



STATE OF WASHINGTON
 OFFICE OF ADMINISTRATIVE HEARINGS
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MAILED
 DEC 05 2015
 SEATTLE-OAH

December 5, 2015

Parent



Jennifer Trauffer, Executive Director, Student Services
 Tacoma School District
 PO Box 1357
 Tacoma, WA 98401-1357

Carlos Chavez, Attorney at Law
 Pacifica Law Group LLP
 1191 Second Avenue, Suite 2000
 Seattle, WA 98101

In re: Tacoma School District
 OSPI Cause No. 2015-SE-0054
 OAH Docket No. 06-2015-OSPI-00102

RECEIVED

DEC 7 2015

Dear Parties:

SUPERINTENDENT OF PUBLIC INSTRUCTION
 ADMINISTRATIVE SERVICES CENTER

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,

Anne Senter
 Administrative Law Judge

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

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

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SEATTLE-OAH

IN THE MATTER OF:

OSPI CAUSE NO. 2015-SE-0054

OAH DOCKET NO. 06-2015-OSPI-00102

TACOMA SCHOOL DISTRICT

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Anne Senter in Tacoma, Washington, on September 28, 29, and 30, and October 1, 2015. The Parent of the Student whose education is at issue¹ appeared and represented herself. On September 28 and 29, 2015, the Parent was accompanied and advised by Jami Visaya. The Tacoma School District (the District) was represented by Carlos Chavez, attorney at law. Betsy Minor Reid, District director of student services, also appeared.

STATEMENT OF THE CASE

The Parent filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on June 4, 2015. The Complaint was assigned Cause No. 2015-SE-0054 and forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered June 5, 2015, which assigned the matter to ALJ David Hansen. The District filed its Response to the Complaint on June 15, 2015.

Prehearing conferences were held on July 22 and September 14, 2015. Prehearing orders were entered July 24 and September 15, 2015.

On August 27, 2015, the case was reassigned to ALJ Anne Senter to ensure that an ALJ was available for the scheduled hearing.

Both parties timely submitted post-hearing briefs on November 6, 2015.²

Due Date for Written Decision

As set forth in the Prehearing Order dated July 24, 2015, the due date for a written decision in this matter is 30 days after the record of the hearing closes. As the record closed

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

²The Parent's post-hearing brief includes a discussion of settlement offers the District made prior to the due process hearing. If the Parent had offered this information as testimony, it would not have been admissible. See Evidence Rule (ER) 408. For this reason, and because the information was not offered under oath, the ALJ has not considered the Parent's statements about the District's settlement proposals.

with the receipt of the parties' post-hearing briefs on November 6, 2015, the due date for the written decision in this case is **December 6, 2015**.

Evidence Relied Upon

Exhibits Admitted:

District's Exhibits: Exhibits D1 - D20; and

Parent's Exhibits: Exhibits P1, P2 (except pp. 35-36), P3 - P16.

Witnesses Heard (in order of appearance):

Jami Visaya, family friend of Parent/mental health professional;
Polly Towle, District general education teacher;
Elizabeth Skarshaug, District school psychologist (retired);
Melissa Porter, District school guidance counselor;
Erin Azama, District special education teacher;
Aisha Oliver, former District school psychologist;
Immaculate Howard, District general education teacher;
Cathryn Carini, District general education teacher;
Rob Vander Stoep, District assistant director of student services;
Carrie Crabbe, District substitute teacher;
Gail Antilla, District school nurse;
Lisa Moore, District special education teacher;
Cassandra Swasey, District school counselor;
Rayna Zahler, District general education teacher;
Courtney O'Catherine, District preschool teacher (former)/instructional coach (current);
Steve Holmes, District principal;
The Student's Mother; and
Linda Darling, District assistant director of student services (retired).

ISSUES

As set forth in the second Prehearing Order dated September 15, 2015, the issues for the due process hearing are:

- a. Whether the District failed to timely evaluate the Student for special education and related services during the 2013-2014 school year;
- b. Whether the District failed to implement the June 2014 Individualized Education Program (IEP) and the January amended IEP, including the Behavior Intervention Plan (BIP) and crisis plan, before June 4, 2015;
- c. Whether the District failed to implement and provide counseling services as provided for in the IEP before June 4, 2015;
- d. And, whether the Parent is entitled to the requested remedies, or other equitable remedies, as appropriate.

FINDINGS OF FACT

Background

1. The Student was in the second grade at the time of the hearing.
2. The Student attended a District special education preschool at Grant Elementary School (Grant) as a peer model, not as a special education student. Parent, Tr. 628.³
3. The District evaluated the Student, at the Parent's request, while he was in preschool. Exhibit D1, pp. 2-8.⁴ At an evaluation group meeting on February 3, 2013, it was determined that the Student did not meet the eligibility criteria for special education and related services. *Id.*
4. Later in February 2013, while the Student was still in preschool, the Parent obtained a psychological evaluation of the Student by Dr. Stephen Schilt at Children's Outpatient Services. Exhibit D3, pp. 17-18. Dr. Schilt diagnosed the Student as having "ADHD and ODD with intermittent explosive and Dysthymic Disorder." Exhibit D3, p. 34. There is no evidence that the Parent provided this diagnosis to the District prior to the District's next evaluation of the Student in May 2014. See Exhibit D3, pp. 3-29.

