

WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS

In the matter of:

[REDACTED] School District and
[REDACTED]

Docket Nos. 02-2023-OSPI-01799
02-2023-OSPI-01811

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

Agency: Office of Superintendent of
Public Instruction
Program: Special Education
Cause Nos. 2023-SE-0023X
2023-SE-0034X

A due process hearing in this matter was held by videoconference before Administrative Law Judge (ALJ) Paul Alig on March 8, 10, and 13, 2023. The Parents of the Student whose education is at issue¹ appeared and were represented by Mary Griffin and Jamie Bates, attorneys at law. The [REDACTED] School District (District) was represented by Elizabeth Robertson, attorney at law. [REDACTED] was represented by Tracy Miller, attorney at law. [REDACTED], Principal of [REDACTED] Elementary School, also appeared for the District and [REDACTED], Executive Director of [REDACTED] also appeared for [REDACTED].

PROCEDURAL HISTORY

The Parents filed a Due Process Hearing Request (Parents' Complaint) under 2023-SE-0023X on February 10, 2023, and the matter was assigned to ALJ Courtney Beebe. On February 14, 2023, the District filed a motion to add [REDACTED] as a party. The matter was reassigned to ALJ Paul Alig on February 16, 2023. On February 17, 2023, the ALJ issued an order granting the motion to add [REDACTED]. On February 21, 2023, [REDACTED] filed its response to the Parents Complaint and moved for an order placing the Student in an appropriate interim alternative education setting (IAES). On February 22, 2023, [REDACTED] filed a Due Process Hearing Request ([REDACTED] Complaint) under 2023-SE-0034X.

On February 22, 2023, a prehearing conference was held and a Prehearing Order was issued February 24, 2023 consolidating the cases and bifurcating the expedited and non-expedited issues for hearing. On February 27, 2023, [REDACTED] filed

¹ To ensure confidentiality, names of parents and students are not used.

an objection to the statement of issues in the Prehearing Order. On March 1, 2023, [REDACTED] filed its prehearing brief. On March 2, 2023, the ALJ issued an Order Granting [REDACTED] Objection to the Statement of Issues. On March 6, 2022, the Parents filed a Motion in Limine which was decided during the hearing. The consolidated expedited issues were heard in a due process hearing held on March 8, 10, and 13, 2013. On March 17, 2023, each party filed a post-hearing brief. A prehearing conference to schedule a due process hearing on the consolidated non-expedited issues is scheduled for March 30, 2022.

Under Washington Administrative Code (WAC) 392-172A-05160 appeal of decisions to remove a student eligible for special education who violates a code of student conduct from their current placement or manifestation determinations or a school district that believes the maintaining the current placement of the student is substantially likely to result in injury to the student or others the due process hearing must be expedited and must occur within twenty school days of the date the complaint is filed. The ALJ must then enter a final decision and order within ten school days after the hearing.² Ten school days after March 13, 2023, the last day of the due process hearing, is March 27, 2023.³ Therefore, the due date for the written decision in these two consolidated expedited matters is **March 27, 2023**.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J1-J11;
Parents Exhibits: P1-P13;
[REDACTED] Exhibits: D1-D20.

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

The Parent⁴

[REDACTED], Principal of [REDACTED] Elementary School
[REDACTED] Threat Assessment Coordinator
[REDACTED], Special Education Teacher, [REDACTED] Elementary School
[REDACTED], General Education Teacher, [REDACTED] Elementary School

² Washington Administrative Code (WAC) 392-172A-05160(3)(a).

³ March 20, 2023, reserved as an emergency closure, was a scheduled school day. Exhibit D1p1. Therefore, ten school days from March 13, 2023, is March 27, 2023.

⁴ References to the Parent are to the Student's Mother.

[REDACTED], Assistant Principal, [REDACTED] Elementary School
[REDACTED], Special Education Administrator, [REDACTED] Elementary School
[REDACTED], Paraeducator, [REDACTED] Elementary School
[REDACTED], School Psychologist, [REDACTED] Elementary School
[REDACTED] Behavioral Systems Coordinator

ISSUES

The issues for the expedited due process hearing and the parties' requested remedies are:⁵

2023-SE-0023X Parents' Expedited Issues and Requested Remedies

- a. Whether [REDACTED] the District, or both violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
 - i. Failing to involve the Parents in the development of a purported "safety plan" which the Parents have never seen, which sought to override the Individualized Education Program (IEP) and place the Student in a segregated, restricted environment for the school day;
 - ii. Providing a prior written notice about an interim emergency alternative placement decision eight days after the action occurred; and
 - iii. Misusing a threat assessment process to make decisions regarding placement of the Student outside the purview of the IEP team and institute disciplinary actions.
- b. And, whether the Parents are entitled to their requested remedies:
 - i. Declaratory relief that [REDACTED], the District, or both violated the IDEA and denied the student a FAPE.
 - ii. An order that the Student be returned to his prior placement; or
 - iii. Other equitable remedies, as appropriate.

⁵ Order Granting [REDACTED] Objection to Statement of Issues.

- c. Should the Student's placement be changed to an appropriate interim alternative educational setting for at least 45 days, pursuant to WAC 392-172A-05160(2)(b)(ii), because returning the student to the original placement is substantially likely to result in injury to the student or to others?
- d. Is the IEP proposed February 28, 2023, such an appropriate interim alternative educational setting?

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.

Some evidence presented was hearsay, which is a statement made outside of the hearing used to prove the truth of what is in the statement. In administrative hearings, hearsay evidence is admissible if, in the judgment of the presiding officer, "it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." Revised Code of Washington (RCW) 34.05.452(1). An ALJ may not base a finding of fact exclusively on hearsay evidence unless the ALJ determines that doing so "would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence." RCW 34.05.461(4). To the extent any findings of fact are based on hearsay, it is determined that such findings did not unduly abridge the parties' opportunity to confront witnesses and rebut evidence.

The Student

1. The Student is [REDACTED] years old. Parent T88:22.⁶ The Student attends kindergarten in the District. Parent T61:22. The Student is [REDACTED]. [REDACTED] T275:24.

⁶ Citations to the exhibits of record are by the party ("P" for Parents; "D" for District; "J" for Joint) and exhibit and page numbers. For example, a citation to P1p1 is to Parent Exhibit P1 at page 1. Citations to the hearing transcript are by witness last name followed by the page number(s) and line(s) on which the testimony appears. For example, a citation to Parent T61:22 is a citation to the Parent's testimony at page 61, line 22 of the transcript.

The Student was initially determined eligible for special education services in June 2020, prior to turning [REDACTED] years old. D7p5.

2. The Student attended preschool within the District during the 2020-2021 school year and transitional preschool kindergarten within the District during the 2021-2022 school year. Parent T59:23. The Student's preschool was for students with disabilities. Parent T60:1. The Student had an IEP for sensory needs while in preschool. Parent T60:5. The Student was initially identified as having developmental delays. J8p3. The ratio of the Student's 2021-2022 school year preschool class was one special education teacher and two paraeducators to sixteen students. [REDACTED] T168:24. The program was two and a half hours per day up to three days per week. [REDACTED] T169:8-15.

3. [REDACTED] T168:16; T557:23; 560:23. The District T308:5.7

May 2022 IEP Amendment

4. Beginning May 12, 2022, the [REDACTED] developed an IEP amendment for the Student.⁸ J8p3. The May 12, 2022, IEP Amendment stated his next IEP was due February 24, 2023, and his next reevaluation was due June 19, 2023. *Id.* The IEP Amendment provided that the Student receive services 98.28 percent of the school day in a general education setting beginning July 1, 2022, through February 23, 2023. His total time in a special education setting during this period was thirty minutes per week. J8p10. The Student also was to receive fifteen minutes per week of specially designed instruction (SDI) delivered by a special education teacher in a general education setting four times per week, and an additional fifteen minutes five times per week delivered by a special education paraeducator in a general education setting. *Id.* The Student's special education services were in the social/emotional skills domain. *Id.*

⁷ When discussing delivery of special education services to the Student, [REDACTED]

⁸ An earlier IEP was not offered by any of the parties.

2022-2023 School Year

5. The Student began the 2022-2023 school year attending ██████ Elementary School. ██████ T167:10. The Student was placed in an all-day general education kindergarten program with pull-out special education services delivered in ██████. The class consisted of one teacher and twenty-two students. ██████ T169:25.

6. ██████ is a classroom for students eligible for special education. ██████ T502:15. A behavior team staffed ██████ led by a special education teacher, ██████⁹ and paraeducators to support students' needs regarding social, emotional, and behavioral health. ██████ T490:1; T496:1. The ██████ classroom serves students with behavioral needs beyond a general education kindergarten classroom. ██████ T584:15. The Student's special education setting was ██████. ██████ T249:21.

7. The first three weeks of kindergarten went well. Parent T62:16; ██████ T170:15. The Student had a good rapport with his general education teacher, ██████.¹⁰ After the first three weeks ██████ had a multiple-day absence and a substitute teacher was assigned to her classroom. D4p4; ██████ T368:19.

