEST and isolate him for their safety and his safety, as well.” Stephens T507; Exhibit D7.

150. The Student’s behavior at this time included elopement, not attending, wanting to do what he wanted to do. And if he did not get his way, his behavior would escalate. Carini T617. The Student’s behavior would become more explosive. He would tear the book room apart and start throwing things, such as scissors. Carini T619.

151. As the Student’s behaviors escalated, Mr. Stephens and Ms. Elder talked about the Student’s behavior daily and Ms. Elder provided different reward systems. These systems would work for a while, until the Student lost interest. At that point, Ms. Elder and Mr. Stephens would regroup and try a new strategy. Stephens T542, 547.

152. When he needed assistance, Mr. Stephens turned to Ms. Elder or other paraprofessionals in the NEST program. Ms. Elder was the only NEST teacher, but there were five paraprofessionals, including Mr. Stephens. Stephens T548.

153. The District also provided some support from Ms. O’Keefe and Sue Folker, another District behavioral specialist. Blauser T388-89. Both specialists came on an as-needed basis, with Ms. O’Keefe coming “less frequently.” Blauser T389-90. Ms. Folker and Ms. O’Keefe did not provide direct services to the Student, but observed and provided feedback on how staff at Grant

were interacting with the Student and responding to him. Blausen, T390; O'Keefe T1018. Even with this assistance, however, Mr. Blausen did not feel that staff at Grant was able to meet the Student's needs. Blausen T390.

154. Because Ms. O'Keefe had very little involvement with the Student during the 2018-2019 and no direct involvement with him, I afford little weight to her testimony concerning the Student's behaviors during his year at Grant.

155. When the Student's behavior was escalated, Mr. Stephens would try to move things out of the Student's reach. Mr. Stephens also would try and talk to him calmly, and would use the Zones of Regulation training to try to get him back into the green zone, or readiness to work. Stephens T508.

156. When the Student directed physical aggression at Mr. Stephens or others, Mr. Stephens would try to block the hit or kicks by putting his hands in front of him or by trying to back up and leave the room. On some occasions, Mr. Stephens used Right Response, a method for responding to physical aggression, to try to prevent the Student from hitting. Ms. Stephens had been trained in the Right Response method, and in using this training, he stood behind the Student, crossed his arms in front of the Student, and lightly held both wrists "so that he couldn't be throwing punches or anything." Stephens T520-21.

157. During January 2019, the Student tried to escape or elope from Grant on two occasions. The first time, the Student left the school building and was found outside of Mr. Blausen's office, dancing. On the second occasion, the Student went out the front door and started running to the left of the school building, toward the playing fields. Several people followed the Student, and he was always in sight. Stephens T519-20 "Another staff member got in a car . . . and went to catch up with him, and was able to meet up with him before he got off campus and bring him back to campus." Blausen T397.

158. During January 2019, the Student told the Parents that he had escaped from school, and that "he had gotten up to the road and talked to a man in a red Toyota," at which point he ran. Mother T708-09. The Student told the Parents exactly how many steps he had climbed during the escape. Another time, when the Mother and the Student were walking up the steps, the Student started counting, and it was the same number that he had stated. Mother T709; 918. The Student's pediatrician, in hearing about the episode, advised the Mother to talk with the school to develop a plan to prevent the Student from eloping. In the Mother's view, the school did not believe that the Student had escaped. Mother T701.

159. At times, the Mother talked with staff at Grant about the Student's escape attempts, and they responded, "he wants to go back to Browns Point. He's saying that he doesn't like it here." In addition, when the Mother asked the Student where he was trying to go when he ran out, he said "I just want to come back to Browns Point," or "I just wanted to be left alone." Mother T906.

160. The evidence in the record supports a finding that the school was forthcoming about the Student's focus on escape and the fact that he had been able to leave the school building on two occasions. The record does not contain sufficient evidence to support a finding as to whether the January escape that the Student described to his Parents was distinct from the January escape that Mr. Blausen and Mr. Stephens described in their testimony.

### *OSPI Citizen Complaint Resolution*

161. On January 18, 2019, OSPI issued a decision concerning the Parents' Citizen Complaint. Exhibit J22.<sup>14</sup> The Parents were represented by different counsel for that matter, and paid \$8,500 in legal fees in connection with that complaint. The Parents are seeking reimbursement for legal fees paid in connected with the Citizen Complaint. Father T103.

### *January 2019 IEP Review*

162. On January 18, 2019, the Student's IEP team met to review the Student's IEP, following the December 20, 2018, evaluation results. Exhibit J20, p1; Hutcheson T160. The Mother, Ms. Hutcheson, Mr. Blausner, Ms. Carini, Ms. Elder, Ms. Gallup, and an occupational therapist attended. Exhibit J20, p3.

163. The team slightly reduced the Student's time in general education from 91.67% to 90%. The IEP continued to provide SDI in the area of social / emotional / behavioral as set forth in the September 2018 IEP. The team added services from an occupational therapist for 30 minutes per week in a special education setting. The team also added services from a speech and language pathologist for 15 minutes per week in a general education setting. Exhibit J20, p13.

164. On January 18, 2019, the team also implemented a new BIP. Exhibit J21, p1. Ms. Hutcheson played no role in developing the BIP, although she acknowledged that her input, as the school psychologist, could have been valuable. Hutcheson T160, 177. The record does not indicate who developed the new BIP.

### *February 2019 IEP Review*

165. On February 21, 2019, the IEP team met to review the Student's IEP to consider adding additional social / emotional / behavioral SDI. The Mother, Ms. Carini, Ms. Elder, Ms. Hutcheson, Ms. Folker, and an occupational therapist attended. Exhibit J23, p3.

166. The IEP team amended the Student's IEP to add 30 minutes per day of SDI in the area of social-emotional skills, specifically self-regulation. Exhibit J23, p16. The team added increased SDI because the Student's behaviors, such as physical aggression, unsafe climbing, property destruction, verbal threats, profanity, and elopement, were increasing. Hutcheson T161; Exhibit J23, p16. Specifically, the Student had engaged in seven episodes of level 3, or crisis, behaviors in a one-month period. In addition, the Student was using self-regulation strategies "zero" percent of the time, was following tasks when given a visual schedule "zero" percent of the time, and was unable to verbalize the feelings of people he observed in social situations. Exhibit J23, p6. The Student's time in the general education setting was reduced to 81.67% (hereinafter 82%). Exhibit J23, p13.

167. During the meeting, the Mother stated that she would like "goals and benchmarks for returning [the Student to his] neighborhood school added to the IEP." Exhibit J23, p3.

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<sup>14</sup>The OSPI decision was admitted into the record to provide context for the Parents' claim for damages only and was not considered for any other purpose.

168. During the meeting, the Mother proposed that a return to Browns Point might lead to a decrease in escalated behaviors. Exhibit J23, p16. The team considered “a continuum of placement options including general education, Learning Resource Center for students with Autism Spectrum Disorder (NEST), Learning Resource Center (LRC), self-contained classroom for students with Autism, self-contained classroom for students with multiple developmental disabilities, and self-contained classroom for students with emotional and social disabilities.” Exhibit J23, p16. The team considered placement options at Browns Point including the LRC program and a self-contained developmental program. After considering these options, the team concluded that increasing SDI in the area of social / emotional skills within the NEST program was the most appropriate way to address the Student’s needs at the time. Exhibit J23, p16; Hutcheson T162. In making its decision, the team considered the daily behavior data collected through Review 360. Exhibit J23, p16. The team’s conclusion was based largely on the fact that the Student had made progress from the beginning of the year until December and it was beneficial to him to continue to have access to typically developing peers. Hutcheson T162.

169. During testimony, Ms. Hutcheson acknowledged that it would have made sense to do an FBA or to revisit the BIP at that time. Hutcheson T178. When asked why the team had not taken these actions, she replied, “[t]he only thing that I can think of is that these behaviors that he was exhibiting at this moment were still in line with the [FBA] that was done originally. So we were still facing the same patterns.” Hutcheson T179.

#### *Requests for Support from the District*

170. On February 28, 2019, Mr. Blausner sent an e-mail to the District Superintendent, Steven Mondragon, stating, “I’m growing deeply concerned for our ability to serve [the Student’s] academic needs at Grant.” The e-mail discussed the Student’s escalating behaviors, noted that these behaviors are becoming the norm, and opined that “[t]his definitely is not the LRE for him, currently.” Finally, the e-mail ended by stating “I don’t have the answers yet promise that we will continue to work hard for him. That passion has not waned. But, I also want to be real about our current ability to serve his ever increasing needs and behaviors.” Exhibit J35, p1; Blausner T375, 388.

171. Ms. Hutcheson also sent an e-mail to Mr. Mondragon, Mr. Blausner, and the Student’s teachers saying, “This is beyond what only our team can successfully manage, and we need stronger District guidance and involvement.” Hutcheson T200. It is unclear when Ms. Hutcheson sent this e-mail. It is also unclear whether the District responded to the requests for help by Ms. Hutcheson and Mr. Blausner.

172. On March 7, 2019, which was an early release day because of teacher conferences, Mr. Blausner asked the Mother to pick up the Student because of his behavior. The following day, March 8, Mr. Blausner suggested the Student stay home because it was another early release day due to conferences. Mr. Blausner advised the Mother that she did not need to come to the general education conference because the Student spent so little time in his general education class that the general education teacher was probably not going to have any information to share at the conference. Blausner T414-15.

### *Reentry Meeting – March 20, 2019*

173. On March 13, 2019, the Student was emergency expelled from March 14 through March 27, 2019. Exhibit J24, p1; Blausen T412-14; Exhibit D4. The expulsion was converted to a short term suspension, and the Student returned to school on March 25, 2019.<sup>15</sup> The Student was expelled because he was climbing on furniture, swearing, threatening to harm or kill staff and destroying property. Exhibit J24, p1.

174. On March 20, 2019, the District held a reentry meeting to discuss the Student's return to school. Exhibit J26, p1. As part of the Student's reentry plan, the District initiated a five-week trial period in an effort to stabilize the Student's behaviors and return him to the levels documented between September and December 2018. Hutcheson T164; Exhibit J26, p3. The Mother disagreed with the 5-week trial period and stated at the meeting that she thought it was unacceptable and constituted a change in the Student's placement. Mother T715.

175. On March 25, 2019, the Student returned to school. At Mr. Blausen's suggestion, however, the Student return to school for half a day, rather than a full day, because the Student had a medical appointment in the afternoon. Exhibit J25, p1; Blausen T415. I find that the Student was excluded from school for a period of 7.5 school days for the March 14 expulsion.

176. When the Student returned to school on March 25, 2019, his schedule indicated that he would spend no time in general education. Exhibit P18, pp1-2. This was a schedule for this particular day, negotiated at the reentry meeting to allow the Student to transition back to school and the general education program after the expulsion. Blausen T408-09; 430-31.