Kindergarten (2013-2014 school year)

5. The Student attended kindergarten at Grant during the 2013-2014 school year. He began the school year with Polly Towle as his teacher. Towle, Tr. 137-38.
6. On Saturday, November 30, 2013, the Parent sent an email to Aisha Oliver, the District school psychologist at Grant, stating the following:

My name is [Parent], mother of [Student]. He attends Grant Elementary and is in Ms. Towle's Kindergarten class. I have had concerns about his mental state since birth. I have addressed my concerns with his pediatrician, multiple counselors, and a psychiatrist. He has been on a waiting list since March 2013 at The Child Therapy Unit for an assessment. I have taken him to Child Find twice. *He does not qualify for Special Education and this is not my goal.* He does have some serious behavioral challenges. I have taken many behavioral management classes including Parenting With Love and Logic. The strategies and techniques used with typical children do not work with him. I have requested a questionnaire for Ms. Towle, from his pediatrician. His doctor hopefully will give this to me at his appointment on 12-31-2013. There are quite a few contributing factors to the problem. Unfortunately I have yet to find anyone who is able to help. With all this being said, I am requesting to have you please

³ Citations to the written transcript of the due process hearing are in the following format: "Parent, Tr. 628" refers to the testimony of the Parent on page 628 of the transcript.

⁴ Citations to exhibits are in the following format: "Exhibit D1, pp. 2-8" refers to pages 2 through 8 of District Exhibit 1.

conduct an observation/evaluation. I am trying to get to the root with hopes of finding a way to actually help him deal with his frustrations in a productive/positive way. I sure hope that this is all I have to do to get this ball rolling. If this is not adequate could you please lead me in the appropriate direction. I know that there is not much time before winter break, but if it is at all possible I would love to have something to bring along to his doctor appointment.

Exhibit P1, p. 61 (emphasis added).

7. Ms. Oliver responded by email on December 2, 2013, stating:

Ms. Melissa Porter, guidance counselor, spoke with me this morning regarding your concerns for [Student]. You indicated in your email that in the past, [Student] did not qualify for Special Education services and that Special Education is not your goal. The primary role of the school psychologist in the Tacoma School District is to identify and address learning and behavior problems that interfere with school success. This is achieved by evaluating eligibility for special education services. I was told by Ms. Porter and Ms. Towle, that although [Student] can be a busy little boy in the classroom, he responds well to redirection. Students who typically qualify for Special Education services do not respond to redirection or behavior modification. Additionally, Special education eligible students have behaviors that significantly impact their learning and the learning of others. Based on the information I received, this is not the case for [the Student] at school. What type of resources/help are you seeking for [the Student]?

Exhibit P1, p. 60.:

8. There is no evidence that the Parent responded to this request for additional information by email. Instead, the next email in the record from the Parent to Ms. Oliver is dated December 4, 2013, in which the Parent stated:

I filled out those forms and put them in Ms. Porter's box this afternoon. Thank you so much for your help. Have a beautiful day.

Exhibit P1, p. 60.

9. Ms. Oliver recalls she met with the Parent shortly after her email to the Parent on December 2, 2013, and the Parent clarified that special education was not her goal. Oliver, Tr. 232, 239. The Parent wanted to identify resources within the community because of the Student's behavioral difficulties and mental health issues at home. *Id.* The Parent wanted documentation of the Student's behavioral difficulties to provide to a doctor so she could obtain a diagnosis and resources for him. *Id.* at 245. Ms. Oliver and the Parent agreed that Ms. Oliver would provide questionnaires for the Parent to complete and be scored, so she could take them to the doctor. *Id.* at 245.

10. Ms. Porter recalls a similar conversation with the Parent in which she stated that special education was not her goal at the time, and she wanted to provide information to the Student's doctor over the holiday break. Porter, Tr. 202. Neither Ms. Oliver nor Ms. Porter understood

the Parent was requesting that the District evaluate the Student to determine if he was eligible for special education and related services. Oliver, Tr. 244; Porter, Tr. 202.

11. In contrast, the Parent recalls she met with Ms. Oliver and Ms. Oliver denied her request to evaluate the Student *before* she sent Ms. Oliver her email on November 30, 2013. Parent, Tr. 586. Instead of agreeing to evaluate the Student, Ms. Oliver provided the questionnaires for her to fill out. *Id.*

12. Because the recollections of Ms. Porter and Ms. Oliver are more consistent with the emails between Ms. Oliver and the Parent, their recollections are given greater weight than that of the Parent. It is found that the Parent did not ask the District to evaluate the Student to determine if he was eligible for special education and related services in November 2013.