8. On September 19, 2022, the Student wanted to line up first but was second in line with other students. The Student hit, pinched, and kicked three other students in the general education kindergarten classroom. When the substitute teacher intervened, he punched her in the stomach. D4p12; ██████ T172:9.

9. The head principal at the Student's school is ██████.¹¹ ██████ T166:5. The school has a no-tolerance policy regarding hitting and kicking teachers and students. ██████ T173:2. The policy results in a suspension when this happens.

⁹ ██████ is a special education teacher employed by ██████ assigned to ██████ Elementary School. This is his first year in this position. She has a conditional teaching certificate which means she will earn her certificate in special education at the end of the conditional period. She has a master's of elementary education and a minor in special education from the University of Oregon. She is currently obtaining a master's in special education through Western Governor's University. As part of her conditional certificate, she has an assigned special education teacher mentor. Prior to being employed in her current position she was in a teaching program at the University of Oregon. ██████ T283:8-285:9.

¹⁰ ██████ is a certificated kindergarten teacher in ██████ Elementary School. This is her eighth year in this position. Prior to that she was a substituted for ten years. She has a bachelor's degree in education. ██████ T366:9-367:2.

¹¹ ██████ is the Principal at ██████ Elementary. This is her first year in this position. Prior she was the Assistant Principal at the school. She has previous experience as dean of students at the school. ██████ has a master's in teaching and certificate as a principal and teacher. She has an endorsement in technology and early childhood. T166:12-167:7.

██████ T173:6. The Student received an out-of-school suspension for two days for the September 19, 2022, incident. D4p3; ██████ T173:20. The Student was sent home after the incident. ██████ T173:8. After a reentry meeting, the Student returned to school on September 22, 2022. D4p4.

10. Interventions regularly attempted to address the Student's escalating behaviors in the general education classroom included, calming talk, breaks, within and outside of the classroom, redirection, fidget toys, wiggle seat, stretch band on the legs of the chair, and a treasure box reward system. ██████ T370:11-18. These interventions did not always work and at times the general education classroom would need to be cleared to deescalate or remove the Student. ██████ T370:23.

Functional Behavioral Assessment (FBA) Initiated

11. On September 19, 2022, the ██████ initiated the process to conduct a functional behavioral assessment (FBA) of the Student. D5p1. ██████ T326:23. The FBA was conducted by ██████, a District school psychologist.¹² ██████ T488:24. The ██████ issued a prior written notice (PWN) stating the Student had demonstrated aggressive behaviors toward peers and staff which were impacting his educational access and disrupting the learning environment of others. D5p7. The PWN stated the Student had shown a pattern of maladaptive behaviors which were escalating in severity and proposed conducting the FBA. *Id.*

12. On September 26, 2022, the Student was physically aggressive to a teacher and other staff members in ██████. D4p12. The Student received a half-day, out-of-school suspension for this incident. D4p7. On September 30, 2022, the Student kicked someone in the stomach while sitting on the ground in the playground. D4p4. On October 13, 2022, the Student hit school supplies out of another student's hands in the general education classroom. D3p1; D4p12. He also threw classroom supplies and used physical aggression with three staff members. *Id.* He received a one and a half-day suspension for this incident. D4p8.

13. On October 17, 2022, the Student's IEP team met to review his FBA. J9p3; ██████ T421:24; ██████ T489:6. The team included, the Parents, ██████, ██████ Special Education Director ██████,¹³ and the

¹² ██████ is an ██████ school psychologist. He has an educational specialist degree and a master's degree. He is certificated with an endorsement in school psychology. He has a national certification through the National Association of School Psychologists. He has experience, from 2016-2017, providing applied behavior analytics (ABA) therapy under the supervision of a board-certified behavior analyst. He has forty hours of ABA training. D19, 20; ██████ T486:9-487:9.

¹³ ██████ is an assistant special education director for the ██████. He has a master's degree in education and administration. This is his third year in this position. Before working in this position, he

Student's WISE¹⁴ counselor, [REDACTED], LMHC. J9p3. The team identified the Student's target (unwanted) behaviors as:

Physical aggression is defined as any behavior that involves the target student making contact with a peer, staff member, or object with force and intent. It may look like hitting, kicking, punching, throwing, and pushing. The behavior often occurs quickly and suddenly, several times in a day, with intent to cause a reaction. The behavior rarely occurs over long periods of time, but can escalate to the level of a room clear during rare circumstances. This is a middle to high level intensity of behavior, as it can occur without adult knowledge but often does cause alarm when reported.

Examples include:

- Hitting another student with force in the stomach with a closed fist
- Kicking a teacher with force in the stomach
- Purposefully ripping a stuffed animal
- Throwing an object with force and intent to damage object or target

J5p3; [REDACTED] T490:23.

14. [REDACTED] collected data for the FBA using observations of the Student in the general education classroom, antecedent behavior consequence (ABC) narratives, anecdotal information, and duration/latency measures. J9p3; [REDACTED] T490:8.

15. The FBA identified that the unwanted behaviors occurred when other students or staff were present. The behavior tended to occur during stimulating activity or situations when other students were close. It could occur when the Student was elevated and may lose quick control of some actions. Events leading up to the unwanted behavior were during activities that involved movement or transitioning between activities within the classroom or out on school grounds during recess. The FBA hypothesized the Student could get very busy with high sensory seeking behaviors, was peer oriented, and wanted to be around his classmates. During high stimulation activities he could lose control of his behaviors and act aggressively toward peers. He very much wanted to be around his classmates and a part of the classroom system but needed to show that he was able to without physical harm to others. J9pgs 4, 5.

16. The FBA recommended a behavior intervention plan (BIP) for the Student. D5p6. Further recommendations were:

- Giving him a dedicated space within the classroom to calm and remove himself if needed. J5p5; [REDACTED] T493:12.
- During high stimulation activities give him his own space to participate. J5p5; [REDACTED] T495:3.

was employed for a year as a special education director for a county in Oregon. Before that he worked for three years for [REDACTED] School District as a special education facilitator. Before that he worked for the [REDACTED] educational activity agency. Prior to that he taught in [REDACTED]. He has Washington state certification endorsements in special education and art. He directly supervises [REDACTED]. T412:12-413:27.

¹⁴ WISE is a community crisis response team that works with the Student. Parent T113:15-114:6.

- Teach him how and when to take a break to support self-regulation within the general education setting. J5p5.
- Teach him emotional regulation strategies, such as big deal/little deal, mistakes versus on purpose, and effective ways to redirect peers. J5p5; [REDACTED] T494:23.
- Teach him effective problem-solving, and to use language to get his needs met as opposed to physical aggression. J5p5.
- Remind him that he gets to interact and be with peers if he displays safe and pro-social behaviors. J5p5; [REDACTED] T497:21.
- Use coaching, practice, repetition, positive reinforcement, and supportive consequences. J5p5.
- If the wanted behavior occurs reward him with positive reinforcement and allowed access to his peers. *Id.*
- Should the unwanted behavior occur, remove the Student from his peers until he is able to demonstrate a safe body. Once he can demonstrate a safe body, allow him to reengage with his peers and the classroom activity. J5p5; [REDACTED] T497:21.

Behavior Intervention Plan (BIP) Developed

17. The [REDACTED] prepared a PWN documenting the FBA. J9p6; [REDACTED] T496:9. At the same meeting on October 17, 2022, the team discussed a BIP for the Student. J10p3; [REDACTED] T498:12. Some of the strategies team identified were:

- Provide the Student a designated spot within the general education classroom to allow him to move and calm and take breaks when he becomes escalated or during high stimulation activities. J10pgs 4, 5.
- Teach the Student effective strategies to avoid repetitive strategies to avoid negative interactions which appear to drive the aggressive behavior including using self-soothing and problem-solving strategies. *Id.*
- Teach the Student how and when to take a break to support self-regulation within the general education setting. *Id.*
- Teach the Student emotional regulation strategies, such as big deal/little deal, mistakes versus on purpose and effective ways to redirect peers. J10p4.
- Instruct the Student in effective problem-solving, to use language to get his needs met as opposed to physical aggression. *Id.*
- Remind the Student that he gets to interact and be with peers should he display safe and pro-social behaviors. *Id.*
- Provide the opportunity to use sensory items and/or rip up materials provided for that purpose. *Id.*

18. The Student's time in the general education setting was to be ninety-five percent unless implementation of the BIP called for him to be pulled out for behavior intervention. [REDACTED] T499:18. The BIP included a crisis recovery plan that allowed restraint by trained staff when there was potential for imminent harm. J10p5; [REDACTED] T544:19. The training the [REDACTED] used for behavior management and crisis response protocols was Right Response taught by [REDACTED].¹⁵ [REDACTED] T561.14.