### *The "New NEST" Program*

177. The five-week trial period started when the Student returned to school on March 25, 2019. To create the "New NEST" classroom, staff "cleared out" the existing NEST classroom, and moved everything to a room across the hall.<sup>16</sup> Stephens T515. The District configured the New NEST classroom to eliminate anything that the Student could crawl on or throw. One wall contained a white board with a visual schedule and choices for the Student. A second wall contained calming strategies and the Student's token reward system. There was a grouping of large tables in the center and some tables or desks to the side. Two adult staff were always present, and sometimes other students in the NEST program were "pulled in for social-emotional learning or instructional time." Hutcheson T164-64, 190-91.

178. The District intended the five-week trial placement in the New NEST classroom to be a short-term placement, where the Student could learn to deescalate and regulate his emotions so he could return to the general education setting as soon as possible. However, the New NEST placement continued through the end of the school year. Blausen T382-83; Hutcheson T194-95, 202.

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<sup>15</sup> The short term suspension form indicates that March 22, 2019 was the "Date of Return to School." Exhibit J15, p1. Mr. Blausen specifically recalled, however, that the Student returned to school on March 25, 2019. Blausen T.415; see also Exhibit D4.

<sup>16</sup> Throughout the hearing, the Parents referred to this five-week trial period and to the reconfigured NEST room as the "New NEST."



179. The IEP team did not amend the Student's IEP to reflect his placement in the New NEST placement because the District considered it a change of setting or a change to the Student's environment, rather than a change to his educational programming. As Ms. Hutcheson explained, "[b]y directive of the District . . . it was okay to have this trial period of time without altering his IEP minutes. . ." The goal was for the Student to continue to spend 82% of his time in the general education setting while he was in the New NEST. Hutcheson T191-92 (emphasis added); Blausen T380; Stephens T516.

180. Although the goal was for the Student to continue to spend 82% of his time in a general education setting, some days the Student spent no time in general education. Blausen T381. In addition, while the District did not intend the trial period to be a self-contained classroom, it became a *de facto* self-contained placement. Hutcheson T203; Blausen T381.

181. If the Student was in the red zone and was acting out, throwing things and being unsafe, he was not permitted to go to the general education classroom. Stephens T516. If the Student was in the general education classroom and became disruptive, Mr. Stephens and the Student would leave the general education class and return to the New NEST classroom. Stephens T518.

182. There were days when the Student was the only student in the New NEST classroom, but "they were not planned days." Stephens T515. On some days, the Student would be tired when he arrived at school and would immediately go to the New NEST classroom to sleep. Mr. Stephens would try to wake him up to do work, but there were days when the Student slept all day in the New NEST classroom. Stephens T515.

#### *Conflict Concerning Reevaluation*

183. During the March 20, 2019 reentry meeting, the Mother distributed copies of a memorandum she had drafted requesting an independent educational evaluation (IEE) consisting of an FBA and BIP by the Brooks Powers Group. Blausen T377; Mother T910-11; Exhibit P17.

184. Mr. Blausen could not recall how the District responded to the Mother's request for an IEE, although he knew that the Parents were seeking an IEE from Brooks Powers Group and that there was discussion at the reentry meeting about reevaluating the Student. He could not recall if the Mother requested an IEE before or after the District offered to reevaluate the Student. Blausen T377, 381-82, 387-88.

185. The Mother testified that she first discussed an IEE with Mr. Blausen on March 15, 2019, the Friday before the Wednesday reentry meeting. At that point, Mr. Blausen appeared to be in agreement with the IEE and said he would speak to the Superintendent. Mother T712-13. During the reentry meeting on March 20, however, when the Mother started to distribute copies of the memo to team members, Mr. Blausen asked her to wait and hear about the District's plan first. The Mother was confused because they had "talked about this already." She proceeded with distributing copies of her request for an IEE. Mother T714.

186. According to the Mother, the District planned to have Ms. O'Keefe, who had conducted the prior FBA and BIP, conduct the reevaluation. Since the first FBA and BIP had not been effective, the Mother objected to this plan because she could not understand how the District expected a second evaluation by the same person to yield success. When the District responded

that it could bring in someone else from the District, the Mother said, “Bring somebody else from the District, then.” Mother T717, 911.

187. The following week, Ms. Hutcheson asked the Mother to sign a form refusing the FBA by the District, to which the Mother replied, “But I didn’t refuse. I said, ‘Let’s wait and see what the District has to say about my request. I’m not refusing anything. In fact, it was my idea’” to request an IEE. Mother T718. The Mother didn’t want to sign the form because it was inaccurate, and she disagrees with the PWN stating that she verbally declined an evaluation by the District. Mother T718.

188. Ms. Carini, who attended the March 20 meeting, recalled that the Mother had asked for assistance from an outside independent source, and “vaguely” recalled the Mother questioning the point of having the same person perform a second FBA, when the first FBA had not been successful. Carini T628.

189. According to Ms. Hutcheson, the District verbally offered to conduct an FBA and reevaluation during the March 20, 2019, reentry meeting, but it did not have the reevaluation consent form at that time. Ms. Hutcheson recalls that the Mother “made it known that she would maybe be more interested in an outside evaluation and an FBA completed.” Hutcheson T165. Subsequently, Ms. Hutcheson gave the consent form to the Mother, who stated that she would bring the paperwork home, and that she wanted to provide a personal statement as to “why she’s refusing our district to do a new reevaluation or FBA.” Hutcheson T165-66. Ms. Hutcheson testified that the Mother did not return the form, and that the District did not conduct any subsequent evaluation because the Parent verbally declined and they did not want to move forward without consent. Hutcheson T166.

190. The Mother contends that she did not refuse consent for *any* reevaluation by the District, but that she did not see the wisdom of having Ms. O’Keefe reevaluate the Student, when her first evaluation had not been successful. She contends that the District is “trying to make it look like I refused. That’s ridiculous. I’m asking for it. Not refusing it. I’m asking for it by either somebody else in the District who might provide a better . . . FBA than the person who wrote one that currently isn’t working, or this outside group . . . .” Mother T913.

191. A PWN following the reentry meeting on March 20, 2019 specifies that 1) the Mother requested an IEE in writing on March 20, 2019, 2) the Mother verbally declined the District’s offer to conduct an evaluation; and 3) on March 25, 2019, the District provided the Mother with an evaluation consent form, which the Mother brought home. The Parent noted that she would be returning the consent form with her own written statement as to why she was refusing the District’s offer. J26, p3.

192. The record does not contain a “Reevaluation Notification / Consent” form concerning the District’s proposed reevaluation of the Student. The form, which the District had used when it sought to reevaluate the Student in March 2018 and November 2019, indicates the proposed areas of reevaluation, provides an area for a parent to suggest additional areas requiring assessment, and provides check boxes stating “I give consent for my child to be evaluated” and “I refuse consent for my child to be evaluated.” Exhibit J10, p3; Exhibit J19, pp3-4.

193. On April 2, 2019, the District denied the Parents’ request for an IEE. Also on April 2, 2019, the District filed with OSPI a request for a due process hearing to demonstrate that its December

20, 2018, evaluation of the Student was appropriate and that the Parents were not entitled to an IEE at public expense. File.

194. Based on the foregoing evidence, I find the following facts. First, the Mother submitted a written request for an IEE by the Brooks Powers Group on March 20, 2019, and distributed copies to the IEP team. Second, the IEP team also discussed a District proposal to conduct its own reevaluation and FBA on March 20, 2019, but the District's proposal was not formalized in writing until March 25, 2019. Third, during the March 20, 2019 meeting, the Mother voiced concerns about having Ms. O'Keefe conduct a second FBA on the ground that her first FBA had not been successful. Finally, the District presented the Mother with a consent form proposing a reevaluation on March 25, 2019. That form was prepared after the Mother had already requested an IEE and had voiced her concerns about Ms. O'Keefe conducting a reevaluation. Because the form is not part of the record, it is unclear precisely what the District proposed, and whether the District took into account the Mother's concern that the second FBA should be conducted by someone other than Ms. O'Keefe.

*The Student's Daily Schedule in the New NEST Placement During April 2019*

195. During the 2018-2019 school year, Ms. Elder prepared a schedule for the Student to follow each day. Stephens T509. Often, the Student's actual schedule varied from the prepared schedule. Stephens T528-38. Mr. Stephens would keep track of the Student's actual schedule by circling on the prepared schedule what the Student actually did during the period in question. Stephens T512-13; 549-50.

196. For example, Ms. Elder's schedule for April 1, 2019, listed "Math lesson" for "9:30-10:00 a.m." The schedule then listed "Ms. Carini, Ms. Elder, (and) Mr. Stephens." Exhibit D3, p2. If the Student worked with Mr. Stephens while Ms. Carini was leading the lesson, Mr. Stephens would circle his own name and Ms. Carini's name. Stephens T512-13. However, if the Student was in the red zone and in the New NEST classroom, Mr. Stephens would circle his own name. Stephens T549.

197. Ms. Elder's schedule called for the Student to be in the New NEST classroom for a social lesson from 11:00 to 11:30 a.m. and from 12:30 to 1 p.m., and to take a sensory break in the New NEST classroom or occupational therapy room from 2:10 to 2:30 p.m. Stephens T528-32. As a result, Ms. Elder's schedule called for the Student to be out of the general education setting for a total of 1 hour and 20 minutes of time. The Student's IEP from February 2019 provided that he would receive social / emotional / behavioral SDI in the NEST a total of 1 hour per day, and would receive 30 minutes of occupational therapy a total of 30 minutes weekly. Accordingly, I find Ms. Elder's schedule called for the Student to spend 70 more minutes per week in the New NEST classroom than his IEP permitted.

198. During the five-week trial period, the Student's behaviors escalated and there were many times when he was in the red zone. The Student was excluded from other students during those times. Stephens T518. During this period, the Student sometimes spent the whole day in the New NEST classroom and no time in the general education classroom. Stephens T527; Blausen T381.

199. During this five-week trial period, the record does not contain any documentation of the actual time the Student spent in the general education classroom. In addition, the record does not

contain any Review 360 data following February 20, 2019, and is unclear whether the District was, or was not, keeping data about the Student's behavior at this time. Exhibit P15.

### *Emergency Expulsions in May 2019*

200. On May 3, 2019, the Student was emergency expelled through May 17, 2019, for a period of 11 school days. Exhibit J28, p1; Blausen T416-17. The Student was expelled "for a variety of aggressive and physically aggressive acts, self-harm, harm to others, and elopement . . ." Exhibit J29, p4.