13. The Parent emailed Grant principal, Steve Holmes, on January 31, 2014, requesting that the Student be "evaluated as a Focus of Concern." Exhibit P1, p. 45. Mr. Holmes understood this to be a request that the District evaluate the Student to determine if he qualified for special education. He spoke with Ms. Oliver and learned that she was already aware the Parent had concerns about the Student. Holmes, Tr. 513-14, 556-57. Mr. Holmes did not expressly communicate to Ms. Oliver that the Parent was requesting a special education evaluation, yet he mistakenly understood from their conversation that Ms. Oliver was aware of the request and that the Student would be evaluated. Holmes, Tr. 541-42, 558.

14. Because no action was taken with respect to her request to Mr. Holmes, the Parent contacted Carla Santora, District superintendent, in an email on March 11, 2014. Exhibit P1, p. 73. Ms. Santora connected the Parent with Chris Hinds, District instructional director for Grant, to address her concerns. *Id.*

15. The Parent alleges that, on or about March 20, 2014, the Student told Ms. Porter that he wanted to kill himself. Parent, Tr. 752. See Exhibit P15, p. 6. As there is no evidence in the record that is not hearsay that the Student made this statement to Ms. Porter, no finding can be made on this assertion.⁵

16. On March 25, 2014, the Student reported to Mr. Holmes that he was physically abused by his father, who did not reside with the Parent. Exhibit P15, p. 2; Mother, Tr. 584-85.

17. A District team met and determined, on April 14, 2014, that it would evaluate the Student. Exhibit D2, p. 5. The Parent provided written consent the same day. Exhibit D2, p. 6. This decision was made 44 school days after the Parent's request to Mr. Holmes on January 31, 2014. Exhibit D20, p.1.

18. On April 15, 2014, the Student told Ms. Towle that he was going to kill her and that he was going to get a gun and shoot it. Exhibit 1, p. 86; Towle, Tr. 157. The Student was suspended

⁵ Findings of fact in administrative hearings may not be based exclusively on evidence that would be inadmissible in a civil trial, such as hearsay, unless it would not unduly abridge the parties' opportunity to confront witnesses and rebut evidence. Revised Code of Washington (RCW) 34.05.461.

for one day. Exhibit P5, p. 8. When he returned, he was assigned to a different kindergarten teacher, Immaculate Howard, for the rest of the year. Parent, Tr. 650.

19. Ms. Towle graded the Student for the fall and winter grading periods. Towle, Tr. 137-38. For both periods, she identified the Student as either approaching or meeting the end of year standard in every academic area graded. Exhibit P3, p. 2-3. In the fall grading period, she rated the Student as "consistently" engaging in all of 12 behaviors that promote learning, the highest rating for behaviors. *Id.* In the winter grading period, she reduced his rating for "communicates own needs, concerns and feelings appropriately" to "inconsistently." *Id.* She continued to rate him as "consistently" meeting each of the other 12 behaviors that promote learning. *Id.* She did not identify any behavioral areas of concern in the report. *Id.* At the hearing, Ms. Towle described the Student as in "many ways" demonstrating "very typical kindergarten behavior," although his behavior deteriorated slightly over the time he was in her classroom. Towle, Tr. 159-160. She also acknowledged that, in her 20 years of teaching, less than 10 students had made death threats toward her. *Id.* at 164. Ms. Towle did not believe the Student was in need of special education services, even considering the death threat. *Id.* at 167.

20. The District's evaluation of the Student was completed on May 19, 2014. Exhibits D3, p. 3; P11, p. 17. This was 25 school days after the Parent provided consent for the evaluation and 69 school days after she made her request for an evaluation to Mr. Holmes. Exhibit D20, p. 1. The evaluation team concluded that the Student met eligibility criteria for special education and related services under the "other health impairment" eligibility category. Exhibits D3, pp. 3, 16; P11, pp. 17, 30.

21. An individualized education program (IEP) team meeting was held on June 6, 2014, resulting in an IEP. Exhibit D4, p. 3; P11, p. 30. This meeting was held 13 school days (18 calendar days) after the Student was determined eligible for special education and related services. Exhibit D20, p. 1. At this meeting, the Parent requested that the Student have access to "the Nest," an area in which a program primarily for autistic students was located and where occupational therapy (OT) and physical therapy (PT) services took place. Parent, Tr. 656; Azama, Tr. 273. The IEP team did not agree that the Student could use or access the Nest. Parent, Tr. 656.

22. The IEP provided that the Student would receive 15 minutes of social/emotional/behavioral services each day delivered by a general education teacher in the general education setting and an additional 15 minutes per day of social/emotional/behavioral services delivered by a special education teacher in the special education setting. Exhibit D4, p. 9. The IEP also provided that the Student would receive counseling services. *Id.* The special education and related services matrix stated separately that he would receive counseling services 30 minutes weekly and 15 minutes weekly, both to be provided by a counselor in the special education setting, without explaining why the counseling services were broken out this way. *Id.* The IEP provided a number of accommodations for the Student, including that he would be provided an area for sensory breaks to calm down and become refocused. Exhibit D4, p. 7. The IEP did not identify any particular areas for this purpose. *Id.* Nor did the IEP provide for OT services. Exhibit D4.