19. On October 17, 2022, the Student punched another student in the classroom in the face/neck area after the student asked him not to kick Legos. D4p12. When [REDACTED] and a paraeducator blocked his access to the other student he punched them repeatedly. D3p1; D4p12. On October 21, 2022, the Student punched and kicked another student in the general education classroom. The same day the Student punched, kicked, scratched, and hit a paraeducator. D3p2. On October 24, 2022, the Student pushed another student in the classroom. He also hit and pinched his general education teacher multiple times. D4p12. On October 28, 2022, the Student pushed another student in the cafeteria to the floor. D4p13. On October 31, 2022, the Student headbutted [REDACTED] in the cafeteria and pushed another student. *Id.* On November 1, 2022, the Student grabbed a staff member's hand in the classroom, digging his nails in drawing blood and pushed her in the stomach. D3p2; D4p13. On November 4, 2022, the Student shoved a staff member in the hall. *Id.* On November 7, 2022, the Student hit other students and threw supplies at staff in the classroom. D4p13.

Reevaluation Initiated

20. On November 8, 2022, the [REDACTED] held a meeting regarding its proposal to initiate a reevaluation of the Student. [REDACTED] T500:16. The Parent attended the meeting. Parent T106:11. During the meeting the team discussed adding more time at the start of his day in [REDACTED]. [REDACTED] T501:1. The plan included developing a schedule of breaks in [REDACTED] every fifteen minutes the Student was in the general education classroom if he was struggling. P5p1; [REDACTED] T300:16-23. The [REDACTED] considered this to be an evaluative placement, meaning an interim setting to see how the Student performed within different settings and with different interventions in place. [REDACTED] T501:14. The additional instruction contemplated in the evaluative

¹⁵ [REDACTED] is a Behavior Systems Coordinator with [REDACTED]. He has training in Right Response to teach that system to others. He is a certified trainer in trauma informed practices. P11p1; [REDACTED] T557:18-558:25. This is his fifth year in this position for [REDACTED] T563:24. He has emergency certification as a teacher. [REDACTED] T564:18. He has taken behavior technician training but has not worked under the direction of a board-certified analyst (BCA) long enough to become a registered behavioral technician. [REDACTED] T564:6-17. He has experience as a preferred substitute behavior specialist with the [REDACTED] School District, a role similar to a paraeducator. P11p1; [REDACTED] T592:13.

setting was to occur in [REDACTED] T502:9-15.

21. During the November 8, 2022, meeting the team also discussed adding a 1:1 paraeducator with Student at all times. [REDACTED] T292:11, 296:64; [REDACTED] T501:11. The 1:1 paraeducator was part of the evaluative placement. [REDACTED] T294:17, [REDACTED] T501:7-20. The purpose of the 1:1 paraeducator was to support accommodations and intervene, should escalation and crisis occur. [REDACTED] T502:7. The paraeducator primarily assigned to the Student was [REDACTED].¹⁶ [REDACTED] T476:21.

22. The [REDACTED] did not generate any documentation memorializing decisions made at the November 8, 2022, meeting or documenting the Parents' agreement with the evaluative placement. [REDACTED] T295:14-21; [REDACTED] T501:25. No documentation was prepared documenting the evaluative placement. [REDACTED] T501:25. An IEP Amendment and PWN was not developed. [REDACTED] T294:9; [REDACTED] T501:25. The Parent does not recall the words "evaluative placement" being used at any time during the meeting or after. Parent T92:13

23. On November 9, 2022, the Student kicked another student in [REDACTED]. D3p3. On November 14, 2022, the Student pushed another student in [REDACTED] and kicked staff. *Id.* On December 5, 2022, the Student pushed students in their chairs in the classroom. D3pgs 3, 4.

24. Beginning by at least December 2022, the Parent and [REDACTED] communicated each school day about the Student's behavior using a notebook and email. D17; Parent T148:3; [REDACTED] T187:4-11.

25. On December 7, 2022, the Student's behavior escalated in [REDACTED]. The Parent observed a portion of the incident and provided feedback to members of the IEP team via email. D17pgs 1, 2. On December 8, 2022, the Student received a half-day, out-of-school suspension for throwing supplies in the classroom. D4p9.

26. On December 12, 2022, [REDACTED] reported the Student had a good day overall with few small struggles. D17pgs 3, 4.

27. On December 13, 2022, the Student wanted to touch his paraeducator's feet and began throwing items and hitting staff in [REDACTED]. D3p4; D4p14. The Student

¹⁶ [REDACTED] worked for [REDACTED] Elementary for nine school years as a substitute teacher in developmental preschool. She then started in the kindergarten through fifth grade Title 1 doing primarily math intervention. She then began working in a kindergarten through second grade behavior program. The following year she began in the [REDACTED] for students with behavior needs. She began working with the Student this year after briefly leaving the District to go back to school. She is working on her master's degree. She has an emergency teaching license. [REDACTED] T475:4-476:10.

received a one and a half day out-of-school suspension to return December 17, 2022. D4p8. On December 14, 2022, the Student received a two and a half day out-of-school suspension for an extended escalation in the classroom involving physical violence to return January 3, 2023. Staff applied two holds and isolation. D3p5; D4p10, 14; D17p5. On January 3, 2023, the Student struck [REDACTED] three times. His consequence for this incident was lost time in [REDACTED] class. D3p5. On January 4, 2023, the Student went after multiple staff to both hit and push them. His consequence for this incident was lost time in [REDACTED] class. On the same day, the Student struck [REDACTED] twenty-eight times in [REDACTED]. He lost additional class time and recess as a consequence for this incident. D3p5; D17p13.

28. On January 5, 2023, [REDACTED] reported the Student had a fantastic day and was only in her office for requested breaks. D17p15.

29. On January 6, 2023, the Student left [REDACTED] to go to the general education classroom without permission. He began yelling, kicking the door and staff when asked to have a calm body before entering. On a different occasion the same day, the Student threw supplies at [REDACTED] when told she would make the decision about which racetracks to buy for [REDACTED]. D3p5; D17p19. On January 9, 2023, the Student went after four staff members by scratching, kicking, hitting and headbutting them. Staff applied two holds and then used the isolation room. D3p6; D17p23. On January 10, 2023, the Student attempted to run to the playground and pushed staff multiple times. Staff redirected the Student to [REDACTED], and he missed lunch in the cafeteria. D3p6.

Results of Reevaluation

30. On January 10, 2023, the [REDACTED] held a meeting to review the reevaluation of the Student. J11p5. The Parents participated in the reevaluation meeting with the other members of the IEP team. [REDACTED] T510:13. The Student had attention-deficit/hyperactive disorder, conduct disorder, and generalized anxiety disorder. D7p6; [REDACTED] T504:18. The Student was identified as eligible under the category of health impaired. D7p6. The reevaluation indicated the Student has deficits in executive functioning that cause him to be quick to react, lose emotional control and become extremely elevated. D7p6; [REDACTED] T505:12-20. The reevaluation recommended the Student receive SDI in social/emotional skills and behavioral skills. D7p7; [REDACTED] T506:16.

31. As part of the reevaluation [REDACTED] conducted a variety of assessments including the Behavioral Assessment System for Children, Third Edition (BASC-3). D7p11; [REDACTED] T525:22. [REDACTED] obtained BASC-3 rating scales from the Student's

special education case manager, [REDACTED], and his general education teacher, [REDACTED], but not the Parents. D7p13; [REDACTED] T526:63. [REDACTED] also administered the Adaptive Behavior Assessment System, Third Edition (ABAS-3) assessment. D7p19; T526:15. [REDACTED] also obtained ABAS-3 rating scales from [REDACTED] but not the Parents. [REDACTED] T526:13. Other than briefly discussing medical and physical findings the reevaluation report does not reflect any input from the Parents. [REDACTED] T525:17.

32. [REDACTED] opined the Student should receive SDI for behavior in a special education setting and not a general education classroom. [REDACTED] T514:23-516:5. [REDACTED] opined that the services outlined in the Student's IEP designed on February 28, 2023, was an appropriate IAES. [REDACTED] T519:13. He further opined that the Student was substantially likely to injure himself or others if he remained in the placement represented by the May 10, 2022 IEP amendment coupled with the October 2022 BIP or in the evaluative placement. [REDACTED] T518:17-519:8. The reason [REDACTED] did not obtain BASC or ABAS rating scales from the Parents was because the reevaluation was trying to determine the Student's functioning level at school and needs within the school environment and the Parents were reporting that he was doing well within the home. [REDACTED] T 526:3-14.

33. After the reevaluation was complete and continuing through the emergency expulsion, the [REDACTED] continued to remove the Student for breaks and de-escalation at [REDACTED]. He received the bulk of his academic instruction in the general education setting. The amount of time he was in [REDACTED] fluctuated daily. [REDACTED] T359:3-361:6; D17pgs 38, 39. The Student continued to receive his primary services in the general education classroom up to the point of his emergency expulsion on February 2, 2023. *Id.* The Student continued to work with a 1:1 paraeducator at all times until he was emergency expelled. [REDACTED] T476:25. The only element of the evaluative placement that continued to be in place at the time of the emergency expulsion was the 1:1 paraeducator. [REDACTED] T359:3-361:6; D17pgs 38, 39; [REDACTED] T476:25.

