STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
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September 17, 2015

Parents
[redacted]
Issaquah, WA 98027

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In re: Issaquah School District
OSPI Cause No. 2015-SE-0066X
OAH Docket No. 07-2015-OSPI-00125

Dear Parties:

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

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

Sincerely,

Michelle C. Mentzer
Administrative Law Judge

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

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

IN THE MATTER OF:	OSPI CAUSE NO. 2015-SE-0066X
	OAH DOCKET NO. 07-2015-OSPI-00125
ISSAQUAH SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Issaquah Washington, on September 1, 2, and 9, 2015. The Parents of the Student whose education is at issue[1] appeared and were represented by Karen Pillar, attorney at law. The Issaquah School District (District) was represented by Christopher Hirst, attorney at law. Court-certified Korean interpreters Vania Hamm and Grace Yi assisted the Mother at the hearing. The following is hereby entered:

STATEMENT OF THE CASE

The District filed a due process hearing request (complaint) on July 14, 2015. A prehearing conference was held on July 31, 2015. A prehearing order was issued on August 4, 2015.

The due date for the written decision is ten (10) school days after the due process hearing is completed. *See* Prehearing Order of August 4, 2015; Washington Administrative Code (WAC) 392-172A-05160(3)(a); 34 Code of Federal Regulations (CFR) §300.532. The hearing was completed and the record of the hearing closed on September 9, 2015. Ten school days thereafter is September 23, 2015. The due date for the written decision is therefore September 23, 2015.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J-1 through J-8;
Parent Exhibits: P-1 through P-3; and
District Exhibits: D-1 through D-16.

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

Traci Brewster, District teacher;

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

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Neil Lasher, District security officer;
Andrea McCormick, District school principal;
Susan Wolever, District director of secondary special education;
Melissa Madsen, District executive director of special services;
Laura Asbell, Issaquah police officer;
Delton Young, Ph.D., psychologist;
Jonathon Lee, mental health counselor, Asian Counseling and Referral Service;
The Father of the Student;
Chester Samuel Clare, Issaquah resident;
Adam Wallas, manager, Overlake Specialty School; and
Kelsey Farr, program supervisor, Northwest School of Innovative Learning (NW SOIL).

ISSUE

Whether the ALJ should enter an order changing the Student's educational placement to an appropriate interim alternative educational setting (IAES) for up to forty-five (45) school days in accordance with WAC 392-172A-05160; *see also* 34 CFR §300.532.

See Prehearing Order of August 4, 2015.

FINDINGS OF FACT

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

2. The Student is 17 years old and was in 10th grade during the 2014-2015 school year. He lives with his parents and younger siblings within the Issaquah School District (District). The Student attended part of the due process hearing but did not testify.

3. The Student's Mother is Korean and his Father is Caucasian. The family lived in Korea and the United States at various times when he was young. Beginning when the Student was in 4th grade, the family has resided in the U.S. The Student experienced social and emotional difficulties in Korean schools and in his transition back to the U.S., in part due to his bi-racial status. Severe medical problems of a younger sibling have also been a source of stress for the Student. J-2:2-3.[2] In middle school, the school psychologist recommended counseling for the Student's parents at Asian Counseling and Referral Services (ACRS). Testimony of Wolever.

4. The Student had significant disciplinary and truancy problems during middle school in the District, as well as poor homework completion and poor grades. His discipline record included two emergency expulsions, both converted to long-term suspensions. J-2:3; J-3. His absenteeism was addressed with schedule adjustments to allow late starts, "fresh starts," counseling, incentives if he attended school for a full week, and positive comments about how

[2] References to the exhibits are in the following format. "J-2:2-3" refers to Joint Exhibit 2, at pages 2 - 3.

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pleased teachers were to see him in class. J-3:3, 18. In 6th grade, the Student was required to obtain an emergency psychiatric evaluation for an alleged suicidal statement in order to return to school. A peer had reported the statement to school staff. The Student was out of school for six weeks awaiting the results of the evaluation done at Children's Hospital. J-2:3; J-3:15.

5. In 7th grade, the Student had a lighter at school and was burning paper and other items. J-3:18. A search of his backpack found a Humanities journal containing entries threatening to burn the middle school vice principal and the vice principal's car. The Student then repeated the threat to his counselor at Friends of Youth. The counselor consulted with his supervisor and then reported the Student's threat to the police. The Student was suspended and then expelled. The Student was referred for a psychiatric evaluation, which was completed at ACRS. The Student and his Father shared with the ACRS psychiatrist their belief that both the 6th grade and the 7th grade incidents were misunderstood and others had overreacted. The Student denied ever having suicidal or homicidal ideation, and denied that he would actually try to do the things written in his journal. J-2:2-3. The ACRS psychiatrist diagnosed Disruptive Behavior Disorder Not Otherwise Specified, and listed a number of other disorders that should be ruled out. J-2:5. The Student returned to school thereafter. J-3:3. Toward the end of 7th grade, in May 2012, truancy proceedings were filed in juvenile court under the BECCA process. J-3:18.

6. At the beginning of 8th grade, in September 2012, the District conducted an initial evaluation of the Student for special education.[3] He was found eligible under the category of emotional behavioral disability (EBD). The evaluation team recommended specially designed instruction in reading and writing, in addition to behavior. The discrepancy between the Student's cognitive scores and his reading comprehension and writing scores led to a finding of a learning disability in these areas. J-3:4, 23.

7. Early in 10th grade, in October 2014, the District conducted the Student's annual IEP revision. The IEP noted that the Student's behavior had greatly improved in high school over middle school. He had also made progress in reading and writing in high school, so that he was spending more time in general education classes and less time in special education. Thus far in 10th grade, there was also improvement over 9th grade in terms of cooperation and engagement in class. J-4:8-9; P-2.

8. The October 2014 IEP, which is still in effect, provides that 86% of the Student's time will be spent in the general education setting, with 40 minutes per day of special education in reading and writing (20 minutes each), plus ten minutes per day of special education in behavior. J-4:17. The IEP has two annual goals in behavior: to improve assignment completion from less than 40% to at least 60% (passing) in all classes, and to improve attendance from less than 40% to 80% of school days. Progress on all annual goals is to be reported each semester. J-4:12. The IEP does not include a behavior intervention plan (BIP). It includes a number of accommodations (J-4:14), but does not include the related service of counseling.

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[3] Near the end of the Student's 6th grade year, in June 2011, the District had conducted an initial evaluation for special education. He was found not eligible at that time for either an individualized education program (IEP) or a Section 504 plan. J-2:4; J-3:7.

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9. Truancy continued to be a major problem for the Student in 10th grade, 2014-2015. Early in the year the Student was offered a late-start schedule and/or wake-up calls to help his attendance. He declined these supports and indicated he would be able to attend without them. J-4:7. It appears from his disciplinary record that after a series of disciplinary actions related to attendance, a BECCA proceeding for truancy was initiated on April 17, 2015. P-3.