201. On May 6, 2019, the District held a manifestation determination meeting. Exhibit J29, p1. During the manifestation determination meeting, the team determined that the Student's behavior was a manifestation of his disability. The team further noted that it would like to update the Student's BIP "to capture the interventions which have taken place over the last 5 weeks to alter the classroom environment with less visuals and furniture, break taking space, routines for requesting breaks, and a token system of [Student] bucks." Exhibit J29, p5.

202. During the meeting, the Mother stated that she did not feel the BIP "has been implemented as planned and should be reviewed by an ABA Behavioral Therapist." The other team members disagreed. Exhibit J29, p6. Ms. Hutcheson recalled that the Mother was concerned that the BIP was not being implemented because the Student had not been given a sensory tent. The team members felt that the BIP had been implemented because the tent was in the New NEST room but it wasn't fully opened for him to climb into. Hutcheson T167.

203. After the manifestation determination meeting, at the Mother's request, Ms. Hutcheson started meeting with the Student individually once a week. Hutcheson T166-68. At times, the Student was not available to meet because he was engaged in a task in the classroom, sleeping, or not in the right place emotionally. Toward the end of school, he was absent from school. Hutcheson T198. Ms. Hutcheson met with the Student approximately three times for 30 minutes each time. Hutcheson T168. Because the Mother made this request, it was not reflected in the IEP. Hutcheson T199.

204. At some point in May 2019, Mr. Blausen was called to assist after the Student, who was participating in physical education class, climbed to the top of the bleachers and defecated. The other students were removed from the area, and by the time Mr. Blausen arrived, the Student was running around the gym. The Student was laughing and said, "Bring the kids back in. I want them to see it." Blausen T422-23. The Student "seemed to, sort of, be kind of joyous that he was able to pull that off and we couldn't stop him." Blausen T421. The Father, a pediatric gastroenterologist, saw this incident as a classic sign of regression. Father T55, 85.

205. On May 28, 2019, the Parents filed a complaint with the Tacoma Police, alleging that Mr. Stephens had shoved the Student in the chest and kicked the Student in the shin. Exhibit J31; pp1-4; Mother T728. The Mother believes the Student was telling the truth because he tells the exact same story every time. Mother T729. After this incident, the Mother decided that the Student would not return to school. Mother T729.

206. The police called Mr. Blausen, who discussed his observations of the incident. The Student was escalated and was kicking, spitting, and throwing things. Mr. Stephens, Mr. Blausen and Ms. Elder responded in their typical fashion, which was to protect themselves physically, to try to

remain at a distance, to use their voices and “all the techniques that we typically do.” Blausen T. 403. The police never spoke with Mr. Stephens, who denied that he ever hit or kicked the Student. Stephens T520-21. The Mother called the police to inquire about the investigation and was told that they did not have enough staff to investigate. Mother T920.

207. For the following reasons, I find that the evidence in the record is not sufficient to support a finding that Mr. Stephens shoved or kicked the Student. First, Mr. Blausen and Mr. Stephens, who observed the incident, testified that Mr. Stephens did not engage in this conduct. Second, the police declined to take further action after their discussion with Mr. Blausen. Finally, because the Student did not testify at the hearing, it was not possible to ask questions about his account.

208. On May 28, 2019, the Student was emergency expelled for a third time because he was hitting and kicking staff, throwing heavy objects at staff, spitting and destroying property. Exhibit J30, p1; Blausen T418. Based on the evidence in the record, I find that the Student was excluded from school for seven school days, from May 28 to June 6, 2019, related to the May 28 expulsion.

209. Although the Student was invited to return to school on June 6, 2019, the Mother kept the Student home for the remainder of the school year, which ended on June 18, 2019, because she was concerned about his safety. Blausen T418-19; Exhibit D7.

210. On June 6, 2019, the District held a manifestation determination meeting. Exhibit J32, p1. The team again determined that the Student's behavior was a manifestation of his disability, and that they would like to update the BIP. Exhibit J32, p5. The Parents were notified of the manifestation determination meeting but did not attend. Exhibit J32, pp1, 4.

211. I find that the Student was excluded from school for a total of 26.5 days during the 2018-2019 school year (7.5 days for the March 14 expulsion; 11 days for the May 3 expulsion; 7 days for the May 28 expulsion). In addition, although the Student was not officially expelled or suspended from school on March 7 and 8, 2019, which were early release days, Mr. Blausen suggested that the Student stay home on those days, and the Parent complied with that request. Accordingly, these half-days are counted in the total days that the Student was excluded from school.

212. Expelling or suspending the Student from school could reinforce the Student's escape-seeking or elopement behaviors. Hutcherson T186.

#### *The Student's Progress at Grant - 2018-2019*

213. In the Mother's view, the Student is “broken” after his year at Grant and needs to recover. She believes he requires more interventions than he received at Grant and is afraid that even if the Student returns to Browns Point, the Student might not be successful because of what has already happened. Mother T823.

214. In the Mother's view, staff at Grant were well-intentioned but did not have the additional training or specialization in Autism that the Student needs. Mother T825. She felt that Grant did not provide any services or supports beyond those that had been provided at Browns Point. Mother T825; 932.

215. After his time at Browns Point and Grant, the Student, who taught himself to read and loved school, was no longer interested in reading or going to school. Exhibit P2, p7.

216. Between February 2019 and June 2019, the NEST program and New NEST program were not meeting the Student's needs. Blausen T373-75. The Student could not function very well in the general education classroom, the NEST, or the New NEST. Staff tried specific interventions and environments for him but couldn't meet his needs. Blausen T369-75. By February 28, 2019, Mr. Blausen questioned whether Grant was equipped to help the Student. Blausen T375. Although staff at Grant were trying their best to support the Student, at times they were unable to do so. Hutcheson T196.

#### *Home ABA Services*

217. On July 31, 2019, Lisa Murphy, BCBA, met with the Student to conduct an initial FBA for in-home ABA services through a program called L.E.A.P.S. for ABA services. Murphy T769; Mother T734-36. Ms. Murphy observed the Student while he was at home, playing outside with his brother. Murphy T776. Ms. Murphy has never observed the Student in an educational setting, and has not reviewed any of the Student's educational records. Murphy T798. At the time of the hearing, L.E.A.P.S. had not started providing services to the Student, but was looking to identify an RBT who could start work with the Student. Murphy T771.

218. The Parents are asking for the District to contract with L.E.A.P.S. to provide ABA support in a school setting, either as a prospective placement or compensatory education. Mother T737. Ms. Murphy recommends a program called "delay/denial tolerance" for the Student. Murphy T776. Ms. Murphy has never employed the L.E.A.P.S. program in a school setting and would need to consult with District employees in order to determine how it could be adapted to be used within a school setting. Murphy T779. In a home setting, Ms. Murphy has used this program successfully with three children, and has supervised the successful implementation of the program with three students. Murphy T779; 809-10.

#### *Visit to Gersh Academy and Consultation with Lionel Enns, PhD*

219. The Mother's long-term objective is for the Student to attend a neighborhood school, in the general education population, with support from a one-to-one RBT under the supervision of a BCBA. Mother T949. In addition, she believes the Student wants to go to Browns Point. Mother T950. Short term, however, the Mother is concerned that the Student "is not ready to jump into a permanent school environment with broken parts . . . ." She believes that "he needs to get stabilized first. We can't put him back there broken." Mother T950-51.

220. After the end of the 2018-2019 school year, the Mother and the Student visited Gersh Academy for Students on the Autism Spectrum – Cougar Mountain (Gersh). The ride to Gersh took approximately 50 minutes from the family home. Mother T732. It is unclear precisely when the visit occurred. After the Mother and Student visited Gersh, Dr. Luisa Sanchez-Nilsen was hired to be the Executive Director / Principal of Gersh for the 2019-2020 school year. Sanchez-Nilsen T274. Dr. Sanchez-Nilsen had a doctorate in education leadership and policy. Her experience includes creating the first Autism program in the Lake Washington School District. Sanchez-Nilsen T274.

221. Gersh serves students “who are typically resistant to treatment in other placements” and serves students who have high functioning Autism by placing “emphasis on academic rigor and meeting students where they are in their learning.” Gersh also provides ABA support, and has specialized Autism services. Sanchez-Nilsen T276-78. All staff at Gersh “have an understanding of ABA principles and use ABA strategies as prescribed by BCBAs.” Sanchez-Nilsen T279. Gersh, which is going into its second year in operation, had 38 enrolled students at the time of the due process hearing, but can serve up to 80 students. The staff to student ratio at Gersh is one to six. Currently enrolled students range in age from 5 to 18, although students up to age 21 may attend. There are no typically developing students at Gersh. At the time of the due process hearing, four enrolled students were entering second grade. Classes are divided into elementary and secondary, meaning that students from different grade levels could be in the same elementary class, depending on the development of the child. At the time of the due process hearing, there were 3 elementary classes, with a total of 15 elementary students. Sanchez-Nilsen T284-86, 288.

222. During the visit to Gersh, the Mother “felt like these kids are just like my son. . . . And I felt like he would have connections to children who think and are wired like him.” Mother T732; 929. Although the Mother believes Gersh is the right place for the Student, she is concerned about the distance to Gersh, and notes that “having our child shipped away from our home is not winning to us. It’s a – it’s therapeutic necessity at this point, to get him whole again.” Mother T730-33; 929.

223. The Mother periodically looks up the travel time to Gersh, or from Gersh, at the times that the Student would be travelling to school or home from school. The longest length of time she has seen is one hour and 11 minutes. She has checked at least 10 times. Mother T925.

224. The Mother also consulted with Lionel Enns, PhD, who testified as an expert witness for the Parents. Dr. Enns has a doctorate in school psychology, and is also a licensed clinical psychologist, BCBA, and nationally certified school psychologist. Exhibit P1, p1; Enns T829.

225. Dr. Enns works with parents and school districts. He has contracted with approximately 25 school districts, often to provide independent evaluations, but also to review or perform FBAs and to create BIPs. Enns T829-30. In addition to performing evaluations, Dr. Enns provides therapy and support for families concerning ABA services. Approximately 80 percent of his practice involves working with children who have Autism and their families. Enns T830.

226. One of the primary challenges for students with Autism is an inability to read and understand the feelings and desires of others, which results in an inability to understand their environment. Enns T835. Working with students who have high-functioning Autism can be difficult because they perceive attempts to manipulate or control their behavior, which cause them to resist. A student with Autism may decide they don’t want to do something just because someone is attempting to control their behavior. Enns T837. Although children who have high-functioning Autism often appear typical, they cannot read the wants and desires of others as a neurotypical child would, and do not have the capacity to meet the expectations applicable to neurotypical children. Enns T839. The behavior of students with high-functioning Autism is often perceived as voluntary. Enns T839.

227. ABA provides structure and context for students who have Autism. Enns T836. Dr. Enns has worked with school districts to provide an ABA system of support. An ABA system works by training parents, teachers, aides and others to provide the support the students require, resulting

in a reduction in the level of services required. If a student has had a difficult experience prior to receiving ABA, they will require a high level of support in the beginning. Enns T853-54.