34. On January 11, 2023, the Student had multiple behavioral incidents, hit [REDACTED] fourteen times, and hit two other staff members. The Student lost time in [REDACTED] class due to the behavioral incidents. D3pgs 6,7; D17p26. On January 12, 2023, the Student had five incidents. During three of these incidents the Student hit staff. The one other incident involved threatening to throw a stapler and the other involved throwing supplies. The Student was put in a hold for at least one of these incidents and removed to the isolation room on three separate occasions. D3pgs 7, 8. On January 13, 2023, the Student had six incidents. He hit staff during four of the incidents and was placed in isolation 4 times. D3p8; D17p28. On January 17, 2023,

the Student had four incidents including separate occasions of throwing a water bottle, supplies and a chew stick at staff. On a fourth occasion he slapped and kicked his paraeducator after he was woken from his nap for an appointment. He was restrained on two occasion and placed in isolation for each incident. D3p9; D19p31. On January 18, 2023, the Student had four separate incidents. During one incident he hit his paraeducator and during another he flung the spit from his chew toy at her face. During another incident, the Student kicked another paraeducator in the chest, knocking the wind out of her. The Student was suspended for a half day and permitted to return January 19, 2023. D3p9; D4pgs11, 14.

Manifestation Determination Review on January 19, 2023

35. On January 19, 2023, a the [REDACTED] held a manifestation determination review meeting regarding the January 18, 2023, suspension. [REDACTED] T426:8. The Parent participated in this meeting along with [REDACTED], and other members of the IEP team. [REDACTED] T261:24; [REDACTED] T426:8. The team found the incident was a manifestation of the Student's disability because it had a direct and substantial relationship to the Student's disability. D8p4; [REDACTED] T427:21. The team, other than the Parent, concluded the conduct did not result from the failure to implement the Student's IEP. Parent T141:7; [REDACTED] T428:2. The [REDACTED] issued a PWN dated the same date detailing the results of the manifestation determination meeting. D8p6; Parent T141:11.

36. During the meeting, the team determined the Student had been suspended out-of-school for a total of eight days up to that point in the school year. D8p6; [REDACTED] T426:25. However, the Student was suspended out-of-school, seven different times, for a total of nine times during the school year as indicated in findings of fact 9 (2 school days), 12 (2 school days, 2 separate suspensions), 25 (.5 school day), 27 (4 school days, 2 separate suspensions), and 34 (.5 school day).

37. On January 19, 2023, the Student had separate incidents including pushing staff with his head, body, and feet; throwing Kleenex and later kicking [REDACTED]; purposefully kicking another student; and pushing his paraeducator against a wall. D3pgs 10, 11. He was placed in the isolation room multiple times. *Id.* He was also referred to Assistant Principal [REDACTED]¹⁷ for kicking his backpack at staff, slapping his paraeducator and throwing two books, hitting another student. D4 pp 14,

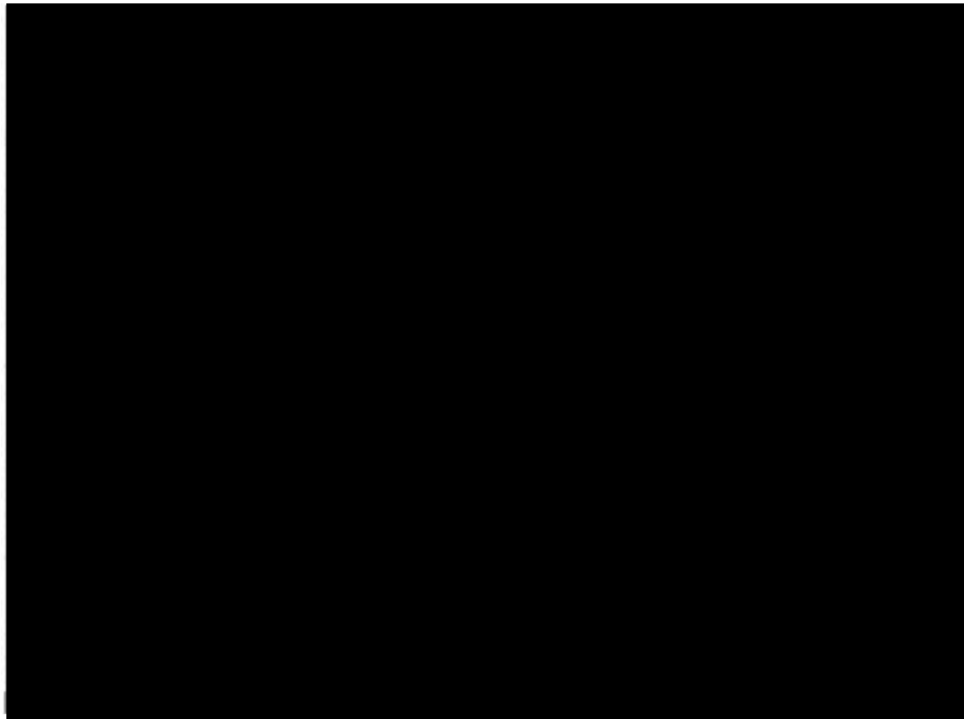
¹⁷ [REDACTED] is an Assistant Principal at [REDACTED] Elementary School. This is her first year in this position. She has two master's degrees, one in elementary education and one in school administration. She has certifications in teaching and school administration. She previously worked for sixteen years [REDACTED] Public Schools as a teacher and teacher leader, where she mentored other teachers. [REDACTED] T382:20-383:24.

15; D17p37. On January 20, 2023, the Student had multiple incidents. His conduct included hitting staff with his coat and backpack, grabbing another student, and pushing her to the ground, and hitting paraeducators when using a body sock. D3pgs 11, 12; D4p15.

38. An IEP meeting scheduled for January 26, 2023, was rescheduled so that [REDACTED] could attend. Parent T100:15-101:10. At some point prior to January 26, 2023, the Parent received a draft IEP. *Id.*

Interim Safety Plan

39. On January 27, 2023, [REDACTED] sent an email to the Parent with the subject line "Interim Safety Plan." P2p1. The email stated:



Id.

40. [REDACTED] did not involve the other IEP team members in developing the interim safety plan indicated in her January 28, 2023, email. [REDACTED] T210:14. This was because the decision was the District response to the harassment, intimidation, and bullying forms. [REDACTED] T210:16-20. The only other person involved in the decision was the District Superintendent. [REDACTED] T212:24. The reason for the decision to keep the Student in [REDACTED] for his school day was to benefit the parents who had filed the HIB complaints, and the Student to make sure the District was doing due diligence that there was nothing else going on. [REDACTED] T213:24-214; Parent T82:14. [REDACTED]

██████████ was not aware of the element of the interim safety plan to change the Student's placement to ██████████. He understood it was an agreement with the Parents and the District to use it as a calm-down space. ██████████ T448:18-449:13.

Threat Assessment

41. On January 30, 2023, ██████████,¹⁸ ██████████ threat assessment coordinator convened a threat assessment meeting. J1; ██████████ T268:11. The District requested the ██████████ conduct a threat assessment due to concern that the Student's behavior was posing a safety hazard to staff and students. ██████████ T268:20. ██████████ used the ██████████ Student Threat Assessment and Management System Level 1 Protocol which is based on the Salem-Keizer Cascade Threat model. ██████████ T269:10. The threat assessment meeting involved both the Parents, ██████████. ██████████ T394:24. The participants did not consider the threat assessment meeting to be an IEP team meeting. ██████████ T394:24. The IEP was not discussed during the threat assessment meeting other than to note an IEP meeting would be held in the future. ██████████ T395:4, 395:24. The threat assessment meeting concluded that the Student's acts of physical aggression were impulsive in nature and not targeted to any student in particular; nor harassing or bullying other students. ██████████ T392:7, 393:23. Based on the Level 1 threat assessment protocol, the threat assessment team developed a management and supervision plan. J1pgs 10, 11; ██████████ T269:15. The plan included-future review of the Student's IEP, 1:1 supervision, parent checks at home, assigned building staff, check-ins with a counselor or behavior specialist, and communication between the school and medical provider. J1pgs 10, 11; ██████████ T270:21. The plan was to utilize the 1:1 to help the Student have safe behaviors and teach those safe behaviors. J1pgs 10, 11; ██████████ T393:20. Nothing specifically in the management and supervision plan talked about placement. J1pgs 10, 11; ██████████ T270:4.

42. On February 1, 2023, the Student attempted to kick students, head butted another student twice, and threw a ball at a group of students. He squeezed another student around the stomach and head-butted staff. D4p15; ██████████ T203:12. That same day in ██████████, the Student made a statement to ██████████ about how if he could make the rules, he would make people take their feet off. Parent T90:9-18.