23. Initially, the IEP team wished to wait until October, after the Student settled into first grade, to conduct a functional behavioral assessment (FBA) and develop a behavioral intervention plan (BIP). Exhibit D4, p. 13. The Parent emailed Principal Holmes and Erin Azama, the Student's case manager, requesting that an FBA and BIP be implemented sooner because of the need to

proactively address the Student's serious behavioral issues. Exhibit D4, p. 13. Mr. Holmes agreed that a behavior plan could be developed. *Id.*

24. A second IEP meeting was held on June 11, 2014, resulting in the development of an FBA and BIP. Exhibit D5. A "crisis plan," developed at least in part by a behavioral specialist invited to the IEP meetings by the Parent, was attached to the BIP. Exhibits D4, p. 3; D5, p. 11; Azama, Tr. 279.

25. The BIP identified a number of intervention strategies, including that, when needed, the Student could use a quiet space in the classroom to decompress and refocus or, depending on the severity of the incident, the Student may be removed to another room or to the office. Exhibit D5, p. 9. It did not identify what other rooms were available for this purpose. *Id.* The crisis plan similarly provided that, in a non-life-threatening event, the Student could be "redirected to a safe place within the environment (i.e. Administrative office)." Exhibit D5, p. 11.

26. The school year ended on June 13, 2013, before the IEP, BIP, and crisis plan were implemented. Exhibit D20, p. 1.

27. The Student received private counseling from Catholic Community Services from approximately April or May through October 2014. Parent, Tr. 751-52. There was no out-of-pocket expense to the Parent for these services. Parent, Tr. 754. The Parent took the Student to a private OT for two eight-week sessions, the first of which began in May or June of 2014. Parent, Tr. 630. She also had him privately evaluated by Dr. Sandra Swenby on June 19, 2014, for purposes of obtaining "mood-altering medication." Exhibit P9, p. 1; Parent, Tr. 747. The Student was also privately evaluated by Catholic Community Services in the fall of 2014. Parent, Tr. 748. There was no cost to the Parent for either of these evaluations. Parent, Tr. 768.

First grade (2014-2015 school year)

28. Rayna Zahler, the Student's first-grade general education teacher, was gone much of the first two months of school because of an accident just before school started. Zahler, Tr. 481. She was aware of the Student's BIP but did not receive a copy of it or the crisis plan until two or three months into the school year. Zahler, Tr. 475, 479-80. Ms. Azama checked in with Ms. Zahler almost daily. Azama, Tr. 251. Carrie Crabbe, who worked as a substitute teacher much of the time Ms. Zahler was gone at the beginning of the school year, did not have the Student's BIP or the crisis plan. Crabbe, Tr. 413-14, 418. She talked often with Ms. Azama about the Student's behavior. Crabbe, Tr. 413-14. Cathryn Carini, the Student's reading teacher, never received anything in writing about the Student's BIP. Carini, Tr. 365-66. Ms. Azama spoke with her verbally to check in on the Student's behavior. Carini, Tr. 365.

29. Cassandra Swasey was the counselor at Grant for the 2014-2015 school year, but she did not start until approximately October 12, 2014. Swasey, Tr. 456; Azama, Tr. 345. More than one person substituted as the Grant counselor before she started. Azama, Tr. 346. Ms. Azama, who was responsible for overseeing the Student's special education services, did not know whether the Student received counseling services before Ms. Swasey started. Azama, Tr. 346. Ms. Zahler recalled that the Student started receiving counseling services in October 2014. Zahler, Tr. 475. Ms. Swasey started providing counseling services to the Student in late October or early November 2014. Swasey, Tr. 458, 467. At first, she was only aware that he

was to receive 30 minutes per week of counseling, and that is all she provided. *Id.* at 456. She did not learn that she was to provide 45 minutes per week until late November 2014, and began providing the full amount then. *Id.* at 462-63. It is found that the Student did not receive counseling services during the 2014-2015 school year until they were provided by Ms. Swasey. Thus, the Student did not receive approximately seven weeks of counseling services, and then did not receive the full amount of services for approximately an additional three weeks. See Exhibit D20, p. 2.

30. The Student had a difficult adjustment period transitioning in the first grade. Zahler, Tr. 481. He had "very difficult" days as well as good days. *Id.* at 481. Ms. Zahler described his behavior in her classroom during the year as almost always good, but stated that he had a few incidents, mostly towards the beginning of the year. *Id.* at 483. He had issues mostly during transition times such as recess and lunch. *Id.* at 483. Principal Holmes described the first half of the Student's year as having "rough patches." Holmes, Tr. 549. Ms. Azama described the Student having challenges in the fall related to keeping his hands to himself on the playground and transitions within his day. Azama, Tr. 327. Ms. Crabbe didn't believe the Student's behavior stood out as a major concern, but recalled hearing him say that he would shoot someone and they would be dead. Crabbe, Tr. 434. The Student's behavior was "fine" in Ms. Carini's classroom and she was easily able to redirect him if necessary. Carini, Tr. 363.