228. Evidence in the record, particularly Dr. Enns's testimony and the UW evaluation, establishes that ABA therapy is effective for providing behavioral support to Students with high-functioning Autism. The record does not, however, support a finding that ABA therapy is the only methodology that can provide effective support for this Student. Moreover, because this Student had not had ABA therapy at the time of the due process hearing, the record does not support a finding that ABA therapy will, in fact, be an effective support for this Student.

229. On August 3, 8 and 9, 2019, Dr. Enns evaluated the Student. The Mother completed the BASC-3 parent form, and Dr. Enns interviewed the Student. Exhibit P2, p2. The interview with the Student lasted 90 minutes. Exhibit P2, p9. Dr. Enns has never observed the Student in an educational setting. Enns T887.

230. Dr. Enns also reviewed the Student's educational records, including his evaluations and assessments, IEPs, FBAs and BIPs. Enns T842. Dr. Enns did not speak with the Student's teachers or anyone from the District. Enns T875-76. Dr. Enns did not contact the District to have any of the Student's teachers complete rating scales. Typically he would do so, but there were time constraints in this case. Enns T 832, 887. He did not believe the conclusions in his report would have changed even if he had spoken with District staff. Enns T888-89.

231. The Student requires a "very thoughtful, intentional, stable, ABA-supported environment," which can occur at home and in school. Enns T890. Gersh Academy is already set up to provide this type of a supportive environment. The District could also provide this type of environment but may not be set up to do so. Accordingly, Dr. Enns recommends that the Student attend Gersh for one year, followed by placement in the District. Enns T894-96.

232. Dr. Enns visited Gersh for the first time on August 8, 2019. He was there for several hours, and met with Dr. Sanchez-Nilsen. Enns T898. While he was there, the staff were confronted with a difficult behavioral issue. Dr. Enns observed the interaction and believed the staff at Gersh handled the difficult situation very well. Enns T892.

233. During cross-examination, Dr. Enns admitted that in reviewing the Student's records and preparing his report, he considered a document dated January 14, 2019, which actually pertained to the Student's brother, not to the Student. Enns T883. Neither party elicited any testimony from Dr. Enns with respect to how this review might impact his overall conclusions.

234. Dr. Enns opined that 30 hours per week of ABA services in a school setting with an RBT would enable the Student to engage in his grade-level academics in the general education setting. Enns T852.

235. Specifically, Dr. Enns recommends that the Student attend Gersh for one year, followed by a placement in the District in the general education setting with support in the form of 30 hours per week of ABA delivered by an RBT under the direct supervision of a BCBA 10% of the time. Exhibit P2, p15; Enns T860-61; 894-96.

236. Dr. Enns did not diagnose the Student with post-traumatic stress disorder (PTSD), and would need to conduct a complete evaluation with neuropsychological testing before doing so.



Enns T870; Exhibit P2, p5. He did opine that the Student exhibited signs of school-based trauma because the Student expressed his hatred for the school and was exhibiting regressive behavior when he defecated in the gym. Enns T872. An adequately supportive educational program could help the Student work through the trauma. Enns T874. Accordingly, he felt that placement at Gersh would provide the Student with an opportunity to recover from this trauma. Exhibit P2, p15; Enns T892.

237. The negative aspect of a placement at Gersh is that it is far from the Student's home and it is unclear how the long bus ride will impact the Student. Enns T884.

238. Because Dr. Enns is a highly trained and qualified expert witness with expertise in working with children who have Autism, I afford his testimony and opinion concerning the Student's placement needs significant weight. In determining how much weight to afford Dr. Enns's testimony concerning the District's actions, however, the fact that Dr. Enns did not speak with any of the Student's teachers or District staff, completed the BASC-3 without teacher rating scales, and inadvertently reviewed the Brother's IEP, tempers the weight of his testimony. Similarly, the fact that he only visited Gersh on one occasion for several hours tempers the weight of his testimony.

239. Based on a review of Dr. Enns's evaluation of the Student, Dr. Sanchez-Nilsen opined the Student would be a good fit at Gersh. Sanchez Nilsen T281. Similarly, Ms. Yu believes that Gersh would be a good fit based on her review of Dr. Enns's evaluation and the FBA conducted by Ms. Murphy. Yu T310. Dr. Sanchez-Nilsen and Ms. Yu have never met the Student or his Mother. Sanchez-Nilsen T276; Yu T317. In addition, neither Dr. Sanchez-Nilsen nor Ms. Yu have reviewed any of the Student's educational records or talked to any of the Student's teachers or District staff. Sanchez-Nilsen T291-92; Yu T316-17. The fact that Dr. Sanchez-Nilsen and Ms. Yu have such limited knowledge of this particular Student's needs undermines the weight of their testimony.

#### *Prospective Placement in District*

240. Ms. Hutcheson opined that a therapeutic day placement could be very beneficial for the Student. She is not, however, familiar with Gersh Academy. Hutcheson T197. Because her knowledge of ABA is not very strong, she could not opine on the efficacy of a District placement where the Student's one-to-one aide would be an RBT under the supervision of a BCBA. Hutcheson T197.

241. Ms. Boitano is not familiar with Gersh, but believes that the Student could be served by a school that specializes on serving students with high-functioning Autism, and that offers one-to-one support from registered behavior technicians under the supervision of a BCBA. Ms. Boitano thought that assistance from someone who has knowledge of behaviors specific to Autism "is probably exactly what he needs." Boitano T485. She also believes that the Student could be served by a District placement with a registered behavior technician providing one-to-one support under the supervision of a BCBA. Boitano T488. The District has employees who are BCBA's. Almlie T656.

242. Because Ms. Boitano worked very closely with the Student during the 2017-2018 school year, I give some weight to her testimony. That weight is tempered, however, by the fact that Ms. Boitano did not work with the Student during the 2018-2019 school year and does not have ABA training.

243. Ms. Friedrich-Nielsen is a special education teacher with more than five years of experience teaching in a self-contained classroom. Friedrich-Nielsen T555. Students in a District TLC program are typically in that program because their behavior manifests in a way that prohibits them from meaningfully engaging in the LRC or general education classroom. Friedrich-Nielsen T555. None of the Student's neighborhood schools offer a TLC placement. Friedrich-Nielsen T588-89. Although Ms. Friedrich-Nielsen did not offer an opinion on which placement she believed would best serve the Student, she believed a TLC placement could serve the Student. Friedrich-Nielsen T591-92. Because Ms. Friedrich-Nielsen did not work directly with the Student during his year at Grant, however, I give limited weight to her opinion.

244. In Mr. Blausler's view, the appropriate placement for the Student would be a self-contained program that allows Student to receive academic instruction and social-emotional learning, and that has routines that are familiar to the Student and does not have a lot of transitions. Blausler T424. He also agreed that the Student would be best served in an Autism-specific program. Blausler T429.

245. Dr. Harper believes that a TLC placement in the District "would be very good" for the Student. Dr. Harper has limited knowledge about Gersh Academy and believes that a behavioral placement, rather than an Autism placement, would better serve the Student. Harper T224. Dr. Harper, like Ms. Friedrich-Nielsen, did not work with the Student during his year at Grant. Accordingly, I give limited weight to her opinion.

## **CONCLUSIONS OF LAW**

### *Jurisdiction and Burden of Proof*

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 burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005). Because the Parents are seeking the relief in Cause No. 2019-SE-0076, they bear the burden of proof with respect to those issues. Because the District is seeking relief in Cause No. 2019-SE-0049 concerning the Parents' request for an independent educational evaluation (IEE), the District bears the burden of proof with respect to those issues.

### *The IDEA*

3. 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 United States Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA, 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 206-07 (footnotes omitted).

4. Under the IDEA, a school district must provide “a free and appropriate public education” (FAPE) to all eligible children. In doing so, a school district is not required to provide a “potential-maximizing” education, but rather a “basic floor of opportunity.” *Id.* at 200-01.

5. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . . [H]is educational program must be appropriately ambitious in light of his circumstances . . . .

*Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_, 137 S. Ct. 988, 999-1000 (2017).

6. The Ninth Circuit has explained the *Andrew F.* standard as follows:

In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can make progress in the general education curriculum . . . . taking into account the progress of his non-disabled peers, and the child's potential.

*M.C. v. Antelope Valley Union High Sch. Dist.* 858 F.3d 1189, 1201 (9th Cir.), cert. denied, 583 U.S. \_\_\_, 138 S. Ct. 556 (2017) (citations omitted).

7. Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy 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 decision-making 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); 34 CFR §300.513.

***Issue (a):*** *Whether the District's evaluation of the Student conducted on December 20, 2018, was appropriate and, if not, whether the Parents are entitled to an independent educational evaluation consisting of a functional behavioral assessment at public expense?*

8. Under certain circumstances, Parents have a right "to obtain an independent educational evaluation of the student if the parent disagrees with a school district's evaluation." WAC 392-172A-05005(1); 34 CFR § 300.502(a)(1). WAC 392-172A-05005(1)(c)(i) defines an IEE as an "evaluation conducted by a qualified examiner who is not employed by the school district responsible for the education of the student in question." If a parent requests an IEE, the district must either ensure that an IEE is provided at public expense without unnecessary delay, or initiate a due process hearing within 15 days to show that its evaluation is appropriate. WAC 392-172A-05005(2)(c).

9. In this case, the Parents requested an IEE, consisting of an FBA, on March 20, 2019. The District denied the Parents' request and initiated a due process hearing on April 2, 2019, which is within the 15-day time period required by WAC 392-172A-05005(2)(c).

10. Schools districts must follow the requirements for evaluations set forth in WAC 392-172A-03020, which provides:

(1) The school district must provide prior written notice to the parents of a student, in accordance with WAC 392-172A-05010, that describes any evaluation procedures the district proposes to conduct.

(2) In conducting the evaluation, the group of qualified professionals selected by the school district must:

(a) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining:

(i) Whether the student is eligible for special education as defined in WAC 392-172A-01175; and

(ii) The content of the student's IEP, including information related to enabling the student to be involved in and progress in the general education curriculum, or for a preschool child, to participate in appropriate activities;

(b) Not use any single measure or assessment as the sole criterion for determining whether a student's eligibility for special education and for determining an appropriate educational program for the student; and

(c) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(3) Each school district must ensure that:

(a) Assessments and other evaluation materials used to assess a student:

(i) Are selected and administered so as not to be discriminatory on a racial or cultural basis;

(ii) Are provided and administered in the student's native language or other mode of communication and in the form most likely to yield accurate information on what the student knows and can do academically, developmentally, and functionally unless it is clearly not feasible to so provide or administer;

(iii) Are used for the purposes for which the assessments or measures are valid and reliable. If properly validated tests are unavailable, each member of the group shall use professional judgment to determine eligibility based on other evidence of the existence of a disability and need for special education. Use of professional judgment shall be documented in the evaluation report;

(iv) Are administered by trained and knowledgeable personnel; and

(v) Are administered in accordance with any instructions provided by the producer of the assessments.