10. However, the Student had no non-truancy related discipline for most of 10th grade, just as he had none in 9th grade. P-3; Testimony of Father. Then toward the end of 10th grade, on April 16, 2015, the Student was disciplined for theft of a teacher's textbook. On June 2, 2015, he received an in-school suspension for intentionally dumping food down stairs onto the floor below. *Id.* Then on June 10, 2015, a residential burglary involving the taking of a firearm occurred near the high school. The firearm was left outside the home after the homeowner verbally confronted the burglars. The Student and another high school student were arrested for the crime. The Issaquah Police Department has forwarded a recommendation of prosecution for felony residential burglary. The charges are pending with the juvenile prosecutor. D-2; D-3; D-9; D-13; D-14; Testimony of Lasher, Asbell, and Clare.

11. The school was involved with the burglary investigation because the two students were identified by the high school security officer on three security videotapes entering the high school very early in the morning, an hour and a half after the burglary occurred. The two students matched the homeowner's description of the burglars and an investigation ensued. D-3; D-9; D-13; Testimony of Lasher and Asbell. On June 18, 2015, the other student spoke with police. He named the Student as the person who entered the home with him. He claimed the entry into the home and the Student's taking of the firearm occurred for more benign reasons than may appear. D-2:8-9. The Student has declined to speak with police about the burglary since his arrest on June 19, 2015. D-2:11; Testimony of Asbell.

12. On June 29, 2015, the high school principal met with the Father about the burglary allegations. Among other things, they discussed whether the Student was in counseling. The Father said he could not convince the Student to attend counseling since a counselor had disclosed the Student's earlier threats against his middle school vice principal (which occurred in 7th grade). D-10. Because the Student had not yet engaged in conduct posing a direct safety threat to the high school, the principal concluded her meeting with the Father by stating she planned to ask the Student's IEP team to meet during the summer and discuss whether the Student needed counseling services as part of his IEP. D-10.

Emergency Expulsion

13. Then on July 6, 2015, during summer school, the Student turned in a math assignment on which he wrote the following words under an algebraic equation problem: "kill everyone!" J-5:2; D-8; Testimony of Brewster. Above the phrase "kill everyone!" he wrote: "unlimited solution". The math teacher's direct-testimony declaration stated: "Student made a threat to 'kill everyone' as part of what he described as an 'unlimited solution.'" Her declaration stated that the threat was totally unrelated to his work in class. D-8.

14. The math teacher was not questioned about whether the term "unlimited solution" has any algebraic meaning. Testimony of Brewster. Even if it is an algebraic term, the Student may have written it in relation to the math problem, and then used it in a different sense by adding

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the phrase "kill everyone!" The two phrases may or may not be related to one other, so no finding of fact is made as to whether they are. The only finding made is that "kill everyone!" was unrelated to the math problem.[4]

15. The math teacher informed the principal about what the Student wrote, and the principal interviewed the Student about the threat on July 8, 2015. The following exchange occurred during the interview, as recorded in the principal's interview notes:

Q: When I look at your discipline history & hear of weapon theft allegations and then see this, I'm wondering are you angry?
A: I am angry and I hate school. I just get bored easily.
Q: Well do I [have] reason to be concerned?
A: I don't know, do you?
Q: I'm ask[ing] you.
A: Well I'm asking you.
Q: [Student's name], you're not really helping me here.
A: What do you want me to say?

D-1; D-10; Testimony of McCormick. The principal found the Student's interview statements to be very troubling and provocative. She placed the Student on emergency expulsion on the day of this interview. D-4; D-10; Testimony of McCormick.

Manifestation Determination

16. On July 14, 2015, a meeting was held to determine whether the conduct that led to the Student's emergency expulsion was a manifestation of his disabilities. (Such a meeting is often referred to as a "manifestation determination" meeting.) The following people attended the meeting: the Father; the high school principal (Andrea McCormick); the executive director of special services (Melissa Madsen); the director of secondary special education (Susan Wolever); a general education teacher who had taught the Student math in 9th grade (Michael Steffan); a special education teacher who would be the Student's new case manager, and who was new to the District (Holly Hovey); and the school resource officer (police detective Diego Zanella). The Student was invited but elected not to attend. J-7:1, 3, 6.

17. The manifestation determination team decided that the conduct that led to the Student's emergency expulsion had a direct and substantial relationship to his emotional behavioral disability. The team also decided that the conduct was not a direct result of the District's failure to implement his IEP. The conduct was described as: "Threat to school: [The Student] wrote on a test paper "kill everyone" and when later interviewed indicated how angry he is and how much he hates school." J-7:4.

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[4] In response to another algebraic problem on the same page, the following was written: "infinite solution," then below that a heavily crossed-out word, followed by the word "everyone". J-5:2. There was no testimony about this, and no finding of fact is made about the Student's intent in writing it.

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18. The manifestation determination team also made the following decisions: The Student would be expelled from the high school; an interim IEP amendment would be proposed to change the Student's educational placement for summer school; a tour of the Northwest School for Innovative Learning (NW SOIL) in Redmond, Washington, would be organized for the Father and the Student; a reevaluation would be completed prior to the 2015-2016 school year, including a functional behavioral assessment (FBA) and a risk assessment; and the IEP team would meet before the start of the 2015-2016 school year to review the reevaluation and determine an appropriate educational program for that year. J-7:6-7. The Student's recent arrest for an alleged residential burglary was listed in the prior written notice under "other factors that are relevant to the action." The notice stated that court dispositions may be reviewed in the reevaluation process in relation to the threats made at school. J-7:7.

19. The Father agreed with the reevaluation proposal, but wanted the Student to return to the high school for summer school. He stated he had tried to get the Student to participate in counseling but had been unsuccessful thus far. However, he believed the Student would participate now. J-7:6-7.

Emergency Expulsion Converted to Expulsion

20. Also on July 14, 2015, the principal sent the Parents a letter converting the Student's emergency expulsion to an expulsion for a period up to 365 days for violating the following rule from the Student Handbook:

> A student shall not threaten injury, attempt to cause physical injury, behave in such a way as could reasonably be expected to cause physical injury or cause fear of physical injury, or inflict physical injury on or to any person. A student shall not threaten to damage or cause damage to school or other property. A student shall not extort, nor attempt to extort, anything of value.

D-6:1. The letter also stated as follows: The Student may be considered for readmission at any time. Any application for readmission would be expected to be supported by a risk assessment that must reflect that reenrollment poses no immediate threat to the physical and/or emotional safety of the Student or others. To be reenrolled, the Student would need to authorize a school administrator to communicate directly with the psychologist or psychiatrist who conducted the risk assessment, and the Student would need to follow through on any recommendations that person made. Finally, the expulsion letter included information on how to appeal the expulsion decision. D-6.