31. At the Parent's request, meetings were held on October 28 and November 4, 2014, to address her concerns and to update the Student's FBA and BIP. Exhibit D7, p. 8. One of the items addressed was the Parent's concern that the Student was not receiving counseling and other services. Zahler, Tr. 475-76.

32. The BIP was amended as a result of these meetings to change many of the Student's intervention strategies. Exhibit D8, p. 4. Under "setting change," it stated that the Student may use a "quiet space in the classroom to decompress and refocus" and, depending on the severity, he may be asked to "go to another room (stop partner room, counselor's office, LRC room) or to the office." *Id.*

33. The prior written notice (PWN) proposing changes to the BIP includes the following "under other factors relevant to the action:"

IEP team met to review and update the BIP. SPED instructional coach will meet with the school team to help assist with implementation of the plan and train staff on Zones of Regulation. School nurse will meet with [the Student] to review physical implications/affects [sic] of escalation in behavior to support with teaching [the Student] about calming strategies. Case manager will meet with specialists and other certificated staff who work with [the Student] to review [the Student's] FBA/BIP. School principal will meet with hourly staff to review [the Student's] FBA/BIP. Communication folder will be given to parent by Gen. Ed. Teacher in the afternoon and returned in the morning via YMCA/office staff.

Exhibit D8, p. 5.

34. Courtney O'Catherine was the instructional coach referred to in the PWN. Darling, Tr. 713. Linda Darling, District assistant director of student services, also discussed at one or both of the IEP meetings the possibility of an outside behavior specialist from the Brooks Powers

Group assisting District staff in implementing the Student's program. *Id.* at 743. She waited to speak with the Brooks Powers Group before the team offered this service so no decision to provide it was made at either of the meetings. *Id.*

35. For the first grading period of the first grade year, Ms. Zahler identified six of the 12 behaviors that promote learning as being "areas of concern" for the Student: follows class and school rules; demonstrates self-control; chooses appropriate strategies to resolve conflict; assumes responsibility for own actions; communicates own needs, concerns and feelings appropriately, and listens and responds appropriately. Exhibit P3, pp. 5-6. This is the lowest possible rating for student behaviors. *Id.* She rated the Student as "inconsistently" demonstrating five additional behaviors: demonstrates respect for diversity, rights, feelings, and property of adults and students; works cooperatively with students and staff; follows directions; and organizes self and materials. *Id.* She identified him as "consistently" meeting only one behavior – working independently. *Id.*

36. On December 3, 2014, an incident between the Student and another student at recess that culminated in the Student punching Principal Holmes in the face in his office. Exhibit P5; Holmes, Tr. 522-525. This resulted in an emergency expulsion, which was later converted to a short-term suspension. Exhibit D19. The Student received an in-school suspension the following week for teasing another student and pushing her lunch off the table in the cafeteria. Exhibits D19, p. 1; P5, p. 7; Holmes, Tr. 527.

37. An IEP meeting was held on January 12, 2015, to review the Student's transportation services. Exhibit D9, p. 1. A change in transportation services became necessary when the YMCA program the Student attended at Grant before school refused to continue serving him because of his behavior. Parent, Tr. 591-92; 669-70. The District made arrangements for general education transportation for the Student from his new day care. Darling, Tr. 721-23. The Parent requested the IEP meeting to amend the IEP to include special education transportation for the Student. Exhibit P1, p. 29. The team determined that the Student was not eligible for special education transportation services. Darling, Tr. 723; Azama, Tr. 326. Although it does not appear that the team made any substantive changes to the June 2014 IEP following this meeting, it generated an amended IEP with a start date of January 22, 2015. Exhibit D9, pp. 4 - 13.

38. The PWN following the IEP meeting included the following as "other factors relevant to the action:"

An outside behavior specialist observed today (1/15/15). A consultant (therapist) will be available to meet/assist with [the Student] 2+ times per week. The Zones of Regulation curriculum will be used by the Instructional Facilitator, behavior consultant (therapist), and school staff. Instructional Facilitator will also be working with [the Student's] class and staff using the Zones curriculum.

Parent requested weekly progress reports regarding services. Staff will develop a matrix of services, including the zones curriculum. A form will be developed and shared with parent weekly to inform her of the topic(s) discussed during group sessions such as counseling and lunch bunch times.

Exhibit D9, p. 15.

39. Ms. O'Catherine, District instructional coach, was the instructional facilitator referred to in the PWN. O'Catherine, Tr. 494; Azama, Tr. 286. The outside behavior specialist referred to staff from the Brooks Powers Group. Azama, Tr. 290. Ms. O'Catherine met with Principal Holmes, Ms. Azama, and Brooks Powers staff to discuss creating an intervention tool for the Student's behavior. O'Catherine, Tr. 499. Ms. O'Catherine taught the Zones of Regulation curriculum, a social-skills curriculum helping students identify their state of regulation, to the Student's core team and modeled its implementation for Ms. Zahler and Ms. Azama. O'Catherine, Tr. 500, 502. After that, Ms. O'Catherine stayed involved by monitoring the check-in binders used for the Student in the classroom and at recess through the end of the school year. O'Catherine, Tr. 500-01.