(b) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(c) Assessments are selected and administered so as best to ensure that if an assessment is administered to a student with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the student's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(d) If necessary as part of a complete assessment, the school district obtains a medical statement or assessment indicating whether there are any other factors that may be affecting the student's educational performance.

(e) The student is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(f) Assessments of students eligible for special education who transfer from one school district to another school district in the same school year are coordinated with those students' prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(g) In evaluating each student to determine eligibility or continued eligibility for special education service, the evaluation is sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.

(h) Assessment tools and strategies are used that provide relevant information that directly assists persons in determining the educational needs of the student.

See also 34 CFR § 300.304.

11. School districts must also follow the requirements for evaluations set forth in WAC 392-172A-03025, which provides in relevant part:

As part of an initial evaluation, if appropriate, and as part of any reevaluation, the IEP team and other qualified professionals, as appropriate, must:

(1) Review existing evaluation data on the student, including:

(a) Evaluations and information provided by the parents of the student;

(b) Current classroom-based, local, or state assessments, and classroom-based observations; and

(c) Observations by teachers and related services providers.

(2)(a) On the basis of that review, and input from the student's parents, identify what additional data, if any, are needed to determine:

(i) Whether the student is eligible for special education services, and what special education and related services the student needs; or

(ii) In case of a reevaluation, whether the student continues to meet eligibility, and whether the educational needs of the student including any additions or modifications to the special education and related services are needed to enable the student to meet the measurable annual goals set out in the IEP of the student and to participate, as appropriate, in the general education curriculum; and

(b) The present levels of academic achievement and related developmental needs of the student. . . .

See also 34 CFR § 300.305.

12. In conducting evaluations, school districts must follow the requirements for evaluation reports set forth in WAC 392-172A-03034, which provides:

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

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

(b) A discussion of the assessments and review of data that supports the conclusion regarding eligibility including additional information required under WAC 392-172A-03080 for students with specific learning disabilities;

(c) How the student's disability affects the student's involvement and progress in the general education curriculum or for preschool children, in appropriate activities;

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

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

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

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

13. Under WAC 392-172A-03020(3)(a)(iv), a school district must ensure that evaluations are “administered by trained and knowledgeable personnel.” In this case, Kissy Rose, a school psychology intern, administered the BASC-3, the WISC-V, and the BRIEF 2. The District, which bears the burden of proof with respect to this issue, provided no evidence concerning Ms. Rose’s education, experience, qualifications or training. Although Ms. Hutcheson supervised Ms. Rose by observing her and reviewing her work, this does not satisfy the plain language of WAC 392-172A-03020, which requires that evaluations be “*administered* by trained and knowledgeable personnel.” (Emphasis added.) Similarly, the fact that the District’s evaluation team included Ms. Hutcheson and other trained and qualified personnel does not satisfy the requirement that the person who administers the evaluation must be trained and knowledgeable. The District has not shown by a preponderance of the evidence that Ms. Rose, who administered the evaluation, was trained and knowledgeable as required by WAC 392-172-03020. Because the District has not met this requirement, it has failed to prove the evaluation was appropriate. Accordingly, the Parents are entitled to an IEE at public expense.

14. Even if Ms. Rose had been qualified to administer the evaluation, however, the District has not met its burden to show that the evaluation was sufficiently comprehensive to assess the child in all areas related to the suspected disability. WAC 392-172A-03020(3)(e).

15. During the due process hearing, Ms. Hutcheson conceded that the box for “social / emotional / behavioral” had been checked as an area for reevaluation, and that a parent might not understand that checking this box was not enough to constitute a request for an FBA. Ms. Hutcheson then emphasized “the language of ‘I want a functional behavioral assessment with this evaluation’ was never stated. If it were, it would have been documented and done.” Hutcheson T175-76.

16. The U.S. Department of Education, Office of Special Education Programs (OSEP), recently noted that when a district has conducted an evaluation, and a parent disagrees with the evaluation because a child was not assessed in a particular area, “the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and

the extent of the special education and related services that the child needs.” *Letter to Baus*, 65 IDELR 81 (OSEP 2015).

17. Here, because the box for “social-emotional-behavioral” was checked, it was reasonable for the Parents to believe the District was already aware that the Student’s behavior was an area of concern that required assessment. Significant evidence in the record establishes that the Student struggled with behavioral issues throughout kindergarten, and that his behaviors were slowly escalating throughout the first half of first grade. Ms. Hutcheson admitted that if the Parents had sought an FBA, one would have been provided, thus implicitly acknowledging that an FBA would have been appropriate at that time. A parent does not have to utter the magic words “I want a functional behavioral assessment” to obtain an appropriate assessment. Parents are not expected to be experts in the evaluation of children suspected of having disabilities.

18. Given the Student’s longstanding struggles with behavior, and the Parents’ reasonable belief that checking the box for “social-emotional-behavioral” encompassed a request for an FBA, the District has not met its burden to prove that it satisfied WAC 392-172A-03020(3)(g), which requires that a District ensure that “[i]n evaluating each student to determine eligibility or continued eligibility for special education service, the evaluation is sufficiently comprehensive to identify all of the student’s special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified.”

19. In its closing brief, the District contends that under the plain language of WAC 392-172A-05005, a disagreement with the District’s evaluation is a prerequisite to the Parent’s right to an IEE at public expense.<sup>17</sup> DB15 The District contends that this requirement has not been fulfilled because the District proposed a reevaluation and FBA of the Student on March 20, 2019, and the Mother responded by refusing to consent and requesting an IEE. The District further contends that the Mother was not requesting an IEE because she disagreed with the District’s December 2018 reevaluation of the Student or any other evaluation. Rather, the District contends that the Mother didn’t want the District to conduct an FBA, but wanted an FBA by an outside agency, and “[a] disagreement with a district’s proposal to evaluate a student does not entitle a parent to an IEE.”

20. It appears that the District is arguing that because it offered to conduct a *new* evaluation and FBA of the Student, the Parents are not entitled to an IEE based on a disagreement with the evaluation from December 2018. This is not an accurate reading of WAC 392-172A-05005. Moreover, OSEP recently offered guidance on this topic, noting that if a parent disagrees with an evaluation because a specific area of the child’s needs wasn’t assessed, the parent’s right to request an IEE at public expense to fill the gap “isn’t extinguished even if the district responds by conducting the missing assessments.” *Letter to Carroll*, 68 IDELR 279 (OSEP 2016); see also *Jones-Herrion v. District of Columbia*, 2019 U.S. Dist. LEXIS 17613 (October 10, 2019) (District could not cure defect in evaluation by offering to fund two assessments it had failed to perform).

21. Accordingly, the Parents are entitled to an IEE consisting of an FBA at public expense.

***Issue (b)(i):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to provide an appropriate IEP during the 2017-2018 school year by not providing appropriate*

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<sup>17</sup> Citations to the closing briefs are as follows. “PB” refers to the Parent’s closing brief. “DB” refers to the District’s closing brief. For example, PB23 is a citation to page 23 of the Parent’s closing brief.



*supplemental aids and services, namely, one-to-one behavior support provided by a skilled behavior technician under supervision of a BCBA, to effectuate the Student's inclusion in a general educational setting.*

22. An IEP is appropriate if it is developed through the IDEA's procedures and is reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Rowley*, 458 U.S. 176; *Endrew F.* 137 S. Ct. 994, 999. "Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal." *Endrew F.* at 999. Whether an IEP is appropriate is measured at the time it was developed. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9<sup>th</sup> Cir. 1999).

23. When a child's behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR §§ 300.324(a)(2)(i) and (b)(2); and 300.320(a)(4). When necessary for a student to receive FAPE, a behavioral intervention plan (BIP) is incorporated into a student's IEP. WAC 392-172A-01031.

24. Under WAC 392-172A-03110(3), an IEP team must review a student's IEP periodically, but not less than annually, to determine whether the student's annual goals are being achieved, and must revise the IEP, as appropriate, to address lack of progress toward the student's annual goals and in the general curriculum, results of reevaluations, information about the student provided to or by the parents, the student's needs, or other matters.

25. Moreover, the U.S. Department of Education, Office of Special Education and Rehabilitative Services (OSERS) and OSEP recently issued a letter clarifying educational agencies' obligations under the IDEA to provide students with disabilities appropriate behavioral interventions and supports necessary for them to receive FAPE. The letter explains that an IEP team must "consider, and when determined necessary for ensuring FAPE, include or revise behavioral supports in the IEP of a child with a disability exhibiting behavior that impedes his or her learning or that of others. *Dear Colleague Letter*, 68 IDELR 76 (OSERS/OSEP 2016).

26. "Children with disabilities may only be removed from the regular educational environment when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR § 300.114(a)(2)(ii). "[B]ehavioral supports might include meetings with a behavioral coach, social skills instruction, counselor, or other approaches." *Letter to Carroll*, 68 IDELR 279 (OSEP 2016).

27. The Student entered kindergarten at Browns Point with an IEP and BIP developed during preschool. Within his first few days at Browns Point, the Student was already taking off his clothes, swearing, kicking over a chair, banging his head and threatening to harm himself. The Student's behaviors were significant enough that in October, the District hired a one-to-one paraprofessional for the Student and enlisted the help of a District behavioral specialist. In October, the Parents also provided the District with a letter and evaluation from UW diagnosing the Student with ASD and setting out numerous recommendations for both home and school. When the Parents provided these documents to the District, they also requested an IEP meeting. At some point during the fall of 2017, they also requested an FBA.

28. The IEP team did not meet, however, until January 4, 2018. Moreover, when the IEP team met, it reviewed an assessment of the Student's reading, math and writing skills and did not

address his behaviors. The IEP team recognized that the Student had been diagnosed with ASD by UW, but concluded that it could not change the eligibility category at that point. The District has provided no legal authority for this assertion. Although the PWN notice recognizes that the Student “was observed as having egregious behavior compared to same age/grade peers, i.e., inability to focus, leaving the classroom at will and yelling and screaming profanity down the halls,” the IEP team did not discuss any of the recommendations in the UW evaluation with respect to school at that time, and did not make any changes to the IEP.

29. After the Student was suspended from school on January 25, 2018, the District finally proposed an FBA. Despite the fact that the behavioral specialist had been gathering data about the Student’s behaviors since September, the FBA was not complete until March 1, 2018, a *period of nearly six months*. The IEP team did not implement a BIP until April 26, 2018, nearly seven months after the District began collecting data on the Student’s behaviors at school, at which point only 35 school days remained in the school year.