¹⁸ ██████████ is the Student Threat Assessment Coordinator for ██████████. He has been in this position eight years. He is trained in the ██████████ School District. He attended annual training at least twice a year on a number of different threat assessment topics. He has a master's in counseling psychology and is a certified threat manager through the association of threat assessment professionals. ██████████ T267:13-268:7

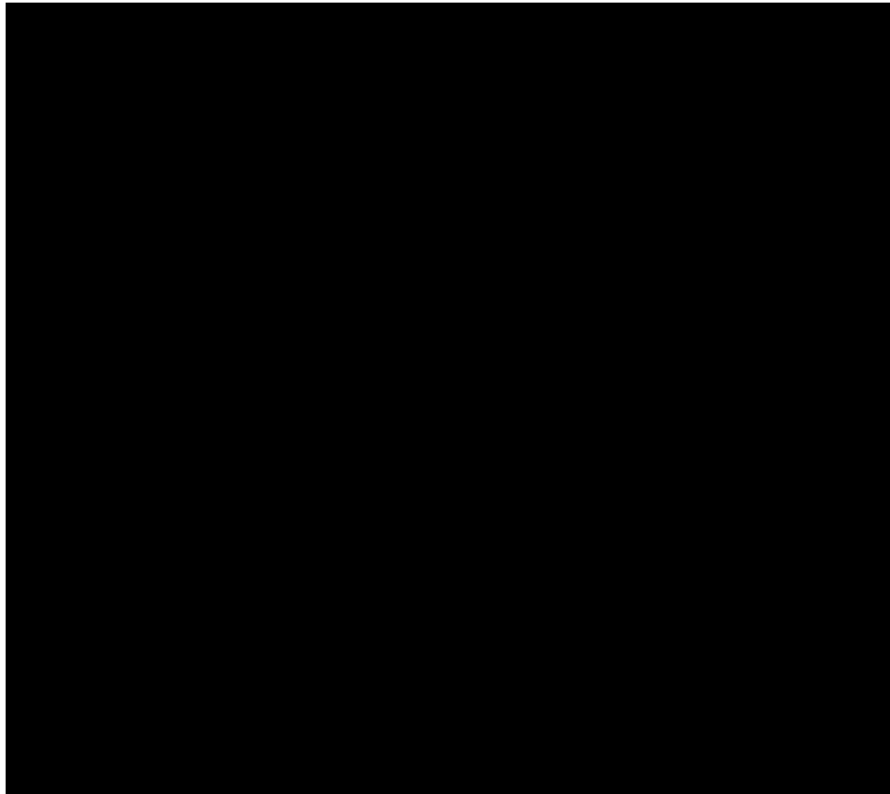
██████████ interpreted this as a direct, but not believable, threat to cut off the paraeducator's feet. ██████████ T203:17-23.

43. On February 2, 2023, the Student had a good day at school. ██████████ T202:19.

44. On or about February 2, 2023, the Parents expressed that they wanted the Student to receiving special education in the general education classroom and refused to agree to change his primary classroom to ██████████ T202:24.

Emergency Expulsion

45. On February 2, 2023, the Student was emergency expelled. ██████████ T205:15. The District notified the Parent through a letter dated the same day. The letter stated:



J5p.1.

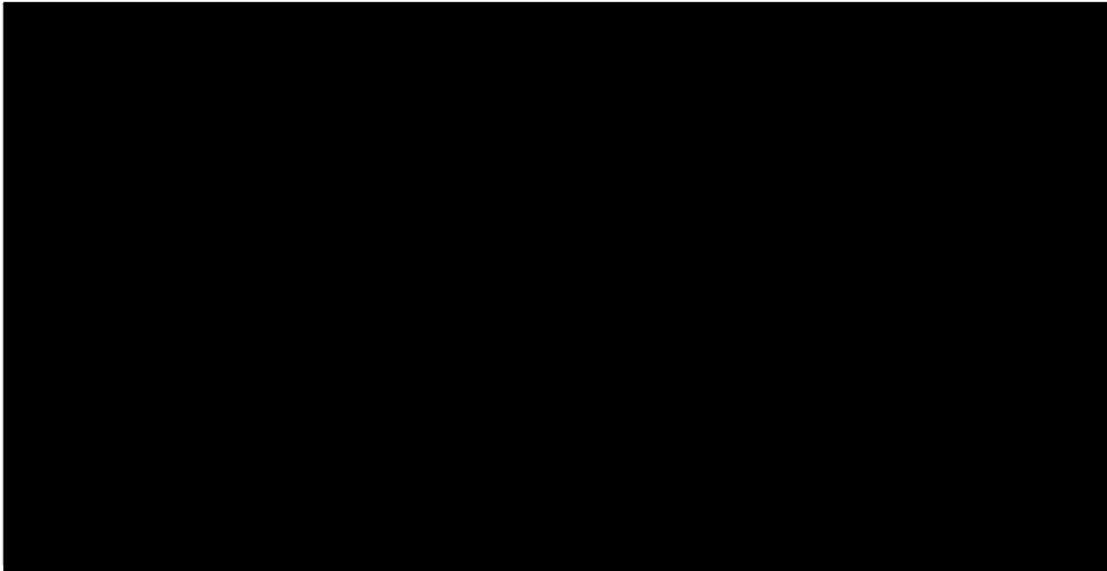
46. Members of the Student's IEP team believed the behaviors of February 2, 2023, were a manifestation of the Student's disability as the behavior was caused by or had a direct and substantial relationship to the Student's disability. ██████████ T263:2-9; ██████████ T436:12-437:5. ██████████ believed a manifestation determination review was not required because the Student was emergency expelled. ██████████ T437:15.

47. [REDACTED] contacted [REDACTED] after the emergency expulsion. He determined that the February 1, 2023, threat to the paraeducator was not a direct, meaningful threat and did not provide additional recommendations. [REDACTED] T271:17; [REDACTED] T397:15

48. The [REDACTED] issued a PWN dated February 3, 2023. J6p3. The PWN acknowledged the Student was emergency expelled. *Id.* The PWN stated the [REDACTED] considered a manifestation determination review and rejected it because an “emergency expulsion is not subject to whether the disability is related to the issue.” *Id.*

Interim Alternative Placement

49. The [REDACTED] issued a PWN dated February 6, 2023. J7p3. The PWN stated:



J7p3.

50. The [REDACTED] rescheduled the IEP meeting scheduled for February 7, 2023, because the Parents intended to bring their attorney, and so that [REDACTED] attorney could also be present. Parent T100:20; [REDACTED] T189:10.

51. On February 10, 2023, the Parents’ filed their Complaint. Parents’ Complaint.

52. On February 16, 2023, and February 28, 2023, the Student’s IEP team met. The Parents attended these meetings. Parent T149:25-T150:24.

53. The Emergency Expulsion expired on February 16, 2023. [REDACTED] T206:10. The Student has not returned to school as the Parents object to the Interim Alternative

Placement proposed on February 6, 2023, and the IAES proposed through [REDACTED] Complaint. [REDACTED] T207:6.

54. On February 22, 2023, the [REDACTED] filed its Complaint. [REDACTED] Complaint.

IEP and BIP Revision

55. On February 28, 2023, the Student's IEP team completed his IEP. Parent T150:13; [REDACTED] T338:1; [REDACTED] T454:17. The [REDACTED] issued a PWN on March 1, 2023. D18p25. The PWN stated the IEP would begin on March 10, 2023. D18p25. The PWN rejected that Parents request for the Student to be in the general education setting 67%-95% of the time. *Id.* Elements of the February 28, 2023, IEP included:

- Adjusting social/emotional goals to continue to work on safe behaviors at school. D18p10.
- Adding behavior goals to address pro-social, de-escalation, and on task skills. D18pgs 11, 12.
- Increasing the Student's total of one thousand two hundred minutes per week of services in a special education setting. D19p22.
- Reducing the Student's time in the general education setting to 33.33%. D18p22; Parent T153:8
- Adding 45 minutes one time per week of sensory/motor consultation from an occupational therapist (OT) in the special education setting. *Id.*
- Adding a 1:1 paraeducator two hundred forty minutes / five times per week in the special education setting. *Id.*
- Adding a 1:1 paraeducator one hundred twenty minutes / five times per week in the general education setting. *Id.*
- An updated BIP based on the Student receiving increased time in a self-contained behavioral classroom. The BIP also provided for increased time in general education as the Student demonstrates improvement through a safe behavior plan. The BIP also provided "[d]epending on the severity of the behavior and any eminent [sic] threat to self or others, [the Student] may be placed within a hold or isolation to assist with de-escalation and to prevent possible harm to self or others." D18p15. The IEP team developed the BIP based upon input from the Parents. Parent T150:14-24.

56. Forty-five school days from February 3, 2023, is April 13, 2023, and the next school day following is April 17, 2023. D1p1.

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 under these provisions, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. [REDACTED] met this definition and had the duty to provide the Student FAPE.

3. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Both the Parents and the [REDACTED] have filed complaints seeking relief in this case. The U.S. Supreme Court and Washington courts have held that the burden of proof in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981); *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797 (1999); *Hardee v. Dep't of Social & Health Services*, 172 Wn.2d 1, 4 (2011). Therefore, the Parents bear the burden of proof on the issues they have alleged and their requests for relief and the [REDACTED] bears the burden of proof on the issues it has alleged and its requests for relief.