40. Staff from the Brooks Powers Group worked with the Student beginning in January 2015. Zahler, Tr. 483; Exhibit D9, p. 15. Ms. Zahler recalled that they came more than two times per week. Zahler, Tr. 485. By April, the Brooks Powers Groups services were discontinued because District staff no longer observed a pattern of concerning behavior from the Student. O'Catherine, Tr. 501, 505-06; Zahler, Tr. 484; Exhibits D11; P6. Ms. Zahler had no concerns about Brooks Powers Group staff no longer working with the Student day at that point. Zahler, Tr. 484. The Student was without services from the Brooks Powers Group for approximately nine weeks between the time the District discontinued the services and when the Parent filed her request for due process hearing. Exhibit D20, p. 2.

41. Following the IEP meeting, the daily communication log was modified to include more categories of information for the Parent. Azama, Tr. 295. However, it did not include communication to the Parent from the Student's specialists, such as the counselor and the behavior specialist about what the Student was working on with them, and that information was also not provided to her as part of a weekly matrix. Parent, Tr. 597-98; Exhibit D16.

42. On February 12, 2015, Ms. Zahler sent an email to the Parent and the rest of the IEP team letting them know that she had stopped sending the communication folder home to the Parent because the Student was having good days every day. Exhibit D10, p. 1. She stated that she would call the Parent or talk to her in person when that wasn't the case. *Id.* Mr. Holmes responded that the communications folder needed to be continued because it was part of the IEP, unless the Parent agreed to remove it from the IEP. *Id.* The Parent responded that she was comfortable with Ms. Zahler letting her know how things were going personally, but stated that she was "much more concerned with the services that he is or is not receiving." *Id.* She stated that she did not want the requirement removed from the IEP because Ms. Zahler would not always be his teacher, and she wanted any infractions documented. *Id.* The District no longer sent a communications log to the Parents after this. Azama, Tr. 297.

43. In May 2015, shortly before the expiration of his IEP, the Student's progress reports reflected that, for two of his three behavioral goals he demonstrated emerging skills but might not achieve his annual goals within the duration of the IEP. Exhibit D15.

44. An IEP meeting was held on May 26, 2015, to develop a new annual IEP and BIP. Exhibit D12, p. 3; Exhibit P11, p. 104. The Parent expressed a number of concerns with the draft IEP and the District agreed to hold another meeting to address them. Parent, Tr. 598-600. No further meeting was set after the Parent filed her due process hearing request. Darling, Tr. 731.

45. Ms. Swasey learned for the first time at the IEP meeting on May 26, 2015, that she was supposed to be providing information about the Student's counseling services to the Parent. Swasey, Tr. 459-60. She provided email communications to the Parent for the remainder of the school year. *Id.* at 460.

46. For the final grading period of the year, Ms. Zahler gave the Student the lowest rating possible, "area of concern," for three of the behaviors that promote learning: demonstrates respect for diversity, rights, feelings and property of adults and students; demonstrates self-control; and listens and responds appropriately. Exhibit P3, pp. 5-6. She rated him as "inconsistently" demonstrating six other behaviors: follows class and school rules, chooses appropriate strategies to resolve conflict; assumes responsibility for own actions; communicates own needs, concerns and feelings appropriately; works cooperatively with students and adults; and follows directions. *Id.* She rated him as "consistently" demonstrating only two behaviors: organizes self and materials and works independently. *Id.*

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. See *Schaffer v. Weast*, 546 U.S. 49 (2005). As the Parent is the party seeking relief in this case, she has the burden of proof.

The IDEA

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

First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Id. at 206-207 (footnotes omitted).

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

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

Id. at 188-189.

Evaluation Timing

Parent's request

5. A parent may initiate a request for an initial evaluation to determine if a student is eligible for special education. WAC 392-172A-03005(1); 34 CFR §300.301(b). The district must decide, within 25 school days after receiving the request for an evaluation, whether or not to evaluate the student. WAC 392-172A-03005(2)(c).

6. Because the District did not decide to evaluate the Student until 44 school days after the Parent's request to Mr. Holmes, it failed to comply with the requirement to make a decision within 25 school days.

7. When a district decides to evaluate a student, it must provide prior written notice to the parent, obtain the parent's consent for an evaluation, evaluate the student, and arrive at a decision regarding eligibility for special education within 35 school days after receiving the parent's consent unless certain exceptions apply. WAC 392-172A-03005(3).

8. Because the District completed the evaluation, including making a determination about the Student's eligibility, 25 school days after obtaining the Parent's consent, the District complied with the timing requirement for evaluating the Student after obtaining consent.

9. A district's failure to timely evaluate a student is a procedural violation. *P.P. v. West Chester Area Sch. Dist.*, 585 F.3d 727 (3rd Cir. 2009); *Lake Washington Sch. Dist.*, Cause No. 2014-SE-0015 (SEA WA 2015);⁶ *Lake Washington Sch. Dist.*, 113 LRP 45513 (SEA WA 2013). However, not all procedural violations result in a denial of FAPE. *LM v. Capistrano Unified Sch.*

⁶ A copy of this decision can be obtained from the Office of Superintendent of Public Instruction's public records officer.