30. The District emphasizes that the Student’s IEP was reasonably calculated to enable the Student to receive an educational benefit when it was developed in April 2017. At that time, the Student had not been diagnosed with Autism. As a result, I conclude that the fact that the April 2017 IEP did not contain Autism-specific behavioral interventions does not render the IEP inappropriate.

31. The issue, however, is not limited to whether the District developed an appropriate IEP, but whether the District *provided* an appropriate IEP during the 2017-2018 school year to provide the Student with appropriate supplemental aids and services. In other words, the question includes whether the District responded appropriately as the Student’s behavioral needs changed and after the Parents provided it with the UW evaluation to provide the Student with an appropriate IEP. The evidence establishes that although the District provided a one-to-one paraprofessional for the Student in October, 2017, it did not update the Student’s IEP at that point or in January, 2018 to provide appropriate supplemental aids and services to address the Student’s behaviors. In addition, although the District was collecting data concerning the Student’s behaviors for most of the year, it did not incorporate that data into an FBA and BIP until well into the second half of the school year. When the BIP was implemented, only 35 school days remained. As a result, although staff at Browns Point were “trying anything and everything” in terms of behavioral interventions throughout the school year, in the absence of an FBA and BIP, those efforts were not data-driven or evidence-based.

32. The Parents point to the effectiveness of ABA therapy for children with high-functioning Autism in general and contend that the District should have provided one-to-one support from an RBT under the supervision of a BCBA. School districts are generally entitled to deference in deciding what programming is appropriate for a student. *J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1031 n.5 (9th Cir. 2009). For that reason, IEPs need not address the instructional method to be used unless a specific methodology is necessary for a student to receive an appropriate education. *See id.* at 1039; see also *Department of Education, Analysis of Comments and Changes to IDEA Regulations*, 71 Fed. Reg. 46665 (2006) (nothing in IDEA requires IEP to include specific methodology; methods may be addressed in IEP if necessary for child to receive FAPE). Even the UW evaluation, however, did not specify the use of ABA in the school, in contrast to its specific recommendation for ABA in the home setting. At the time of the due process hearing, the Student had not actually begun to receive in-home ABA therapy. Ms. Murphy testified that they were still looking for an RBT to work with the Student. Accordingly, the record is not sufficient

to establish that ABA therapy is, in fact, effective for this Student. There is no evidence in the record that ABA was the *only* methodology that could have served the Student's needs. Even if ABA therapy would have been effective for the Student, the IDEA does not require a school district to use a specific methodology, such as ABA, unless that methodology is the only methodology that will provide the Student a FAPE. The Parents have not proven that only ABA interventions could have provided the Student a FAPE. Accordingly, the Parents have not demonstrated that the 2017-2018 IEP was not reasonably calculated to provide an educational benefit because the District was not required to use the Parent's preferred methodology.<sup>18</sup>

**Issue (b)(ii):** *Whether the District violated the IDEA and denied the Student a FAPE by failing to implement the Student's IEP during the 2017-2018 school year by repeatedly isolating and segregating the Student from his peers.*

33. The Parents argue that the Student's seating arrangement in January 2018 was overly restrictive because the Student could not meaningfully interact with his peers or see his teacher when she was in front of the class providing instruction. The Parents further contend that although the Student's IEP for the 2017-2018 school year required him to be in the general education setting 94.17 percent of the time, his participation in the general education classroom significantly decreased over the course of the year as he spent more and more time in the LRC classroom and sleeping during the school day.

34. A school district's obligation to provide the special education and related services provided in a student's IEP does not require "perfect adherence to the IEP . . ." *Van Dyun v. Baker Sch. Dist.* 5J, 481 F.3d 770, 779 (9<sup>th</sup> Cir. 2007). Failure to implement an IEP constitutes a denial of FAPE only "when the services provided to a disabled child fall significantly short of those required by the IEP," so as to constitute a material failure. *Id.* at 773.

35. The Parents have not proven that the Student's seating arrangement constituted a material failure to implement his IEP because it isolated him or segregated him. The Student's desk was approximately four feet away from the other students' desks, and there is no testimony that this distance or the arrangement interfered with his ability to interact with the other students or the teacher. Ms. Boitano's testimony established that because the students were in kindergarten, they moved around a lot, and the Student only spent about 25% of his time at the desk. Moreover, the arrangement was limited to three weeks because Ms. Horner asked the general education teacher to change it when she learned that the Mother was upset. Finally, although the Student was facing away from the teacher on the day that the Mother visited, Ms. Boitano sat with the Student each day. I therefore gave more weight to her testimony, which established that the Student could see the teacher as long as he did not have his head down on the desk. Given the limited timeframe for this arrangement, the Parents have not proven that it constitutes a material failure to implement the Student's IEP.

36. The Parents acknowledge that the Student was not excluded from school for disciplinary reasons for more than 10 days during the 2017-2018 school year. PB23. Accordingly, to the extent

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<sup>18</sup> During a prehearing conference on July 26, 2019, the Parents' counsel indicated that other aids and services besides ABA aids and services could be at issue, but she could not specify what those were. I advised her that the Parents could seek to amend the issue statement to reflect those aids and services. Second Consolidated Prehearing Conference, p.3, n.3. Subsequently, the Parents did not amend the issue statement to allege that the District had failed to provide other aids and services.

that the Parents' claim that the Student was repeatedly isolated and segregated relies on out-of-school discipline, that claim is without merit.

37. The Parents also argue that District staff encouraged the Student to spend increasing amounts of time in the LRC, despite the fact that the Student initially did not like to go to the LRC. The record shows that Ms. Boitano worked on teaching the Student to view the LRC as a reward so that he would feel that he had a safe place to go. This translated to the Student spending increasing amounts of time in the LRC, especially as the year progressed and his behaviors escalated. Finally, the record establishes that the Student often slept one or two hours each day, and some of that time sleeping was in the LRC. Over the course of just one week, this amounts to 5-10 hours. Accordingly, the Parents have shown that the District, by encouraging the Student to spend increased time in the LRC and by allowing him to sleep one or two hours per day, failed to implement his IEP. Moreover, a reduction of 5 to 10 hours per week in the general education classroom significantly shortened the time provided by the IEP and therefore constitutes a material failure to implement the Student's IEP. *Van Dyun*, 481 F.3d at 770.

38. Accordingly, the Parents have shown that the District's failure to implement the 2017-2018 IEP violated the IDEA and denied the Student a FAPE.

***Issue (b)(iii)(A):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to educate the Student in his least restrictive environment (LRE) during the 2018-2019 school year by not providing appropriate supplemental aids and services, namely, one-to-one behavior support provided by a skilled behavior technician under supervision of a BCBA, to make a placement in the Student's neighborhood school successful.*

39. The IDEA requires that:

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

20 U.S.C. §1412(a)(5)(A). This obligation to educate students in their least restrictive environment (LRE) is also codified at WAC 392-172A-02050. In the Ninth Circuit, the seminal case on LRE is *Sacramento Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994), *cert denied*, 114 S. Ct. 2679 (1994). *Rachel H.* approved consideration of the following four factors for determining a student's LRE:

(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student had on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.

*Id.* at 1404.

40. Moreover, WAC 392-172A-02060(3) provides that "Unless the IEP of a student requires some other arrangement, the student shall be educated in the school that he or she would attend

if nondisabled. In the event the student needs other arrangements, placement shall be as close as possible to the student's home."

41. An IEP team's decision where to place a student on the LRE continuum is reviewed using the same "snapshot" analysis to determine the appropriateness of an IEP; that is to say, a team's LRE decision is analyzed in light of what the team knew or reasonably should have known at the time the team made the LRE decision. *Baquerizo v. Garden Grove Unified Sch. Dist.* 826 F.3d 1179, 1187, 68 IDELR 2 (9<sup>th</sup> Cir. 2016); *Adams*, 195 F.3d at 1149.

42. Moreover, as previously discussed, OSERS and OSEP recently clarified educational agencies' obligations under the IDEA to provide students with disabilities appropriate behavioral interventions and supports necessary for them to receive FAPE in the LRE. As the letter explains:

It is incumbent upon IEP teams to implement IDEA's procedural and substantive requirements to ensure that children with disabilities receive the behavior supports they need to enable them to advance appropriately toward attaining the annual goals specified in their IEPs and to make progress in the general education curriculum. . . .A failure to implement these procedural requirements or provide needed behavioral supports to a child with a disability could result in the child not receiving a meaningful educational benefit, and therefore constitute a denial of FAPE and/or a denial of placement in the LRE (i.e. an unduly restrictive placement).

*Letter to Colleague*, 68 IDELR 76 (OSERS/OSEP 2016).

43. The Parents contend that the District failed to provide the Student with appropriate supplemental aids and services to enable him to make a placement in his neighborhood school successful.

44. At the June 13, 2018 IEP meeting, the IEP team placed the Student in the NEST program because they believed that program, which was specifically designed to meet the needs of students with high functioning Autism, would best support the Student. This decision followed review of the UW evaluation and other evaluations, along with consideration of whether the Student's needs could be met at Browns Point. It also followed extensive discussion and debate about the available placement options, with a focus on what option would provide the Student with behavioral support yet also afford him interaction with his typically developing peers. Based on the information available at that time, the IEP team's decision that the NEST program was the Student's LRE was appropriate. Therefore, the District did not violate the LRE mandate by placing the Student in the NEST program to start the 2018-2019 school year.

45. As the year progressed, the IEP team amended the Student's IEP in September 2018, January 2019, and February 2019. In September 2018, the IEP team increased the Student's time in the general education setting because he was off to a great start. The IEP continued to provide the Student with a one-to-one paraprofessional and there is no evidence in the record to suggest the Student required additional behavioral supports in order to attain an educational benefit at that time.

46. On January 18, 2019, the IEP team reviewed the Student's IEP and implemented a new BIP. Although the Parents contend that one-to-one support by an RBT under the supervision of a

BCBA would have enabled the Student to remain at Browns Point and to succeed there, the Student had not received ABA as of the time of the due process hearing, and there is no evidence in the record that ABA is an effective methodology for him. Accordingly, the record does not support the claim that one-to-one support from an RBT under the supervision of a BCBA would have allowed the Student to be successful at Browns Point. Moreover, as discussed previously, the IDEA does not require a District to use a specific methodology unless there is evidence in the record that that is the only methodology that will be effective. *J.L. v. Mercer Island School Dist.*, supra, at 1031 n.5, 1029.

47. The IEP team convened again on February 21, 2019, and decided to provide an additional 30 minutes per day of social / emotional / behavioral SDI. Again, while the Parents may have believed that the District should have provided an RBT, the record does not show that this would have been effective for the Student or that it would have enabled him to succeed at Browns Point. The evidence shows that the District was taking steps to review and revise the Student's IEP to address the Student's changing needs in accordance with WAC 392-172A-03110(3).