The IDEA and FAPE

4. Under the IDEA, a school district or [REDACTED] must provide a FAPE to all eligible children. In doing so, an [REDACTED] or school district is not required to provide a “potential-maximizing” education, but rather a “basic floor of opportunity.” *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 197 n.21, 200-201 (1982).

5. In *Rowley*, the U.S. Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. The first question is whether the state has complied with the procedures set forth in the IDEA. The second question is whether the IEP developed under these procedures is 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*, 458 U.S. at 206-07.

6. Procedural safeguards are essential under the IDEA, particularly those that protect the parent’s right to be involved in the development of their child’s educational plan. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). 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); WAC 392-172A-05105(2); 34 CFR §300.513(a)(2).

7. “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.” *Andrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry. As the U.S. Supreme Court has made clear, “[a] focus on the particular child is at the core of the IDEA,” and an IEP must meet a child’s unique needs. *Id.* The “essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.* Accordingly, an IEP team is charged with developing a comprehensive plan that is “tailored to the unique needs of a particular child.” *Id.* at 1000. Additionally, the Student’s “educational program must be appropriately ambitious in light of his circumstances” *Id.*

8. In reviewing an IEP, “the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” *Id.* at 999 (emphasis in original). The determination of reasonableness is made as of the time the IEP was developed. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). An IEP is “a snapshot, not a retrospective.” *Id.*

Change in Placement for Violations of a Code of Student Conduct

9. The IDEA sets forth specific procedural requirements for determining when a decision to change the placement of a student eligible for special education due to a violation of a code of student conduct is appropriate. WAC 392-172A-05145(1). A school district, [REDACTED] must notify the parents of a decision to change the placement of an eligible student due to a violation of a code of student conduct and provide the parents a notice of procedural safeguards the same day of the

decision. WAC 392-172A-05150. A removal for violations of a code of student conduct is a change of placement if it meets criteria under WAC 392-172A-05155. See, WAC 392-172A-05145(2)-(4).

10. Under WAC 392-172A-05155 a change in placement occurs if:

- The removal is for more than ten consecutive school days; or
- The student has been subjected to a series of removals that constitute a pattern:
 - Because the series of removals total more than ten school days in a school year;
 - Because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and
 - Because of such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to another.

11. A determination regarding a change in placement is subject to review through due process and judicial proceedings. WAC 392-172A-05155(3).

Manifestation Determination

12. Within ten school days of any decision to change the placement of a student eligible for special education services because of a violation of a code of student conduct, the [REDACTED] the parent, and relevant members of the student's IEP team (as determined by the parent and the [REDACTED] 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:

- If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
- If the conduct in question was the direct result of the school district's failure to implement the IEP.

WAC 392-172A-05146(1).

The conduct must be determined to be a manifestation of the student's disability if the [REDACTED] the parent, and relevant members of the student's IEP team determine that either of the above conditions are met. WAC 392-172A-05146(2). If it is determined the conduct was a manifestation of the student's disability, the school district or [REDACTED] must take immediate steps to remedy those deficiencies. WAC 392-172A-05146(2).

13. If it is determined that the student's misconduct was a manifestation of their disability, the IEP team must either conduct an FBA and implement a BIP for the student or, if a BIP has already been developed, review the BIP and modify it as necessary to address the behavior. WAC 392-172A-05147(1) and (2). Other than in special circumstance not alleged by any party in this case, the student must also be returned to the placement from which they were removed unless the parent and the school district agree to a change of placement. WAC 392-172A-05147(3).

Expedited Due Process Hearing

14. WAC 392-172A-05160 addresses appeal of placement decisions and manifestation determinations. The pertinent part of the rule provides:

(1) The parent of a student eligible for special education who disagrees with any decision regarding placement under WAC 392-172A-05145 and 392-172A-05155, or the manifestation determination under WAC 392-172A-05146, or 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 appeal the decision by requesting a due process hearing. The hearing is requested by filing a due process hearing request pursuant to WAC 392-172A-05080 and 392-172A-05085.

(2) (a) An administrative law judge under WAC 392-172A-05095 hears and makes a determination regarding an appeal under subsection (1) of this section.

(b) In making the determination under (a) of this subsection, the administrative law judge 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.

(c) The procedures under subsection (1) of this section and (b) of this subsection may be repeated, if the school district believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

Parents' Issue #1: Failing to involve the Parents in the development of a purported "safety plan" which the Parents have never seen, which sought to override the IEP and place the Student in a segregated, restricted environment for the school day.

15. Through an email dated January 27, 2023, ██████████ informed the Parents that the District would implement an interim safety plan due to HIB complaints about the Student's behavior made by other parents. The email indicated that ██████████ had found the Student's behavior was an extreme disruption to the classroom and created a substantial barrier to the other students' learning. The email stated that as an interim safety plan the Student would spend more time in ██████████ as his least restrictive environment (LRE). ██████████ and the District Superintendent made the decision to change the Student's LRE to ██████████ not the IEP team.

16. The Parents argue that this decision was a change in the Student's educational placement. Parents' Post-hearing Brief p. 10. The Ninth Circuit has stated that a change in educational placement "relates to whether the student is moved from one type of program –i.e., regular class –to another type –i.e., home instruction." *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). It has held that "a change in the educational placement can also result when there is a significant change in the student's program even if the student remains in the same setting." *Id.* Likewise, the Department of Education has stated that its "longstanding position" is that "placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school." 71 Fed. Reg. 46540, 46687 (August 14, 2006). In *Letter to Fisher*, 21 IDELR 992 (OSEP 1994), the Department of Education's Office of Special Education Programs explained that there are three components to an educational placement:

It is these three components—the education program set out in the student's IEP, the option on the continuum [of alternative placements] in which the student's IEP is to be implemented, and the school or facility selected to implement the student's IEP—that comprise a placement decision under Part B [of the IDEA]. . . .

In determining whether a "change in educational placement" has occurred, the public agency responsible for educating the child must determine whether the proposed change would *substantially or materially alter the child's educational program.*

Id.

17. [REDACTED] January 27, 2023, email states the Student's LRE would be changed to [REDACTED]. At the time of her email the Student's LRE was identified in his May 10, 2022, IEP Amendment as the general education setting. This was not changed by the October 13, 2022, BIP as it provided for removals to [REDACTED] but maintained the general education classroom as the Student's setting to receive all academic instruction. Further, on January 27, 2023, the Student's primary placement was in [REDACTED] general education kindergarten classroom, and he was only being pulled out to [REDACTED] for breaks and de-escalations. Therefore, as stated in the January 27, 2023, email from [REDACTED], the decision to change the Student's LRE from a general education classroom to a special education classroom designed for student's with social, emotional and behavior needs, identified in the email as [REDACTED], was a proposed change in placement.

18. At the time of the January 27, 2023, email the Student had been suspended for nine days total as identified during the January 19, 2023, manifestation determination meeting. Based on the District calendar the Student would have been removed more than one school day if he was removed to [REDACTED] as stated in the email. This would have met change in placement criteria under WAC 392-172A-05155 because the removal would have resulted in a pattern of removals for more than ten school days for the school year. The behavior alleged in the HIB complaints was also substantially similar and close in time to the Student's past behavior incidents.

19. However, the testimony and evidence at hearing did not establish that the Student's area of academic instruction was in fact changed to [REDACTED] following [REDACTED] email. [REDACTED] testified that the Student continued to be educated in [REDACTED] classroom with pullout to [REDACTED] for breaks and escalation until his emergency expulsion on February 2, 2023. [REDACTED] testimony was consistent with [REDACTED], who understood the interim safety plan was an agreement with the Parents to use [REDACTED] as a calm-down space and not a placement change.

20. Therefore, because the evidence at hearing indicated that despite [REDACTED] stated intent to change the Student's placement in her January 27, 2023, email, the Student's placement remained in the general education classroom until he was emergency expelled on February 2, 2023; the January 27, 2023, email did not effectuate a removal as defined under WAC 392-172A-05145. As explained below, the Student was not removed until February 2, 2023, when the Parents refused to agree to the interim safety plan, and he was emergency expelled for behavior violating a code of student of conduct.

February 2, 2023, Emergency Expulsion

21. The Student was emergency expelled for up to ten consecutive school days through a letter to the Parents dated February 2, 2023. The reason for the emergency expulsion was repeatedly disrupting the learning environment through physical violence, threats, and loud yelling. The letter documented a specific incident on February 1, 2023, of a direct threat to staff and going after the staff member's feet with a pencil. The letter also references the Parents' refusal to agree to the interim safety plan. The emergency expulsion prohibited the Student being on any District campus, transportation, or participation and attendance at school activities. The letter stated the Student would be able to receive education services during the expulsion after the IEP team met. The emergency expulsion was not converted to discipline or revoked and expired on February 16, 2023.