Dist., 538 F.3d 1261 (9th Cir. 2008). Procedural violations constitute a denial of FAPE only when they impede a student's right to a FAPE, significantly impede a parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit. WAC 392-172A-05105(2); 34 CFR §300.513(2).

10. Here, the District made the decision to evaluate the Student 19 school days *later* than required by law. However, it then completed the Student's evaluation 10 school days *earlier* than required by law. The net result is that the entire evaluation process, from the Parent's request for an evaluation until the District determined him eligible for special education, took only 9 school days more than allowed by law.

11. A district must hold a meeting to develop a student's IEP within 30 calendar days of a determination that a student is eligible for special education. WAC 392-172A-03105(2)(a); 34 CFR §300.323(c)(1). Here, the District held an IEP meeting and completed the Student's IEP in 18 calendar days, which was 8 school days earlier than required by law. Thus, the IEP meeting was held only one school day later than if the District had used all the time it was cumulatively allowed by law for the entire process, from the Parent's request for an evaluation until the IEP meeting.

12. It is concluded that the procedural violation of not timely deciding whether to evaluate the Student after the Parent's request did not result in a denial of FAPE. The entire evaluation and IEP development process took only one more school day than allowed by law. The delay of one school day is insufficient to conclude the Student was denied FAPE or suffered a loss of educational benefit. It is also concluded that the one-day delay did not significantly impede the Parent's opportunity to participate in the decision-making process.

Child find

13. In addition to the obligation to determine whether to evaluate a student for special education eligibility based on a parent's request, school districts have a separate "child find" obligation. Districts must "conduct child find activities calculated to reach all students with a suspected disability for the purpose of locating, evaluating and identifying students who are in need of special education and related services, regardless of the severity of their disability." WAC 392-172A-02040(1); *see also* 34 CFR § 300.111. A district may consider whether a student is achieving grade-level benchmarks, but violates its child find obligations if it "relie[s] too heavily on those benchmarks to the exclusion of other circumstances that indicate[d] the presence of a disability." *Central School Dist. v. K.C.*, 61 IDELR 125 (E.D. Pa. 2013).

14. During the Student's kindergarten year, his academic grades were strong and his behavior at school was not rated as a concern. His teacher found his behavior to be typical for kindergarten students. The alleged suicide threat, the disclosure of abuse by the Student's father, and the death threat to Ms. Towle all took place *after* the Parent's request to Mr. Holmes that the Student be evaluated. Because there was no reason for the District to suspect the Student had a disability *before* the Parent's request for an evaluation, the District did not violate its child find duty by failing to evaluate him sooner.

Implementation

15. Material failures to implement an IEP violate the IDEA. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811 (9th Cir. 2007). On the other hand, minor discrepancies in the services required by the IEP do not violate the IDEA. *Id.*

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

* * *

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

Id. at 821 and 822 (italics in original).

Counseling

16. The Student received no counseling services for approximately the first seven weeks of school and then did not receive the required amount for the following three weeks. These services were particularly critical in this time period as the Student was adjusting to a new grade and a new teacher, a transition made more complicated by the new teacher needing substitutes for much of this time. By all accounts, the Student struggled with this transition and had behavioral challenges during this period. The failure to provide the required counseling was a material failure to implement the Student's IEP.

BIP and crisis plan interventions

17. Neither the Student's teacher nor her substitutes had copies of the BIP or the crisis plan for at least the first two months of the school year. Possession of these documents would have helped ensure their consistent implementation. However, all the teachers received frequent, often daily, verbal support from Ms. Azama. Because the Parent has not presented evidence that the teachers were not implementing the interventions in the BIP and crisis plan with Ms. Azama's assistance and coaching, she has not demonstrated a material failure to implement the BIP and crisis plan.

The Nest

18. The Parent argues that the Student should have had access to the Nest as a place to calm himself. Although his IEPs and BIPs provided for him to remove himself from the classroom for that purpose, none of those documents provided that he could use the Nest. Additionally, the Parent acknowledged that the IEP team refused to agree to the Student using the Nest. Accordingly, because the Nest was not a service or accommodation provided by the IEP, the District's refusal to allow the Student to use it was not a failure to implement the IEP.

Brooks Powers Group

19. School districts are bound by the terms of PWNs, even when the contents are not also specifically included in a student's IEP, because parents must be able to rely on what is written in them. *Seattle School Dist.*, 115 LRP 30211 (SEA WA 2015). The Ninth Circuit has stated:

The IDEA explicitly requires written prior notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. The Supreme Court has explained the great importance of such procedural components of the IDEA. . . .

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe that it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

Union School Dist. v. Smith, 15 F.3d 1519, 1526 (9th Cir.), *cert. denied*, 513 U.S. 965 (1994). Because the point of a PWN is to notify the parent of what is being offered, a district must then comply with the offer.