48. Accordingly, the Parent has not shown that the District violated the IDEA and denied the Student a FAPE by failing to educate the Student in his LRE during the 2018-2019 school year by not providing appropriate supplemental aids and services, namely, one-to-one behavior support provided by a skilled behavior technician under the supervision of a BCBA, to make a placement in the Student's neighborhood school successful.

***Issue (b)(iii)(B):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to educate the Student in his least restrictive environment (LRE) during the 2018-2019 school year by placing the Student in a specialized program, called NEST, that was generally inappropriate because staff was not appropriately trained to support the Student in furtherance of his accessing his FAPE.*

49. The Parents, having alleged that the staff in the NEST Program were not appropriately trained to support the Student, bear the burden of proof on this issue. The NEST teacher, Ms. Elder, did not testify at the hearing, but the record supports a finding that she had ABA training and significant experience in working with children with Autism. Mr. Stephens is not trained as an RBT, but he took two Autism classes offered by the District and was supervised by Ms. Elder. Finally, although the record establishes that the staff at Grant ultimately was not able to provide sufficient support to the Student, as discussed subsequently, that fact, without more, does not establish that the NEST staff was inappropriately trained.

***Issue (b)(iii)(C):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to educate the Student in his least restrictive environment (LRE) during the 2018-2019 school year by placing the Student in a specialized program, called New NEST, that was too restrictive and generally inappropriate because staff was not appropriately trained to support the Student in furtherance of his accessing his FAPE.*

50. The principal and school psychologist at Grant both admitted that the five-week trial period in the New NEST, became a *de facto* self-contained program. They further admitted that the New NEST did not end after five weeks, but was still in effect when the Student was expelled on May 28, 2019, and then declined to return to school for the remainder of the year. Finally, they admitted that the District did not amend the Student's IEP to reflect the five-week trial period because, *by "directive of the District,"* it was considered a change in setting, rather than a change in

programming. This is disingenuous given that Ms. Elder's prepared schedule for the Student's very first day in the New NEST on March 25, 2019, called for him to spend no time in the general education setting. Even if this was only a one-day transition, the testimony of Mr. Blausner and Mr. Stephens establishes that the Student later had days when he spent no time at all in the general education setting. Moreover, the IEP team should have made this decision, rather than the District.

51. In sum, the evidence proves that after the District placed the Student in the New NEST, his time in the general education setting declined significantly, to the point that on some days, he spent no time in his general education classroom. The District argues that "no one with sufficient education, training, and experience in education who was knowledgeable about the Student's education needs, and observed him in a school setting testified that the five-week trial was inappropriate." DB p30. This statement is inconsistent with the credible testimony of the principal and the school psychologist that although the goal was always that the Student would continue to spend 82% of his time in the general education classroom, the New NEST placement became a *de facto* self-contained placement. The Student's IEP team never determined that the Student required such a restrictive educational placement.

52. Even if the District did not intentionally set out to change the Student's educational placement to one that sometimes involved zero time in the general education setting, it did. Under the factors set out in *Rachel H.*, it is clear that the New NEST was not the Student's LRE. With respect to the first factor, which focuses on the steps a district has taken to accommodate the child in a regular classroom, the New NEST was a *de facto* self-contained classroom, meaning that the District was no longer taking any real steps to accommodate the Student in his general education classroom. The second and third factors focus on whether a student will receive an educational benefit from regular education and the student's experience in regular education. Here, although the Student's behaviors interfered with his ability to receive an educational benefit, the educational benefit he would have received in the general education classroom far exceeds the benefit he received from the New NEST, where he spent a good portion of his time sleeping and ended up feeling traumatized. Finally, although the Student's behaviors impacted the teacher and students in the general education classroom because they were sometimes evacuated when he was in an escalated state, that impact was not significant enough to warrant placing the Student in a *de facto* self-contained classroom.

53. Notably, the District, and not the Student's IEP team, made the decision to place the Student in this very restrictive placement. By placing the Student in the New NEST program, which was not his LRE, the District violated the LRE mandate set forth in the IDEA. 20 U.S.C. §1412(a)(5)(A); WAC 392-172A-02050.

***Issue (b)(iii)(D), (E) and (F): Whether the District violated the IDEA and denied the Student a FAPE by failing to educate the Student in his least restrictive environment (LRE) during the 2018-2019 school year by: excessively and inappropriately excluding the Student from school and removing the Student from his LRE when disciplining the Student for manifestations of his disability; failing to revisit the Student's behavior intervention plan (BIP) following the Student's exclusion from school for a manifestation of his disability, and failing to meaningfully revise the Student's educational program in response to the Parents' request for a more robust FBA and behavioral support; and not providing the Student with an interim alternative educational setting or other remedial supports after excluding the Student from school in excess of 10 days and***

*finding that the behavior that led to exclusionary discipline was a manifestation of the Student's disability.*

54. Under WAC 392-172A-05145(2)(a), a school district may remove a special education student from his or her placement for up to 10 school days per year to the extent that a general education student would be subject to the same rules. After a special education student has been removed from his or her placement for ten school days in the same school year, and the removal constitutes a change of placement under WAC 392-172A-05155, the student must continue to receive educational services during any subsequent days of removal. WAC 392-172A-05145(3).

55. WAC 392-172A-05155 provides that a change of placement occurs if the removal is for more than 10 consecutive days or the Student has been subjected to a series of removals that constitute a pattern. The school district "determines on a case-by-case basis whether a pattern of removals constitutes a change of placement." WAC 392-172A-05155.

56. Under WAC 392-172A-05146:

(1) Within ten school days of any decision to change the placement of a student eligible for special education because of a violation of a code of student conduct, the school district, the parent, and relevant members of the student's IEP team (as determined by the parent and the school district) must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:

(a) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or

(b) If the conduct in question was the direct result of the school district's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the student's disability if the school district, the parent, and relevant members of the student's IEP team determine that a condition in subsection (1)(a) or (b) of this section was met.

If the school district, the parent, and relevant members of the student's IEP team determine the conduct was a manifestation of the student's disability, the school district must take immediate steps to remedy those deficiencies.

57. If the Student's conduct is found to be a manifestation of his or her disability, the IEP team must either:

(1) Conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

(2) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(3) Except in special circumstances as described in WAC 392-172A-05149, return the student to the placement from which the student was removed, unless the parent and the school district agree to a change of placement as part of the modification of the behavioral intervention plan.



WAC 392-172A-05147.

58. The Parents argue that the District failed to meaningfully revise the Student's education program after disciplining him in response to his behavioral issues. The Parents do not identify which disciplinary action or actions is at issue. The Student was not disciplined for more than 10 days in kindergarten. In addition, the Student's first expulsion during the 2018-2019 school year in March 2019, was for 7.5 days. Accordingly, neither disciplinary action resulted in a change in placement, meaning WAC 392-172A-05147 does not apply.

59. In May 3, 2019, the Student was emergency expelled from school and he was excluded from school for 11 days. The District held a manifestation determination meeting on May 6, 2019, as required by WAC 392-172A-05146. The Student's conduct was found to be a manifestation of his disability. Accordingly, under WAC 392-172A-05147(1), the District was required to conduct an FBA unless it had already done so. Here, the District already had an FBA. Notably, the plain language of this provision does not contain a requirement to review, revise or conduct a new FBA. Under WAC 392-172A-05147(2), if a BIP is in place, the District must review it and modify it as necessary. Because a BIP was in place, the District was required to review it. The Parents, however, did not elicit any testimony as to whether the District reviewed or did not review the BIP at this point. Accordingly, the Parents have not met their burden of proof on this issue.

60. The Parents also argue that because the Student was expelled for more than a total of 10 days, the District was required to provide the Student with an interim educational setting. Again, the Parents have provided no evidence concerning what services were, or were not, being provided when the Student was excluded from school. Accordingly, the Parents have not met their burden of proof on this issue.

61. Finally, the Parents contend more generally that "expulsion became the District's routine response" to the Student's behavior, which "contradicts the preference of the IDEA not to use expulsion to penalize students with disabilities and likely harmed [the Student] by making him feel stigmatized and isolated from his school and peers." PB21. To the extent that the Parents are claiming that the District was punishing the Student *because* of his disability, the record does not support this claim. Moreover, as set forth above, the rules pertaining to the use of exclusionary discipline for special education students are detailed and well-defined. Here, the Parents raise a general claim that the District's reliance on exclusionary discipline was excessive, but they have not identified a violation of the disciplinary rules other than the arguments already addressed above. Nor have they identified any other appropriate authority. Accordingly, the Parents cannot prevail on this claim.

***Issue (b)(v):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to perform an evaluation before placing the Student in the NEST program in September 2018, thereby failing to afford the Parents a meaningful opportunity to participate in the decision-making process;*

62. The evidence establishes that the District evaluated the Student on March 20, 2018, which was only three months prior to the IEP team's decision to place the Student in the NEST program. Moreover, the March 20 evaluation included the area of social / emotional / behavioral, which is the primary area of concern in this case. The evidence does not support the Parents' contention that the decision to place the Student in the NEST was based on "an evaluation that the Parents paid for in 2017 and an FBA that had already proven to be inadequate." Nor does the evidence

support the Parents' claim that the District predetermined the Student's placement and did not consider the Parents' views. To the contrary, the evidence shows that the team considered the Student's placement issue during the April 2018 IEP meeting, but decided not to make a decision until June so that they would have more time to assess the Student's behaviors. During the June meeting, the team considered the UW evaluation and other evaluations, as well as all the placement options available to the Student, and debated the appropriate placement. The Mother was present at this meeting and had an opportunity to voice her position. "[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified Sch. Dist.*, 239 Fed App'x 342, 344 (9<sup>th</sup> Cir. 2007). The Parents have not shown that the District predetermined the Student's placement or refused to consider alternatives.

***Issue (b)(vi)(A)(i and ii):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to afford the Parents an opportunity to participate in meetings by providing affirmative misinformation about the Student's placement options, the continuum of services available, and the appropriateness of his current educational programming as follows: Providing misinformation during the 2017-2018 and 2018-2019 school years by stating: that based on the LRE continuum, the Student could only be served in the NEST program during the 2018-2019 school year and that Grant Elementary would be a temporary placement.*

63. "Compliance with the IDEA procedures is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide meaningful parental participation are particularly important." *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115,1129 (9<sup>th</sup> Cir. 2003). Accordingly, "procedural inadequacies that result in the loss of educational opportunity . . . or seriously infringe the parents' opportunity to participate in the IEP formulation process . . . or that caused a deprivation of educational benefits . . . clearly result in the denial of FAPE." (Citations omitted.) *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 892 (9<sup>th</sup> Cir. 2001).