21. On July 27, 2015, the Father and the Student provided written consent for a reevaluation, FBA, risk assessment, and for the exchange of information between the District and Dr. Delton Young, the psychologist who would conduct the risk assessment. D-7.

Mental Health Counselor's Assessment

22. On August 11, 2015, the Student participated in an intake interview and assessment by Jonathon Lee, a mental health counselor at ACRS. Mr. Lee's report discusses the Student's

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family and school history, and the Student's symptoms of chronic depression, anxiety about academic challenges, poor impulse control and anger, fatigue, lack of concentration, and restless sleep -- symptoms that are complicated by his ongoing substance use. P-1:1. The Student takes no prescribed medications, but described his use of substances to Mr. Lee as follows: daily use of marijuana, smoking one gram; drinking alcohol a few times a week, mostly hard alcohol, a few glasses each time; and the use of Ecstasy (Molly), DMT, Adderall, LSD, SPEED, and DXM. P-1:3, 4.

23. The Student told Mr. Lee that his writing "kill everyone" on a school paper was stupid, a joke, and he would never do it again. He denied homicidal or suicidal ideation. P-1:1. He stated he wants to build self-esteem, reduce depression, improve impulse control, learn anger-management skills, reduce anxiety at school, reduce substance use, graduate from high school and go to college. P-1:1, 7. Mr. Lee diagnosed dysthymia (persistent depressive disorder) and noted the following psychosocial stressors: school avoidance, child of immigrant parents, substance abuse, academic stress, and poor coping skills. P-1:9.

24. The ACRS treatment plan for the Student is once-weekly counseling with Mr. Lee (which will later incorporate family counseling), and once-weekly counseling with a chemical dependency counselor at ACRS. After the initial intake visit, the Student attended his first weekly session with each of these counselors. The next session conflicted with the due process hearing and will be rescheduled. Testimony of Lee.[5]

Psychological Evaluation and Risk Assessment

25. On August 25, 2015, the Student met with Dr. Delton Young[6] for the psychological evaluation and risk assessment required by the District. Dr. Young interviewed the Student and Father together, and then the Student alone. He also spoke with the director of secondary special education (Ms. Wolever), the high school principal (Ms. McCormick), and the high school security officer (Neil Lasher). Dr. Young administered a brief intelligence test and a psychological self-report assessment to the Student. He reviewed numerous school records, police records, and ACRS's 2012 records. Dr. Young's written report had not yet been finalized by September 1, 2015, the day he testified. He expected it would be finalized within a day or two. Testimony of Young. The information below is from his testimony.

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[5] ACRS is located in the Rainier neighborhood of Seattle. According to both Google Maps and MapQuest, its address is 17 miles one-way from the Student's home in Issaquah. ACRS has an office in Bellevue, which is closer to Issaquah, but not all of the services the Student needs are offered at the Bellevue location. Testimony of Lee.

[6] Delton W. Young received his Ph.D. in 1982 from the University of Rochester Graduate School of Education and Human Development. He completed post-doctoral fellowships in adolescent and adolescent/family psychology at Harvard Medical School/McLean Hospital. Dr. Young served as a clinical instructor in psychology at Harvard Medical School, and a clinical instructor and clinical assistant professor at the University of Washington School of Medicine. He has published and spoken extensively on adolescent psychology and is a diplomate of the American Academy of Forensic Psychology. Dr. Young's offices are in Bellevue, Washington. J-8; Testimony of Young.

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26. Dr. Young diagnosed the Student with dysthymic disorder and substance abuse, namely marijuana dependence. He found the Student still functioned in the average range despite missing a great deal of school and despite his marijuana use. The substance abuse that the Student disclosed to Dr. Young, other than marijuana, was drinking alcohol once or twice a week, and a single instance of taking MDMA. Testimony of Young.

27. Concerning recommendations to improve the Student's attendance and participation in school, Dr. Young believes that individual and family counseling could help, as well as the Student forming a personal connection with an adult at school with whom he could talk. However, Dr. Young stated that no school or treatment program will be successful unless the Student is agreeable and commits himself to it. The Student told Dr. Young he does not want to return to his District high school, and wrote the threat on his math paper because he knew it would get him kicked out. *Id.*[7]

28. When asked whether the Student would pose a substantial risk of injury to himself or others if he returned to the high school, Dr. Young stated that he did not know. The Student's risk factors point in two directions, he explained. The factors pointing against risk are: (1) The Student has no history of hurting anyone or trying to hurt anyone, and this is the most important factor; and (2) The family reports no firearms in their home and no one has seen the Student pick up a weapon in a threatening manner. *Id.*

29. On the other hand, other factors point in the direction of risk, according to Dr. Young: (1) The Student wrote "kill everyone" on a school paper. Although the threat was not specific as to a person, time, etc., it should nonetheless be taken seriously. (2) The principal found the Student's statements after the threat to be troubling and provocative. The principal has rarely felt this way after interviewing other students over the years who wrote inappropriate or concerning things, and was instead reassured after speaking with them. (3) The high school security officer, Mr. Lasher, described similar attitudes and behaviors by the Student. (4) The Student's longstanding truancy is a factor, suggesting something is amiss in his life. He missed approximately 60 days of school and failed all but one of his classes in the most recent school year. The Student comes and goes as he pleases at school, just as he does at home. Truancy does not mean he is dangerous, but it raises a concern. (5) Substance abuse raises the level of risk from whatever the baseline was. Of all substances, alcohol is the one most heavily associated with destructiveness and violence. When you add drugs on top of alcohol, the level of risk increases further. Dr. Young could not quantify the level of risk beyond that. He believes the Student is in need of an "intensive outpatient treatment program" for substance abuse. He hopes ACRS will refer the Student for such a program. *Id.*

30. After giving his opinion on the level of risk the Student poses, Dr. Young was shown the list of substances that the Student told Mr. Lee he used. Dr. Young noted the discrepancy in the level of alcohol use reported to the two of them, and the numerous additional substances the

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[7] It is unknown whether the Student's statement to Dr. Young about his motivation for writing the threat was a truthful statement. The Student did not testify and was not subject to cross-examination. Dr. Young did not offer an opinion as to the sincerity of the Student's statement.

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Student reported to Mr. Lee but not to him (Dr. Young). Two of the substances he told Mr. Lee he used (LSD and Speed) he specifically denied using in his interview with Dr. Young. *Id.*[8]

Special Day Schools

31. In this proceeding, the District asks the ALJ to change the Student's placement to an interim alternative educational setting (IAES) for up to 45 school days because the District believes that maintaining the Student's current placement is substantially likely to result in injury to himself or others. There are two special day schools the District believes would be beneficial for the Student: Northwest School of Innovative Learning (NW SOIL), in Redmond, Washington, and Overlake Specialty School, in Bellevue, Washington. D-11; Testimony of Wolever.