20. The District argues that the behavioral support interventions were only intended to be temporary. But there is no such limitation in the January 2015 PWN. Because a PWN informs parents of the offered service, it is that service that must be provided. Thus, the District was obligated to provide the services set forth in the PWN unless the IEP team determines that they are no longer necessary and provides a PWN of their discontinuance to the Parent. It is concluded that the approximately nine weeks the Student failed to receive behavior specialist support at least two times per week was a material failure to implement. While District staff determined the services were no longer necessary, the Student's final behavioral grades and progress on his behavioral goals do not support a determination that he could not have benefitted from continued services.

Weekly reports

21. The failure to provide weekly communications to the Parent about the services provided by specialists, including the counselor and the behavioral specialists, was also a material failure to implement. The Parent's desire for additional information about the services provided to the Student or lack thereof was a continual theme throughout the Student's IEP meetings, and the District failed to provide it once promised.

Other Issues

22. The Parent presented evidence and argument on a number of other matters. Because these matters were not included in her Due Process Hearing Request or in the statement of the issues for hearing, they cannot be considered.

Remedies

Compensatory education

23. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from the special education services the school district should have provided in the first place." *Reid v. Dist. of Columbia*, 401 F.3d 516, 524, 43 IDELR 32 (D.C. Cir. 2005). It is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. Flexibility rather than rigidity is called for. *Id.* at 523-24. Appropriate relief is designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497, 21 IDELR 723 (9th Cir. 1994).

24. The District shall provide the Student with six hours of counseling services (45 minutes x 7 weeks + 15 minutes x 3 weeks divided by 60 minutes = 6 hours). Hour-for-hour services are provided without adjustment because the counseling services in the IEP were to be provided individually. These services shall be provided by fully certificated District staff with the education, training, and experience to provide such services.

25. The District shall provide the Student with 18 hours of behavioral specialist services (9 weeks x 2 sessions per week x 1 hour per session = 18 hours). Hour-for-hour services are provided without adjustment because the behavioral specialist services in the PWN were individual to the Student. These services may be used for consulting purposes in establishing programs for the Student or for the delivery of services to the Student as determined by the Parent. These services may be provided by an outside provider such as the Brooks Powers Group or District staff with equivalent education, training, and experience as determined by the Parent. However, the Parent may not select an outside provider other than the Brooks Powers Group if that outside provider has an hourly rate that is more than 15% higher than that of the Brooks Powers Group hourly rate in effect at the time the services are sought.

26. The compensatory services described above may be delivered at any time in the nine months following the entry of this order, at the duration and frequency determined by the Parent. Once such a schedule is set, the Student shall, except in an emergency, give notice 24 hours in advance of a scheduled session if he is unable to attend. Without such notice and in the absence of an emergency, that session will count towards the compensatory education award. The services shall be provided at Grant unless the Parent and the District agree otherwise.

Other requested remedies

27. The Parent requested that the District be ordered to conduct a psychological evaluation of the Student. Because no violation was found with respect to the District's evaluation of the Student, this remedy is not warranted. Nothing in this order prevents the Parent from making a request to the District that the Student be reevaluated or that the District provide an independent educational evaluation (IEE) of the Student at public expense. Nothing in this order relieves the District of its obligation to follow the law with respect to such a request.

28. The Parent requested reimbursement for expenses related to privately-obtained psychological evaluations for the Student. Because no violation was found with respect to the District's evaluation, this remedy is denied.

29. The Parent requested reimbursement for expenses related to privately-obtained OT services. Because no violations were found with respect to OT services, this remedy is denied.
30. The Parent requested reimbursement for expenses related to privately-obtained counseling for the Student. Because this counseling was not obtained because of the District's failure to provide counseling services at the beginning of the 2014-2015 school year and because the Parent was not required to pay for the privately-obtained counseling services, this remedy is denied.
31. The Parent requested reimbursement for her time and expenses preparing for hearing as well as her time attending other meetings related to the Student's special education services. As the ALJ does not have the authority to provide this relief, it is denied.
32. The Parent requested that the District consider and approve any future request by the Parent to place the Student in a private school at District expense. This request is denied as the ALJ has no authority to grant it. Nothing in this order prevents the Parent from requesting that the District privately place the Student. Nothing in this order relieves the District from its obligation to comply with the law in responding to such a request.
33. The Parent made a number of requests with respect to the timing, make-up, and conduct of future IEP meetings. Because no procedural violations were found with respect to IEP meetings, these requests are all denied. Nothing in this order relieves the District of its obligation to follow the law with respect to future IEP meetings.
34. Any other requested remedies are denied.

ORDER

1. The Tacoma School District violated the IDEA and denied the Student a FAPE by failing to implement the Student's IEP and PWN with respect to counseling services, behavioral specialist services, and weekly written notice to the Parent about the Student's services.
2. The District has not otherwise denied the Student a FAPE.
3. The District shall provide the Student with compensatory education in the form of six hours of counseling services and 18 hours of behavioral specialist services to be delivered as set forth above.

Signed at Seattle, Washington on December 5, 2015.



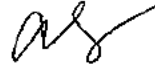
Anne Senter
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

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

CERTIFICATE OF SERVICE

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



Parent



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