64. The record does not support a finding that the IEP team told the Parents the NEST program was the only place that could serve the Student's needs. The evidence establishes that the team considered numerous placement options and that members of the team held different views as to what constituted the most appropriate placement for the Student. Ultimately, with the exception of the Parents and Dr. Harper, team members believed that the NEST program was the most appropriate placement for the Student and would best serve his needs. This evidence undermines the Mother's assertion that she was told that the NEST was the *only* placement that could serve the Student's needs. Similarly, the Mother's testimony establishes that Ms. Almlie, in an attempt to comfort the Mother, explained that the placement at Grant wasn't "necessarily permanent." The Mother interpreted this to mean that placement at Grant was only temporary, although that is not what Ms. Almlie said. Moreover, the Mother's acknowledgement that Ms. Almlie was attempting to comfort her undermines the suggestion that Ms. Almlie was deliberately feeding her misinformation. The Parents have not established that the District violated the IDEA by providing misinformation, and thereby failing to afford the Parents an opportunity for meaningful participation.

***Issue (b)(vi)(B)(i through iv):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to afford the Parents an opportunity to participate in meetings by providing affirmative misinformation about the Student's placement options, the continuum of services available, and the appropriateness of his current educational programming as follows: Providing*

*misinformation during the 2018-2019 school years by stating: that the Student did not elope from the school campus in January 2019; that the Student would be in the isolated New NEST program during a temporary trial program; that the Student was adequately included in the general education setting while he was in the New NEST program; and that the Student only left the general education setting to go to the New NEST program when it was his choice to do so.*

65. During the due process hearing, Mr. Blausner and Mr. Stephens readily admitted that the Student had escaped, or eloped, on two occasions in January 2019. The Mother contends that the District denied that the incident described by the Student occurred. Even if this is true, however, the fact remains that two District employees readily admitted that the Student had eloped. Similarly, because the evidence establishes that the New NEST was intended to be a temporary trial, the fact that District employees stated it would be a temporary trial does not constitute misinformation, but rather a poor assessment of the programs probable success.

66. With respect to the Student's time spent in the general education setting, however, the record establishes that the Mother made numerous unsuccessful attempts to obtain information about the number of minutes that the Student was spending in the general education setting. As a result, the Parents lacked accurate information about the Student's education minutes, which is an essential component of meaningful participation. This is particularly troubling because the hearing record establishes that at times, the Student was spending zero percent of his time in the general education setting.

67. The evidence further establishes that when the Student was in the "red zone," or had escalated behaviors, he was not permitted to go to the general education classroom. This contradicts statements informing the Parents that the Student only went to the New NEST when it was his choice to do so. Similarly, Ms. Elder's schedule for March 25, 2019, indicated that staff intended for him to spend no time in general education. Even if this was only a temporary schedule, it contradicts statements that the Student's attendance in the New NEST was purely voluntary.

68. Accordingly, the Parents have shown that the District failed to provide any information with respect to the Student's general education minutes and his participation in the New NEST. Coupled with the fact that the District placed the Student in the New NEST without changing his IEP, these procedural violations infringed on the Parents' opportunity to participate in the IEP process and therefore denied the Student FAPE. *Amanda J.*, 267 F.3d 892.

***Issue (b)(vii):*** *Whether the District violated the IDEA and denied the Student a FAPE by failing to hold IEP meetings during the 2017-2018 and 2018-2019 school years with all necessary team members in attendance.*

69. Under WAC 392-172A-03095(1), a student's IEP team must include:

- (a) The parents of the student;
- (b) Not less than one general education teacher of the student if the student is, or may be, participating in the general education environment;
- (c) Not less than one special education teacher of the student, or where appropriate, not less than one special education provider of the student;
- (d) A representative of the public agency who:

- (i) Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students eligible for special education;
- (ii) Is knowledgeable about the general education curriculum; and
- (iii) Is knowledgeable about the availability of resources of the school district.
- (e) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in (b) through (e) of this subsection;
- (f) At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and
- (g) Whenever appropriate, the student.

70. The Parents contend that the general education teacher who was assigned to teach the Student at Browns Point did not attend the April 2017 IEP meeting, which was during the 2016-2017 school year. The issue statement, to which the Parents agreed, is limited to whether the District held IEP meetings during the 2017-2018 and 2018-2019 school years with all necessary team members in attendance. Because the Parents did not raise this claim, it is not addressed.

71. The Parents also claim that Ms. O'Keefe did not attend all meetings. The evidence establishes that she spent a significant amount of time working with the Student's team to provide behavioral interventions during the 2017-2018 school year. During that school year, Ms. O'Keefe did not attend all IEP meetings, but she did attend the March 1 meeting to review the FBA, the March 20 reevaluation meeting, and the April 19, 2018 annual IEP meeting. She also recalled attending the meeting to implement the BIP, although there is no attendance sheet for that meeting. This evidence establishes that Ms. O'Keefe was present when necessary to "interpret the instructional implications of evaluation results" as required by WAC 392-172A-03095(1)(e). During 2018-2019, Ms. O'Keefe served only as a consultant who had no direct contact with the Student or Parents. She admitted that she did not attend any IEP meetings.

### **Summary of Violations**

72. WAC 392-172A-03095 does not require that everyone who has spent a significant amount of time working with a student, directly or indirectly, is a necessary IEP team member. The Parents have not met their burden to show that the District failed to have all necessary IEP team members in attendance for the Student's IEP meetings during the 2017-2018 and 2018-2019 school years.

73. The District violated the IDEA and denied the Student FAPE by failing to:

- i. implement the Student's IEP during the 2017-2018 school year by isolating the Student from his peers with increased use of the LRC and excessive time sleeping;
- ii. failing to educate the Student in his LRE during the 2018-2019 school year by placing the Student in a specialized program, called the New NEST, that was too restrictive;
- iii. Failing to provide the Parents an opportunity to participate in meetings by failing to provide information about the Student's general education minutes when he was in the New NEST placement, and by stating that the Student only left the general education setting to go to the New NEST when it was his choice to do so.

The Parents have not otherwise proven a denial of FAPE.

74. 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.<sup>19</sup>

### **Remedies**

75. When a school district has denied a child a FAPE in violation of the IDEA, an ALJ may award appropriate relief, which includes an order of compensatory education. 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), cited with approval in *R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9<sup>th</sup> Cir. 2011). 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).

76. Because compensatory education is an equitable remedy, a tribunal must consider the equities existing on both sides of the case. *Reid*, 401 F.3d at 524. Both parties behaved equitably in this case. The Mother, in particular, worked collaboratively and cooperatively with District staff, and she acknowledged that District staff worked hard to support the student. District staff committed the IDEA violations discussed herein, but did not engage in inequitable conduct toward the Parents above and beyond that. There are no equitable factors to consider that would alter the relief to which the Parents are otherwise entitled.

77. The Parents have requested compensatory education in the form of one calendar year at Gersh Academy from September 2019 to September 2020, or, in the alternative, a 30 hour per week ABA program for up to 40 weeks, or 1200 hours, to be delivered in the Student's home, community or in a District placement in which the Student spends at least 80% of his time in a general education setting at one of the Student's neighborhood schools, namely, Crescent Heights, Browns Point or Northeast Tacoma. The Parents have also requested a prospective placement in the Student's neighborhood school with one-to-one behavior support provided by a skilled behavior technician under the supervision of a BCBA; alternatively, prospective placement at Gersh.

78. A review of the evidence in the record as a whole compels the conclusion that Student did not receive the educational benefit that he would have received, had the District provided him with the special education services he required throughout the 2017-2018 school year and from March through June of 2019. Accordingly, the Parents are entitled to an award of compensatory education.

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<sup>19</sup> The Parents' closing brief raises for the first time the claim that the Student's "2017-2018 IEP was not reasonably calculated to provide him an educational benefit when the parents' request for half-day kindergarten to accommodate a disability was improperly denied." Because the Parents did not raise this issue in their hearing request, it is not considered. WAC 392-172A-05100(3). Even if this issue had been properly raised, however, the Parents have not met their burden to prove that the Parents' request for half-day kindergarten was improperly denied.

79. As discussed previously, the Parents have not proven for purposes of establishing a violation of the IDEA that ABA therapy was the only methodology that would serve the Student's needs. For purposes of determining an appropriate remedy, however, the testimony in the record establishes that the District has not been able to provide the Student with the behavioral services he requires and that the most recent placement, in the New NEST, was traumatic for the Student. In addition, the evidence in the record, particularly the testimony of Dr. Enns and the UW evaluation, establish that ABA therapy would be appropriate for the Student. Accordingly, it is appropriate to award ABA therapy as compensatory education and as a prospective placement.

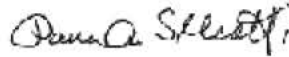
80. Accordingly, the Parents are entitled to compensatory education and a prospective placement in which the Student spends at least 80% of his time in the general education setting in the Student's neighborhood school, namely Crescent Heights, Browns Point or Northeast Tacoma, with one-to-one support by an RBT for 30 hours per week under the supervision of a BCBA. These services may be provided by appropriately credentialed District staff or other providers contracted by the District. The District may contract with L.E.A.P.S., but is not required to do so. The number of hours stated above is provided throughout the remainder of the 2020 school year as both compensatory education and as a prospective placement.

81. The Parents seek reimbursement for the amount paid to a prior attorney to pursue a Citizen Complaint with OSPI, the costs of the UW evaluation, and the costs of providing counseling to the Student. With respect to the costs associated with the Citizen Complaint, the Parents contend that they are not seeking an award of attorney's fees, but rather reimbursement for costs. The District contends that an ALJ does not have the authority to award attorney's fees in a due process hearing, even if those fees are labeled as a reimbursement item. Because the Parents have not offered any legal authority to support an award of attorney's fees as a form of reimbursement in the context of a due process hearing, this request is denied. The costs of the UW evaluation are also denied because the Parents sought the evaluation before the timeframe for the actions challenged in this case. Finally, while the Parents have requested reimbursement for costs associated with counseling, they have not provided any specific information related to that request, nor have they provided any argument as to how this remedy relates to the District's IDEA violations. Accordingly, these reimbursement requests are denied.

### **ORDER**

1. The District's evaluation of the Student conducted on December 20, 2018, was not appropriate. The Parents are entitled to an independent educational evaluation, consisting of a functional behavioral assessment, at District expense.
2. The District violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education as set forth in Conclusion of Law 73.
3. The Parents have not otherwise established that the District denied the Student a free appropriate education.
4. As a remedy, the District shall place the Student in his neighborhood school with one-to-one support by an RBT as set forth in Conclusion of Law 80 above.
5. The Parents' remaining requested remedies are denied.

Signed at Seattle, Washington on the date of mailing.



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Pamela Meotti  
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 this 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. *lan*

Parents



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