22. The emergency expulsion was a change in placement for the Student as he was removed from his special education program as provided under the May 10, 2022, IEP Amendment and October 13, 2022, BIP. The District had a zero-tolerance policy against violence toward other students or staff. Because the decision to emergency expel the Student was based at least partially upon his violation of a code of student conduct the [REDACTED] was required to meet the requirements of WAC 392-172A-05145. The length of the ten consecutive school day emergency expulsion combined with the nine days the Student had already been suspended totaled more than ten school days in the school year and the behavior for which he was emergency expelled was substantially similar and close in time to the Student's past behavior incidents. Therefore, the criteria in WAC 392-172A-05155(1) for a change in placement was met.

23. Because the emergency expulsion was a change in placement the [REDACTED] was required to conduct a manifestation determination review in accordance with WAC 392-172A-05146. The Student's IEP team members at the hearing uniformly testified that the Student's behavior that was the basis of the emergency expulsion was a manifestation of the Student's disability as it was caused by or had a direct and substantial relationship to his disability.¹⁹ Therefore, [REDACTED] and the District were required to return the Student to the placement from which he was removed as required by WAC 392-172A-05147(3). [REDACTED] was also required to review the Student's BIP. WAC 392-172A-05147(2). [REDACTED] was required to immediately take steps to remedy those deficiencies. WAC 392-172A-05146(2).

¹⁹ [REDACTED] post-hearing brief also acknowledges that the Student's conduct leading up to the emergency expulsion was a manifestation of his disability. [REDACTED] Post-hearing Brief p. 22.

24. The [REDACTED] February 3, 2023, PWN rejected conducting a manifestation determination review on the basis that it was an emergency expulsion and not required. At hearing and through its prehearing and post-hearing briefs the [REDACTED] argued that an emergency expulsion is not a disciplinary removal and, therefore, it was not required to conduct a manifestation determination review. This is a misplaced argument as WAC 392-172A-05145(1) and (2) does not refer to disciplinary action but rather uses the language referring to a change of placement based on student behavior that “violates a code of student conduct” as the triggering element to apply the criteria under WAC 392-172A-05155. WAC 392-172A-05146 also uses the language “violation of a code of student conduct” to trigger a manifestation determination. WAC 392-172A-05155 references disciplinary removals, however, that provision is contingent upon WAC 392-172A-05145 and, therefore, the operative language for applying the criteria for a change in placement remains in WAC-392-172A-05145. In this case, after the Parents refused to agree to the interim safety plan, the Student was emergency expelled for violations of a code of student conduct. Therefore, WAC 392-172A-05145 triggered review of the criteria in WAC 392-172A-05155.

25. Case law clarifies that emergency expulsions are not exempt from the protections provided in WAC 392-172A-05145. In *Selah School District*, 66 IDELR 266 (WA SEA 2015) the ALJ considered the question of whether a manifestation determination review was necessary to review a student’s BIP, when the district conceded the Student's conduct was a manifestation of his disabilities but obtained a civil court order restraining the student from attending their elementary school. The ALJ determined that in the context of the emergency expulsion the district removed the student due to violations of a code of student conduct and the manifestation determination review was required to be held in to review the student’s BIP despite the District’s agreement that the student’s conduct was a manifestation of his disabilities. Similarly, the Office of Civil Rights has determined that an appropriate manifestation determination review must be conducted after an emergency expulsion when the amount of removals exceed 10 school days in a school year based on the same definition of a change in placement used in *Letter to Fisher. Quincy (WA) SD 52 IDELR 170* (OCR March 2, 2009). The undersigned having reviewed many Washington special education decisions considering emergency expulsions was unable to identify a single case that concluded an emergency expulsion is not subject to manifestation determination review when a change in placement has occurred. Nor was such a case cited in the [REDACTED] prehearing or post-hearing briefs. See, *Selah School District, supra* (“Neither IDEA nor courts since entry of a civil injunction in *Honig v. Doe*, 484 U.S. 305 (1998), provide authority for District to fail to review the BIP and modify it as necessary to address the behavior.”).

26. Because the Student's conduct pertaining to the February 2, 2023, emergency expulsion was a manifestation of the Student's disabilities the [REDACTED] was required to return the Student to the placement he was in at the time he was emergency expelled. *East Valley SD, 120 LRP 17286 (WA SEA 2020)* (School district was required to return a student to his current placement after determining his behavior was a manifestation of his disability). As concluded above, the evidence and testimony at hearing demonstrated that the placement the Student was in when he was removed was the May 10, 2022, IEP Amendment and October 13, 2022, BIP along with a 1:1 paraeducator at all times. Therefore, the Parents have shown by a preponderance of the evidence that the Student's removal was a violation of WAC 392-172A-05145, and WAC 392-172A-05146, WAC 392-172A-05147, and in accordance with WAC 392-172A-05160(2)(a), the Student must be returned to that placement upon completion of the IAES period as described below.

27. The Parents have established by a preponderance of the evidence that the [REDACTED] removed the Student for a violation of a code of student conduct after the Parents refused to agree to the interim safety plan. The Parents further established that the District unilaterally developed the interim safety plan resulting a change of placement to a more restrictive setting without involving the Parents.

Parents' Issue #2 – Providing a PWN about an interim emergency alternative placement decision eight days after the action occurred.

28. The [REDACTED] issued a PWN dated February 6, 2023, that proposed to place the Student in an emergency interim alternative placement beginning February 7, 2023. The PWN described the proposed action saying the District offered an emergency interim alternative placement as part of the safety plan after the threat assessment conducted on January 30, 2023. It went on to say the [REDACTED] had to continue the IEP meeting scheduled for January 26, 2023, to discuss a change in placement consistent with the threat assessment so that the parties' attorneys could attend and to give the District time to provide records requested by the family. The [REDACTED] proposed to implement a change in placement consistent with what it described as the threat assessment team's recommendation for a safety plan delivered full time in the special education setting in [REDACTED] Elementary School with supports and SDI services delivered by the special education staff. The PWN stated the reason for placing the Student in the emergency interim alternative placement was that he posed an immediate risk to himself and others in the general education setting.

29. Special education rules in the Washington Administrative Code provide for three different procedures in which an [REDACTED] may place a student in an Interim Alternative Educational Setting (IAES) outside of IEP development procedures without

parent agreement. Under WAC 392-172A-05145(2) a student may be removed to an IAES for no more than ten school days as long as the removal does not constitute a change in placement under WAC 392-172A-05155. Counting the two days the Student had already been emergency expelled, February 6, 2023, was past the tenth day of the school year that the Student had been removed due to a violation of a code of student conduct. As the PWN proposed the IAES to begin February 7, 2023, it exceeded ten total school days in a school year for behavior that constituted a pattern of removals under WAC 392-172A-05155. The ESA, therefore, was not permitted to place the Student in an IAES under WAC 392-172A-05145(1). The next procedure by which an [REDACTED] can place a student in an IAES without convening a student's IEP or parent agreement is under WAC 392-172A-05149. This rule involves special circumstances not alleged in this case and is, therefore, inapplicable to the Student's circumstances. The third procedure is provided under WAC 392-172A-05160(1) which permits an [REDACTED] to request a due process hearing if it believes maintaining the current placement of a student is substantially likely to result in injury to the student or others. Removal through that process is not a unilateral act by an [REDACTED] because it requires the [REDACTED] to request a due process hearing and an ALJ to order a change in placement to an IAES for not more than 45 school days. *Anitoch Unified Sch. Dist.*, No 4:19-cv-02453, 78 IDELR 257 (N.D. Cal. 2021). In the Student's case the [REDACTED] did not seek an order from the ALJ until filing a motion under the Parents' hearing request on February 21, 2023. Because the [REDACTED] had not obtained an order from the ALJ or even initiated the process when it issued the PWN on February 6, 2023, the Student's placement was not made in accordance with WAC 392-172A-05160 at that time.

30. The [REDACTED] did not convene the Student's IEP team prior to placing the Student in an emergency interim alternate placement beginning February 7, 2023.²⁰ The Parents were not permitted input or to participate in the process as required by IEP development procedures. See, WAC 392-172A-03100. The February 6, 2023, PWN misstates was happened at the January 30, 2023, threat assessment meeting, as [REDACTED] testimony and the threat assessment documents reflect that placement was not changed at that meeting. Moreover, the threat assessment meeting was not an IEP meeting, it was not convened in accordance with special education rules, did not invite or include the full IEP team, and did not generate an IEP amendment or PWN. WAC 392-172A-03095; WAC 392-172A-03100.

²⁰ Although the [REDACTED] described its proposal as an emergency interim alternate placement, there is no such placement specifically described within the special education rules. It is, therefore, assumed the [REDACTED] meant to place the Student in an IAES, which is a defined term as describe above.