32. At the time of the manifestation determination in mid-July 2015, only NW SOIL had an opening, so the District offered that as a summer school placement for the Student. The family declined to tour either of the two schools and did not agree to a change of placement for summer school. J-7:6; Testimony of Wolever. Dr. Young reports that since that time, the Father has toured NW SOIL and believes it inappropriate for the Student. Testimony of Young. Counsel stipulated that the Parents have not visited Overlake Specialty School. Neither of the two schools has chemical dependency treatment staff, so that service would have to be accessed elsewhere if the Student is to participate in it. Testimony of Farr and Wallas.

Northwest School of Innovative Learning (NW SOIL)

33. NW SOIL is a program of Fairfax Hospital Behavioral Health Services. It has two campuses, located in Tacoma and Redmond, Washington. The Redmond campus has 42 students, approximately 15 of whom are in high school. The high school students all have emotional behavioral disabilities, with underlying diagnoses including attention deficit hyperactivity disorder (ADHD), oppositional defiant disorder (ODD), psychosis, low or high functioning autism, and mood disorders. The high school students range from low to high cognitive functioning, with 70% of them being high functioning. The school has a life skills program, presumably for the lower-functioning students. D-15; Testimony of Farr.

34. Students are placed at NW SOIL by their school districts. The school is approved by the Washington State Office of Superintendent of Public Instruction (OSPI) as a non-public agency. Classes have six to ten students and the school operates year round. School staff includes special education teachers, general education teachers, instructional assistants, behavior intervention specialists, and recreational therapists. Programs include art therapy, pet therapy, and going into the community. Individual, group, and family counseling are offered, but not required. A psychiatrist is present on Fridays to provide services, such as medication management, for students who need, but do not have, psychiatric services outside the school. For subjects in which students do not have IEP goals, they are instructed in a general education curriculum coordinated with the requirements of their home school districts. For subjects in

[8] Likewise, Mr. Lee was asked about the Student's report to Dr. Young of using MDMA only once. (MDMA is related to Ecstasy. Testimony of Young.) Mr. Lee does not recall the Student saying that his use of Ecstasy or Molly was only once. Testimony of Lee.

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which they do have IEP goals, they are provided specially designed instruction pursuant to their IEPs. *Id.*

35. The school uses a token economy to encourage appropriate behavior. Data tracking is done every 15 minutes, and students earn points for positive, engaged behavior. Those points are converted into student "dollars," which can be spent at the school store. The data is also graphed to help staff understand trends and antecedents for student behavior. *Id.*

36. NW SOIL uses a "Journey" program with four levels. At Level 4, a conversation begins about transitioning back to the student's home school district. During a student's time at NW SOIL, their studies are coordinated with the requirements of their home school districts, as well as their IEPs, to make this transition possible. Students petition to move to the next level, and each level has more privileges and rights. Only Level 3 and 4 students may go outside the school building. *Id.*

37. Kelsey Farr, the NW SOIL Redmond school supervisor, was asked about the typical duration of attendance at the school. She responded as follows. The Journey program is designed to be completed in six months, but the length of time is individualized. Students do not stay for more than three years because they will have plateaued by then. The school has had five successful transitions of students back to their home school districts in the last year.[9]

38. If a student has problems with attendance, the problems are dealt with by working with a student's family and by providing incentives for coming to school. The school has space available for the Student. Based on a review of Dr. Young's report,[10] Ms. Farr does not see anything in the report that would lead the school to decline to enroll the Student. Testimony of Farr.

39. The District's special education administrators state that NW SOIL is an appropriate IAES for the Student because it can provide needed structure to manage his troubling, escalating behaviors; curricula to teach him acceptable behaviors; appropriate therapeutic counseling that is built into its program; and District general education curricula at the Student's performance levels. They also state that because of Dr. Young's extensive experience conducting risk assessments and other forensic evaluations, they have a high degree of

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[9] It was not clear from Ms. Farr's testimony whether the five successful transitions back to home school districts were from the Redmond campus, or from the Redmond and Tacoma campuses combined. It is more likely they were from the Redmond campus alone, for the following reason. Ms. Farr is the school supervisor for the Redmond campus, and her testimony about numerical aspects of the student population matches fairly closely the numbers in the OSPI non-public agency document for the Redmond campus alone. D-15:4; Testimony of Farr.

[10] Dr. Young had not yet finalized his written report as of the date he testified (September 1, 2015), but must have finalized it by the date Ms. Farr testified (September 9, 2015), because she had read it. Testimony of Young and Farr. The version of the report Ms. Farr read was redacted to remove all personally-identifying information about the Student. Testimony of Farr. The information in this footnote pertains equally to the manager of the Overlake Specialty School, Adam Wallas. Mr. Wallas also testified on September 9, 2015, after reading a redacted version of Dr. Young's report. Testimony of Wallas.

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confidence in his ability to provide meaningful recommendations to the Student's IEP team, and they expect the team will follow his recommendations, as well as the recommendations of the FBA that is in progress. D-11; D-12; Testimony of Wolever and Madsen.

40. Dr. Young has not visited NW SOIL for many years. At the time he visited, the students had more overt psychological impairments than the Student does. If NW SOIL has a similar population now, Dr. Young does not believe it would be a good fit for the Student, but Dr. Young is unfamiliar with its current population. Testimony of Young.

Overlake Specialty School

41. Overlake Specialty School (Overlake) is a program of Overlake Medical Center's psychiatric services. It has one campus, located in Bellevue, Washington. It has approximately 60 students, 27 of whom are in high school. Students are placed at Overlake by their school districts due to emotional behavioral challenges. The school is approved by OSPI as a non-public agency. D-16; Testimony of Wallas.

42. Overlake serves students with normal or above-normal cognitive skills. Testimony of Wallas. It provides a "therapeutic environment where students learn functional, social, academic and behavioral skills by direct instruction and hands-on experience through healthy relationships with adults and peers." D-16:1. Its staff includes special education teachers, general education teachers, instructional assistants, behavior intervention specialists, recreational therapists, and mental health counselors, but no psychiatrist. Individual counseling is offered, and students decide if they want it. Many students see counselors once or twice a week. D-16; Testimony of Wallas.

43. Classes have approximately ten students and a minimum of three adult staff. Testimony of Wallas. Overlake offers parent counseling and training as well as vocational/career training, which services are not offered by NW SOIL.[11] D-16:3; D-15:4; Testimony of Wallas and Farr. Overlake has four recreational staff providing its sports program, and also offers three to four field trips per week (e.g., to libraries, museums, hiking). General education instruction in subjects outside of a student's IEP goal areas is coordinated with the requirements of the Student's home school district. For subjects in which they do have IEP goals, students receive services as provided in their IEPs. *Id.*

44. Overlake uses a "Circle of Growth" program that has four stages: Belonging (connecting with others); Mastery (specific skill building); Independence (functioning without redirection from adults); and Generosity (giving back to others). The focus is on positive behavior intervention and learning to self-advocate for one's desires instead of using negative behavior to achieve them. Overlake works to help students move back to their home districts and to a less restrictive setting as soon as possible. The shortest successful transition back to a school

[11] Ms. Farr of NW SOIL explained that school districts are responsible for vocational/career services, and the state Division of Vocational Rehabilitation (DVR) can send job coaches to the campus. Testimony of Farr.

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district was after one year; the longest attendance that the school manager knows of was eight years. D-16; Testimony of Wallas.

45. The school has space available for the Student, since there is capacity for 30 high school students and presently only 27 are attending. Acceptance decisions are not made without review of special education documents, a family tour, and an internal team discussion. Based on a review of Dr. Young's report, the school manager, Adam Wallas, sees only one concern: the Student's past attendance problems. The school would want to know if the Parents are willing to participate in its parent program to support the Student's attendance. The school would also want to discuss with the Student what he has enjoyed and not enjoyed at school, so they could create a program he would feel is worthwhile. Testimony of Wallas.

46. In July 2015, the District contacted Overlake about the Student before contacting NW SOIL, but Overlake did not have space available at that time. The District has great confidence in both schools, and has had good results with students at both of them. Testimony of Wolever.

47. Dr. Young visited Overlake a few years ago. He observed students who appeared similar to the Student in their level of functioning, in addition to others who were more impaired. Dr. Young believes Overlake would be appropriate for the Student if he is agreeable and commits himself to going to the school. The only evidence in the record regarding the Student's desires concerning his education were statements to Dr. Young that he does not want to return to his high school, and that he would want to attend one unspecified class at Bellevue College (a public college offering two-year degrees and a few four-year degree programs). The Student was noncommittal and nonspecific with Dr. Young about other school programs. Testimony of Young.

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, in this case the District. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

Applicable Disciplinary Regulations

3. The purpose of the IDEA disciplinary provisions "is to ensure that students eligible for special education services are not improperly excluded from school for disciplinary reasons and are provided services in accordance with WAC 392-172A-05145." WAC 392-172A-05140; *see also* 34 CFR §300.530.

4. WAC 392-172A-05145, in turn, provides that a determination must be made whether the

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conduct for which the Student was disciplined was a "manifestation" of his disability. If it was, then certain steps must be taken.

> (5)(a) 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:
>
> (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
>
> (ii) If the conduct in question was the direct result of the school district's failure to implement the IEP.
>
> (b) 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 (a)(i) or (ii) of this subsection was met.
>
> (c) If the school district, the parent, and relevant members of the student's IEP team determine the conduct was [sic] manifestation of the student's disability, the school district must take immediate steps to remedy those deficiencies.
>
> (6) If the school district, the parent, and relevant members of the student's IEP team determine the conduct was [sic] manifestation of the student's disability, the IEP team must either:
>
> (a) 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
>
> (b) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
>
> (c) Except as provided in subsection (7) of this section,[12] 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-05145(5) and (6); *see* 20 USC §1415(k)(1)(E) and (F); 34 CFR §300.530.

5. In this case, the manifestation determination team found the Student's conduct that led to his emergency expulsion was a manifestation of his disability. Therefore, pursuant to the regulation quoted above, the District obtained parental consent for a functional behavioral assessment (FBA), and must subsequently develop a behavioral intervention plan (BIP).

6. However, instead of returning the Student to the placement from which he was removed, as provided in the regulation quoted above, the District chose another option that is permitted by

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[12] Subsection (7) of WAC 392-172A-05145 concerns "special circumstances" not applicable here.

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a different regulation: "[A] school district that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others" may file a due process hearing request and ask the ALJ to "[o]rder a change of placement of the student to an appropriate interim alternative educational setting for not more than forty-five school days". WAC 392-172A-05160(1) and (2)(b)(ii); *see* 20 USC §1415(k)(3); 34 CFR §300.532. A due process hearing of this type is held on an expedited basis.[13] Following the hearing, the ALJ may:

> (i) Return the student to the placement from which the student was removed if the administrative law judge determines that the removal was a violation of WAC 392-172A-05145 through 392-172A-05155 or that the student's behavior was a manifestation of the student's disability; or
>
> (ii) Order a change of placement of the student to an appropriate interim alternative educational setting for not more than forty-five school days if the administrative law judge determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

WAC 392-172A-05160(2)(b)(i) and (ii); *see* 20 USC §1415(k)(3)(B); 34 CFR §300.532.

Substantially Likely to Result in Injury to the Student or to Others

7. For the following reasons, the District has carried its burden of proof that returning the Student to his current placement "is substantially likely to result in injury to the student or to others." *Id.* First, the Student wrote a threat at school about killing a large number of people. When the principal asked him twice whether she should be concerned about his level of anger, the Student did not recant the threat and declined to offer any reassurance about his safety. After being expelled, the Student minimized his intentions in interviews with Mr. Lee and Dr. Young, telling Mr. Lee the threat was a joke and telling Dr. Young it was done to get kicked out of school, statements that are inconsistent. The statements to Mr. Lee and Dr. Young probably come within the hearsay exception for statements made for purposes of medical diagnosis or treatment (*see* Washington Evidence Rule 803(a)(4)), and so exclusive reliance on them for a finding of fact is not barred by the Administrative Procedure Act. *See* RCW 34.05.461(4). However, it is very difficult to assess the truthfulness of those statements, especially in light of the Student's statements to the principal, without the Student testifying and answering questions about his intent. The Parents could have offered testimony from the Student about the threat, and about his past and future intentions in that regard, without having him to testify about the burglary. He could have exercised his Fifth Amendment right to remain silent about the burglary while testifying about what he wrote on his math paper.

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[13] "The due process hearing must be expedited, and must occur within twenty school days of the date the due process hearing request is filed. The administrative law judge must make a determination within ten school days after the hearing." WAC 392-172A-05160(3)(a); *see* 20 USC §1415(k)(4)(B); 34 CFR §300.532.

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8. Second, it is found by a preponderance of the evidence that the Student participated in a residential burglary that included the taking of a firearm a few weeks before he made the threat at school.[14] While the firearm was abandoned outside the home when the homeowner confronted the burglars, the District is not required to assume this would occur again if the Student were to obtain another firearm. An hour and a half after the burglary, the Student walked into the high school, albeit without the weapon. The Parents argue the tribunal should accept the relatively benign explanation for the burglary and the taking of the weapon offered to police by the second person arrested for the crime. However, that person's statements are unsworn hearsay from someone who did not testify, was not subject to cross-examination, and who has an interest in being found to have a relatively benign motivation. There is also no evidence the Student in any way endorses that person's statements, especially since that person blamed the taking of the firearm on the Student.