31. The facts of this case are like those in *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038 (9th Cir. 2013). There, the student's parent wanted to be physically present at the student's IEP meeting but was sick and unable to attend, even by phone. The district sought to reschedule the meeting in time to meet the annual IEP review deadline, but the parent could not confirm he would be well by then. As a result, the district went ahead with the meeting as originally scheduled. *Id.* at 1042. The parent vigorously objected to the district holding the meeting without him and asked to reschedule for the following week. The IEP team changed the student's placement, after which the parent filed a due process request. *Id.* at 1044. The U.S. Court of Appeals concluded that the parent's right to participate was seriously infringed by the district's procedural violation. *Id.* at 1047. The Court also held that when a district proceeds with an IEP meeting without a parent, holding an after-the-fact IEP meeting is not enough to remedy the failure to include the parent in the initial meeting. *Id.*

32. In the present cases the [REDACTED] had to reschedule the IEP meeting of January 26, 2023, so that both it and the Parent could be present and so that [REDACTED] could attend. The [REDACTED] provided the Parent a draft IEP. However, prior to the IEP team meeting the [REDACTED] changed the Student's placement to the Emergency Interim Alternate Placement without meeting and gathering input from the Parent. This significantly impeded on the Parents' right to participate as provided in *Doug C.* Additionally consistent with ESC 392-172A-05147(2) and the ALJ's decision in *Selah School District*, the [REDACTED] had to review the Student's BIP and did not do so before changing the Student's placement. The [REDACTED] held IEP meetings on February 16, 2023, and February 28, 2023, and obtained information from the Parents regarding the Student's BIP and placement. As provided in *Doug C.*, these subsequent IEP meetings did not remedy the failure to convene the IEP team prior to placing the Student in an IAES on February 6, 2023. The February 28, 2023, IEP that the [REDACTED] developed after convening the IEP team, including the Parents, was less restrictive in that the [REDACTED] proposed 66.66% of the time in the self-contained behavior classroom as compared to the emergency interim alternative placement in the February 6, 2023, PWN outlining 100% placement in the self-contained behavior classroom. This further evidenced the importance in this case of convening an IEP meeting and obtaining input from the IEP team, including the Parents, prior to changing the Student's placement. Based on the foregoing conclusions, the Parents have proven by a preponderance of the evidence that the emergency interim alternative placement proposed by the [REDACTED] on February 6, 2023, was not appropriate as it was not developed through IEP team input and procedures providing the Parents an opportunity to participate, nor did it include the requisite BIP review.

Parents' Issue #3 – Misusing a threat assessment process to make decisions regarding placement of the Student outside the purview of the IEP team and institute disciplinary actions.

33. This issue is addressed and encompassed within the analysis of the February 6, 2023, PWN provided in above paragraphs 27-29.

█ *Issue #1 – Should the Student's placement be changed to an appropriate IAES for at least 45 days, pursuant to WAC 392-172A-05160(2)(b)(ii), because returning the student to the original placement is substantially likely to result in injury to the student or to others?*

34. In this combined hearing the █ has the burden of proof to show that maintaining the current placement of the Student is substantially likely to result in injury to the student or others under WAC 392-172A-05160(1). *Issaquah School District, 115 LRP 58475 (WA SEA 2015)*. The standard of "injury" for the purposes of this rule is a significantly lower standard than showing the student has already inflicted "serious bodily injury" at school as provided under WAC 392-172A-05149. *Renton School District, 111 LRP 39470 (WA SEA 2011)*.

35. The testimony and evidence in this case shows that during the current school year the Student engaged in aggressive physical behavior such as hitting, kicking, pinching, scratching, pushing, or throwing objects at school staff and other students on at least thirty different school days through February 1, 2022. He sometimes had multiple incidents on these days, totaling over forty-five incidents, which were potentially injurious. Some of these incidents occurred in the general education classroom, others in █ and others in common areas. There were days when the Student's behavior was considered good or even fantastic by █ The Student also was able to go several days in a row or longer at times with out any behaviors that could potentially cause injury. Despite those good days, considering the entirety of circumstances, particularly the pattern of frequent, intense, and quickly developing escalations, the █ has shown by a preponderance of the evidence that maintaining the placement of the Student at the time he was emergency expelled on February 2, 2023, was substantially likely to result in injury to the Student or others.

36. The █ has also shown the need for an IAES during the remainder of the forty-five school days to support his transition back to his prior placement. The Student's last day before removal was February 2, 2023. Therefore, under WAC 392-172A-05160(2) the Student's change in placement to an IAES may not exceed April 14, 2023, which is the forty-fifth school day from his removal. See, *Renton School District, 111 LRP 39470 (WA SEA 2011)* (Forty-five school day period must be shortened by the

time the District placed the Student in the IAES based on its erroneous manifestation determination); *Snohomish School District*, 103 LRP 38279 (WA SEA 2003) (Because the forty-five period expired, the school district's request for the ALJ to order an IAES was moot). In reaching this conclusion the [REDACTED] or District are not prohibited from renewing their request for another order placing the Student in an IAES under WAC 392-172A-05160(2)(c) by making another expedited request based on developing circumstances.

37. School days are not added to the IAES period for the Parents' conduct as the BIP review and other elements of the IAES was not reviewed by the IEP team, including the Parents, until February 28, 2023. The [REDACTED] did not propose to start the February 28, 2023 IEP with the updated BIP until March 10, 2023, while litigation was proceeding in these combined matters. Additionally, as described above the [REDACTED] acted to change the Student's placement unilaterally in violation of WAC 392-172-05145 without first obtaining an order under WAC 392-172A-05160(2)(b)(ii).

38. The [REDACTED] has proven by a preponderance of the evidence that maintaining the current placement of the Student is substantially likely to result in injury to the Student or to others. Unless the parties agree otherwise, no later than April 17, 2023, the Student must return to the placement from which he was removed; the May 12, 2022, IEP amendment, with the October 17, 2022, BIP and a 1:1 paraeducator at all times.

[REDACTED] *Issue # 2 – Is the IEP proposed February 28, 2023, such an appropriate IAES?*

39. There are few cases that delineate what is "appropriate" specifically with respect to an IAES ordered pursuant to WAC 392-172A-05160(2)(ii) . According to the DOE when an ALJ grants a school district or [REDACTED] request to change a 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 others:

Factors that could be considered when determining placement in an IAES include the specific programs and services available in the alternative setting, such as additional counseling services, behavioral and academic supports and other services, or programs that could address the behavior that led to the need for the child's placement in an IAES.

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40. In *Issaquah School District*, 115 LRP 54875 (WA SEA 2015) the ALJ noted in the context of an IAES imposed because of "special circumstances" under WAC 392-

172A-05149 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.

See, WAC 392-172A05149(2). The ALJ in *Issaquah School District* concluded that this definition could provide guidance to the current context as well.

41. Approximately ten school days remain in the IAES period. During that time the principal elements of the February 28, 2023, IEP represent an appropriate IAES for the Student. This includes an updated BIP developed with input from the Parents. It also includes increased SDI in behavior and social/emotional instruction and added OT support to address the Student's sensory needs. Per the IEP the Student will participate with non-disabled peers 33.33% of the time for specialists, arrival/check-in in the classroom, lunch, free choice/art, recess time, and time with the school counselor. This amount of time with non-disabled peers should allow the Student to gradually transition back to his prior setting at the end of the IAES period.

42. The Parents argue that the February 28, 2023, IEP is not appropriate because the Student did not demonstrate any improvement in his behavior in the evaluative placement. In addition, they claim members of the IEP team were unqualified and the IEP predetermined. They also challenge the appropriateness of the reevaluation. These arguments pertain more to determining whether the █████ followed IEP procedures in developing the February 28, 2023, IEP and is appropriate on an annual basis. The Parents may pursue these issues at the administrative hearing addressing the non-expedited issues and if necessary, move to amend the due process hearing request to specifically address the February 28, 2023, IEP. Based on consideration of the standards above, the █████ has shown by a preponderance of the evidence based on the elements and services of the February 28, 2023, IEP as stated above that its proposed IAES is appropriate through the remainder of the forty-five-school day period.

ORDER

1. The Parents have proven by a preponderance of the evidence that the █████ School District and █████ have violated the IDEA by removing the Student from his placement on February 2, 2023, and violating WAC 392-172A-05145 (improperly and inappropriately placing the Student in IAES), WAC 392-172A-05146 (failure to conduct manifestation determination review) and WAC 392-172A-05147 (failure to return the Student to the placement from which he was removed).

2. The [REDACTED] and District have proven by a preponderance of the evidence that maintaining the current educational placement is substantially likely to result in injury to the Student or others.

3. The Student's placement may be changed to an appropriate IAES as represented by the February 28, 2023, IEP and explained in paragraph 41 until April 14, 2023.

4. Beginning no later than April 17, 2023, the Student shall return to the placement he was removed from, the May 12, 2022, IEP, with the October 17, 2022, BIP and a 1:1 paraeducator at all times, unless the parties agree otherwise.

SERVED on the date of mailing.



Paul Alig
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, Legal Services, PO Box 47200, Olympia, WA 98504-7200. To request the administrative record, contact OSPI at appeals@k12.wa.us.

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that true copies of this document were served upon the following as indicated:

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Dated March 27, 2023, at Seattle, Washington.

Representative
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cc: Administrative Resource Services, OSPI