9. Third, the Student previously made a written threat of grave physical harm against a school administrator. This factor cuts both ways. On the one hand, the Student did not carry out the prior threat in 7th grade. On the other hand, he continues to think along those lines. At issue is the degree of risk that he may subsequently combine thought with action.

10. Fourth, new things have occurred in the Student's life since the 7th grade threat that may increase his anger toward school personnel. He is facing potential criminal prosecution for a felony, and it was the high school security officer who identified him, causing his arrest. The Student has had three emergency expulsions, but only his current principal declined to convert his emergency expulsion to a suspension. Finally, the District has now initiated this proceeding to remove the Student to an IAES, something that was never attempted in the past.

11. Finally, the Student is engaging in extensive substance abuse. This adds an element of unpredictability to his conduct and increases the baseline level of risk that would otherwise exist.[15] Because of this substance abuse, and because the Student's behavior took a sharp downturn in the spring and summer of 2015, his previous improved conduct in high school over middle school is no longer current information. It indicates the potential for improvement again, but does not negate the current risk. The fact that there is no history of the Student hurting

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[14] A preponderance of the evidence is the standard of proof in the present case. The District is not required to prove the Student's involvement in the burglary beyond a reasonable doubt (the standard used in criminal proceedings) in order to consider the burglary in assessing the risk posed by the Student. The finding that the Student participated in the burglary, and that a firearm was taken from the home during the burglary, are not based exclusively on the hearsay in the police report or in the police officer's testimony. *See* RCW 34.05.461(4) (Administrative Procedure Act). They are also based on the testimony of the homeowner who saw and described the burglars, and the high school security officer who identified them. The finding that a firearm was taken from the home is based on the testimony of the homeowner who noticed his rifle missing and found it on the sidewalk in front of his home immediately after the burglars departed.

[15] The once-a-week chemical dependency counseling proposed by ACRS does not meet Dr. Young's recommendation for an intensive outpatient treatment program. The recommendation for an intensive program was made in Dr. Young's testimony even before he learned about the more extensive level of substance abuse the Student had disclosed in his ACRS intake interview.

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anyone or attempting to hurt anyone is the most positive and optimistic factor in the Student's favor. However, the other risk factors, especially in combination with the unpredictability introduced by the Student's substance abuse, raise the level of risk beyond the level to which a school district is required to expose its students and staff. With his substance abuse, it cannot be assumed the Student will maintain control over his feelings about the school and school officials and not act on them.

12. There is a consistent theme running through the evidence that the Student and his Father believe others have misinterpreted the Student's words and conduct and overreacted to them. If this had occurred with one individual or regarding one instance of conduct, the argument would have more force. However, the peer who reported the Student's alleged suicidal statement in 6th grade, the Friends of Youth counselor who reported to police the Student's 7th grade threat, and the principal who expelled the Student for his 10th grade threat are different individuals with different relationships to the Student, faced with three different situations. The Student's self-perception as not being a threat, and his Father's sharing in this perception, are optimistic indicators about the Student's true nature. A therapeutic school setting will hopefully help the Student return to that true nature.

13. Dr. Young was unable to say whether a substantial likelihood of injury would exist if the Student returned to his high school placement. The factors pointed in both directions, he explained. However, this testimony was given before Dr. Young learned the level of alcohol and drug use the Student had disclosed to the ACRS counselor, Mr. Lee, two weeks before Dr. Young met with the Student. Dr. Young then testified that alcohol raises the risk of physical aggression more than any other substance, and adding drugs to alcohol raises the risk further.

14. The Parents argue the Student has begun attending mental health and chemical dependency counseling at ACRS, and this is sufficient to ensure he will not present a substantial risk if he returns to the high school. As of the date Mr. Lee testified, the Student had attended only one of each type of counseling session at ACRS following his intake interview. Hopefully the Student will continue. However, he may no longer trust ACRS following this decision. He will learn that what he told Mr. Lee about his substance abuse was disclosed to this tribunal and was a factor in the decision in the District's favor. After a prior instance of learning that a counselor disclosed to police what the Student had told him, the Student refused to participate in any counseling for several years.

15. Because it is unknown whether the Student will continue counseling with ACRS, and because the evidence indicates the Student needs more than one hour per week of mental health counseling to reduce his risk factors, an IAES in a therapeutic school is ordered. In that environment there will be significantly more support for the Student's social/emotional challenges and a high ratio of adults to help him with academic and personal issues, in contrast to the lesser level of attention he would receive in the general education environment of a comprehensive high school (the environment where he spends 86% of his time, pursuant to his IEP). In addition, individual counseling sessions at a therapeutic school would not have the barriers to access that ACRS has: There is no 34-mile round trip drive to reach the services, and they would not lengthen the Student's day, but would instead occur during school hours.

16. The Parents make several arguments in addition to those discussed above. They note that the manifestation determination team was mostly composed of people who did not know

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the Student. The team had to be assembled over the summer, and the Parents are correct that most of its members were not acquainted with the Student. However, two of them were: the principal and the Student's 9th grade math teacher. The IDEA requires the manifestation determination team to be composed of "the school district, the parent, and relevant members of the student's IEP team (as determined by the parent and the school district)". WAC 392-172A-05145(5)(a); *see* 20 USC §1415(k)(1)(E); 34 CFR §300.530. It does not require the full IEP team to be present. In any event, the team did find that the Student's conduct was a manifestation of his disability, which provides him the maximum procedural protections under the statute. More importantly, it was not up to the manifestation determination team to decide whether the Student would be placed in an IAES, or to select the IAES. Those decisions can only be made by the ALJ. *See* WAC 392-172A-05160(1) and (2); *see* 20 USC §1415(k)(3); 34 CFR §300.532.[16]

17. The Parents also argue that no case was cited by either party in which an unconsummated threat of violence, without other acts of physical violence, led to a finding that the student was substantially likely to cause injury. However, the statute does not require a showing of actual physical violence, or even attempts at violence. The drafters knew how to do this, because in the "special circumstances" section, actual injury is specified, not a likelihood of injury. *See* WAC 392-172A-05145(7); 20 USC §1415(k)(1)(G); 34 CFR §300.530. Past acts of violence are certainly an important risk factor, but there are other risk factors to be considered.

18. There are five cases cited by the parties in which a student made a threat of violence, but the tribunal found no substantial likelihood of injury if the student were allowed to continue in his or her current placement. The facts that distinguish those cases from the present case are discussed below.

19. In *Saddleback Valley Unif'd Sch. Dist.*, 52 IDELR 56 (SEA CA 2009), a 12-year old student with anger-management issues threatened to pull out a peer's earrings and rip his neck off during an argument they were having. On a different day, during an ice-breaking activity in class, he told a peer he likes to blow things up. When the assistant principal spoke with him about it, the student said he would never blow anything up, but he liked the idea of blowing things up. The student was in therapy and his therapist testified the student's behaviors were improving. The student testified at the hearing, was calm and composed, and explained that he enjoys school this year and has been developing coping skills. The ALJ found that there was no indication his threat to the peer was anything more than words.[17] In the present case, unlike in

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[16] By contrast, where a student's conduct is found *not* to be a manifestation of disability, or where "special circumstances" apply (any of the following at school or at a school function: weapons, illegal drugs, or infliction of serious bodily injury), school districts have the authority to change a student's placement to an IAES *without* seeking an ALJ's order. *See* WAC 392-172A-05145(3), (4) and (7); 20 USC §1415(k); 34 CFR §300.530.

[17] In *Saddleback*, the student also brought knives to school on one occasion, and exhibited one of them on the school bus. He had already served a separate 45-school day IAES under the "special circumstances" rule for that incident. The ALJ found the knife incident was a serious rule violation but was unrelated to the episodes of anger addressed in his BIP. The ALJ found that carrying the knives was a one-time mistake for which the student, who wrote an apology letter and testified at the hearing, seemed genuinely remorseful.

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Saddleback, the Student refused to give any reassurance to the principal about his threat, and did not testify at the hearing to explain his intent or his ability to control his anger.

20. In *Sharon Public Schools*, 45 IDELR 75 (SEA MA 2006), a 17-year old with an emotional behavioral disability told a teaching assistant to "shut the f--- up or I'll kill you." On another occasion, he put his face close to a teacher and called her a "b----." Finally, the school placed a substitute teacher in one of the student's classes without telling her he had an IEP or any emotional disorder. During a dispute with the student about wearing his headphones, the student shoved a desk into the substitute teacher's legs and later punched her wrist downward, bruising her. At the hearing, a psychologist who had treated the student for a year and a half testified that the student's profile was different from that of youths who do pose a safety risk. Another psychologist who conducted a risk assessment diagnosed various disorders and cannabis abuse, but affirmatively concluded the student did not pose a substantial risk of injury to himself or others. In the present case, no witness has stated this (or stated words to this effect), let alone a professionally qualified witness.

21. In *Cabot Sch. Dist.*, 27 IDELR 304 (SEA AR 1997), a 9th grader with attention deficit hyperactivity disorder and possible bipolar disorder was insubordinate, obscene, and disrespectful to school staff. When the assistant principal intervened in a confrontation between the student and staff, the student said either that he would kill the assistant principal, or that he knew someone who wanted to hurt the assistant principal (there was conflicting testimony from witnesses). Since a fight two years earlier, the student had engaged in no physical aggression. The case employed a higher burden of proof than a preponderance of the evidence. The higher standard existed prior to the 2004 amendments to the IDEA.[18] The hearing officer concluded from case law that far more serious and on-going behavior is required to meet the district's burden of proof. In the present case, there is no conflicting evidence as to whether the Student's threat concerned killing, since it is in writing. There are the added circumstances of the Student committing a burglary involving the taking of a firearm a few weeks before the threat, and extensive substance abuse that renders his future conduct unpredictable.

22. In *School Dist. of Philadelphia*, 1997 WL 89113, 1997 U.S. Dist. LEXIS 2059 (E.D. PA 1997), a middle school student with learning disabilities cut a peer's hand with a razor blade that she carried for protection outside of school. Her uncontradicted evidence was that the peer was in the process of exposing himself and attempting to fondle her. At another school, she had threatened a peer with a box cutter. The school district did not allege that the student's continued placement at its school posed a substantial threat of injury to herself or others. Rather, it alleged that her continued presence would disrupt educational programming and the staff's ability to maintain control and discipline, thereby causing irreparable injury. In the present case, the District makes the required allegation, and there is no evidence the Student was acting in self-defense.

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[18] The hearing officer in *Cabot Sch. Dist.* explained that proof by "substantial evidence" (the pre-2004 standard) is a "higher burden" than "merely proving something by a 'preponderance of the evidence.'" 27 IDELR 304. *See also Sharon Public Schools, supra,* explaining the pre-2004 burden of proof.

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23. Finally, in *Clinton County R-III Sch. Dist. v. C.J.K.*, 896 F. Supp. 948 (W.D. MO 1995), a middle school student with learning disabilities made repeated threats to hurt school officials and students. The student testified at the hearing, stating he never intended to carry out his threats (though he told a reporter at the hearing that he did not know whether he would resort to violence). The student had also thrown furniture and other objects in fits of anger, with a chair once bouncing off a wall and injuring a child's ankle to the extent that she cried. The court concluded the student "presents a danger of causing some material physical injury (intended or accidental) that may be five to ten times that of an average boy his age, but that such danger probably does not reach a 5% possibility during the coming school year." *Id.*, 896 F. Supp. at 951. The court rejected the parent's argument that school districts should have to tolerate a 33% chance of injury from a child before that child may be removed to another placement based on a substantial likelihood of injuring themselves or others. The court instead suggested the threshold of a 5% risk of material personal injury that districts should have to tolerate.[19] *Id.*, 896 F. Supp. at 950. In the present case, unlike in *Clinton*, the Student did not testify about his intention in making the threat, so the tribunal could not assess his truthfulness, sincerity, and level of risk. This was especially important where the psychologist who conducted the risk assessment could not come to a definite conclusion and did not have all pertinent information. It was also important because the Student gave two different motivations for his threat to the counselor and the psychologist, and gave contradictory information to them about his level of substance abuse.

24. In summary, the cases discussed above are distinguished from the present case for a number of reasons. This is one of the unusual cases in which there are sufficient risk factors and a sufficiently serious threat that the absence of past acts of violence is not ultimately determinative.

25. Finally, the Parents argue that the IAES options offered by the District are not the Student's least-restrictive environment (LRE), so they would deny him a FAPE. It will be assumed for present purposes that the LRE requirement applies to an IAES (a matter on which neither party provided authority).

26. If this tribunal, in a typical due process hearing case, was presented with a sudden change in a child's placement from 86% time in general education to 100% time in a special day school, without the IEP team having first trying alternatives that fall between these placements on the LRE continuum, it would an unusual case where this would be found appropriate. In the present case, after the burglary but before the threat, the principal did plan to pursue an intermediate alternative: She informed the Father that she would ask the IEP team to meet over the summer and consider adding the related service of counseling to the Student's IEP. After the threat, and after the Student's refusal to retract it or give any assurance about his intentions, the safety of other members of the school community became a more salient factor than it had been. It was already one of the four factors to be balanced in determining the LRE: (1) the

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[19] The *Clinton* court suggested the 5% threshold not for any *all* types of injury risks, but for the more serious risks: "a 5% danger of *material* personal injury or some appreciable danger of *serious* personal injury." *Id.*, 896 F. Supp. at 950 (emphasis in original). The court implied that the percentage risk a school district must tolerate is higher than 5% where the risk concerns more minor injuries.

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educational benefits of placement in general education classes; (2) the non-academic benefits of such placement; (3) *the effect the student has on the teachers and other students in the general education setting;* and (4) the cost of such a placement. *See Sacramento City Unif'd Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994). The recent events made the third factor weigh much more heavily in the balance. It also affected the assessment of the Student's *own* educational needs: it demonstrated that he needed significantly enhanced services in the emotional-behavioral area.

27. It must be remembered that what is decided here is an *interim* placement. A longer-term placement will be decided by the IEP team based on the FBA and BIP that are being developed, and based on updated information on the Student's present levels of performance in the emotional-behavioral area. The degree of assurance about whether the Student poses a safety risk that will emerges from his counselors, teachers, and from himself during the interim placement may, and hopefully will, influence the balancing of the LRE factors.

28. The Parents suggest three alternatives for an interim placement: (1) provide additional supports and services at the high school; (2) place the Student at an alternative school; or (3) place the Student in a tutoring setting with "case aide support" and access ACRS counseling. Parents' Prehearing Memorandum at 7. Regarding the Parents' first alternative, the evidence does not support a finding that such services would provide for the safety of others at the school in the short term.[20] The second alternative finds no support in the record. There was no evidence whether the District operates an alternative high school, and if it does, what services and supports are available there, whether the Student's IEP could be implemented there, and whether the safety of the school community could be adequately provided for. The third alternative -- individual tutoring supplemented by counseling at ACRS -- is a more restrictive alternative than the special day schools offered by the District. The Student would have no contact with peers during either tutoring or counseling (his ACRS treatment plan does not include group counseling).

29. For the foregoing reasons, the District has established by a preponderance of the evidence that it is entitled to an order changing the Student's placement to an appropriate IAES because "maintaining the current placement of the student is substantially likely to result in injury to the student or to others." WAC 392-172A-05160(2)(b)(i) and (ii); *see* 20 USC §1415(k)(3)(B); 34 CFR §300.532. We turn next to the determination of an appropriate IAES.

Appropriate IAES

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[20] To the extent the Parents are arguing the Student's current IEP was not reasonably calculated to provide him a FAPE due to the absence of additional supports and services, they retain the right to file a due process hearing request to raise that claim. However, amendments to the IDEA have eliminated one of the requirements developed in previous case law for a court or ALJ to impose an IAES. Under previous case law, school districts had to prove not only a substantial likelihood of injury if the student remains in their current placement, but also that "the school district has done all it reasonably can to minimize the risk of resulting injury through the use of 'supplementary aids and services.'" *Light v. Parkway C-2 Sch. Dist.*, 41 F.3d 1223, 1230 (8th Cir. 1994), *cert. denied*, 515 U.S. 1132, 115 S. Ct. 2557 (1995) (internal citation omitted). *See also Sch. Dist. of Philadelphia, supra,* 1997 WL 89113; *Clinton County R-III Sch. Dist. v. C.J.K., supra,* 896 F. Supp. at 951; *Cabot Sch. Dist., supra,* 27 IDELR 304.

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30. Neither the IDEA nor its implementing regulations define an IAES in the context of a school district's request for an IAES due to a substantial likelihood of injury. In the context of an IAES imposed because of "special circumstances" (any of the following at school or at a school function: weapons, illegal drugs, or infliction of serious bodily injury), or where a student's conduct is found *not* to be a manifestation of their disability, an IAES is defined as a placement that will allow the student to:

> [c]ontinue to receive educational services, that provide a FAPE, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP.

WAC 392-172A-05145(4)(a); *see* 20 USC §1415(k)(2); 34 CFR §300.530. This definition can provide guidance for the current context as well.

31. Both NW SOIL and Overlake meet this definition of an appropriate IAES. They are high-quality therapeutic day schools for students with emotional behavioral challenges that are not being met in their school district placements. They can provide both special education and general education curricula individually geared to the Student's IEP needs and his home school district's curriculum and graduation requirements.

32. The students at Overlake have normal to above-normal cognitive skills, whereas 30% of the students at NW SOIL are lower-functioning. For this reason, Dr. Young thinks Overlake would be appropriate for the Student, and he is uncertain whether NW SOIL would be, not having seen the student population in many years. With the Student's history of truancy and lack of engagement in school, it is preferable to place him at a school where he may feel more comfortable. However, 70% of NW SOIL's high school students are high functioning, so it is found to be appropriate as well.

33. NW SOIL offers on-site psychiatric services and Overlake does not, but the Student does not take any prescription medication and there is no evidence he is in need of psychiatric services. Overlake offers two services that NW SOIL does not: parent training/counseling and vocational/career services. There was evidence the former would be helpful, and given that the Student is 17 years old, the latter is appropriate as well. For all of these reasons, Overlake is found to be the more appropriate of the two schools as an IAES for the Student.

34. Forty-five school days (one-quarter of a standard 180-day school year) is an appropriate interval after which to assess the Student's progress on the risk factors that led to the IAES placement. It is shorter than the one-year period that is the minimum attendance period of any student who has successfully transitioned from Overlake back to his or her home school district. It is also shorter than the one-semester progress reporting period for the Student's IEP behavioral goals, though this is a much less important factor. Finally, the issues that led to the Student's expulsion were long-standing, not newly-appearing, including a prior threat of grave physical harm to a school administrator. For these reasons, there is no evidence on which to conclude that a shorter period of enrollment than 45 school days would reduce the risk of injury to the Student or others to an insubstantial likelihood.

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35. This is an opportunity for the Student to try something he has never tried. A full staff of caring experts who have devoted themselves to bringing out the best in students with difficult emotional backgrounds is available to the Student if he is willing to come. It is a new place and a new start. Chances like this, at no cost to the Student or his family, are not easy to come by.

ORDER

A. The Student's educational placement is hereby changed to the interim alternative educational setting (IAES) of Overlake Specialty School in Bellevue, Washington, for a period of 45 school days. The 45-school day period begins the first school day after entry of this order. Overlake has space available for the Student, but he has not yet completed the admissions process. The 45-school day period includes days during which Overlake is conducting its admissions process. If the Parents or the Student do not cooperate in the admissions process, or the Student misses days of school during the 45-school day period, the District may raise such matters in the event there is a subsequent proceeding under WAC 392-172A-05160(2)(c); *see* 34 CFR §300.532(b)(3). The 45-school day period may be shortened by mutual written agreement of the District and the Parents.

B. If Overlake does not accept the Student for admission, his IAES shall become NW SOIL in Redmond, Washington, for the same period and under the same conditions as ordered in paragraph A, above.

C. The cost of the Student's attendance at the IAES shall be paid by the District. The District shall provide the related service of transportation for the Student to attend the IAES.

Signed at Seattle, Washington on September 17, 2015.

Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

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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 and faxed a copy of this order to counsel on the date stated herein. MCM

Parents
[redacted]
Issaquah, WA 98027

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

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