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Superintendent of Public Instruction  
Administrative Resource Services



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STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
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April 20, 2017

Parents



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In re: Tacoma School District  
OSPI Cause No. 2017-SE-0026X  
OAH Docket No. 03-2017-OSPI-00256

Dear Parties:

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

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

Sincerely,

A handwritten signature in cursive script that reads "Anne E. Senter".

Anne Senter  
Administrative Law Judge

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

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

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APR 20 2017

IN THE MATTER OF:

OSPI CAUSE NO. 2017-SE-0026X - SEATTLE

TACOMA SCHOOL DISTRICT

OAH DOCKET NO. 03-2017-OSPI-00256

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

A hearing in this matter was held before Administrative Law Judge (ALJ) Anne Senter in Tacoma, Washington, on March 30, 2017. The Father of the Student whose education is at issue<sup>1</sup> appeared and the Parents were represented by Lara Hruska, attorney at law, and accompanied and advised by Vanessa Lewis, Partnerships for Action, Voices for Empowerment (PAVE). The Tacoma School District (the District) was represented by Susan B. Winkelman, attorney at law. Also present was Ann Jones Almlie, District director of student services.

**STATEMENT OF THE CASE**

The Parents filed a Due Process Hearing Request (the Complaint) with the Office of Superintendent of Public Instruction (OSPI) on March 2, 2017. The Complaint was assigned Cause No. 2017-SE-0026X and was forwarded to the Office of Administrative Hearings (OAH) for the assignment of an ALJ. A Scheduling Notice was entered March 3, 2017, which assigned the matter to ALJ Anne Senter. The Parents filed a Motion of Prejudice, seeking reassignment of the ALJ, on March 8, 2017. It was denied as untimely by Senior ALJ Matthew Wacker. The District filed its Response to the Complaint on March 10, 2017. A prehearing conference was held on March 10, 2017, and a prehearing order was entered March 15, 2017.

**Due Date for Written Decision**

The parties have the right to obtain a written decision in this matter within ten school days after the due process hearing. Washington Administrative Code (WAC) 392-172A-05160(3)(a); 34 CFR §300.532(c)(2). Accordingly, the due date for a written decision in this matter is **April 20, 2017**.

**Evidence Relied Upon**

Exhibits Admitted:

**District's Exhibits:** D1 - D8; and  
**Parents' Exhibits:** P1 - P20.

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

Witnesses Heard (in order of appearance):

The Student's Grandmother;  
Tami Markovich, bus driver, Durham School Services;  
Stacy Cecchet, Ph.D.;  
Donna Green, District special education teacher;  
Leslie Sampson, District school psychologist;  
Christian Jordan, District elementary school principal; and  
Sara Woodward, District assistant director of student services.

Post-Hearing Briefs

The parties timely submitted post-hearing briefs.

ISSUES

As set forth in the Prehearing Order entered March 15, 2017, the issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
  - i. Finding that the behavior for which the Student was suspended was not a manifestation of his disability;
  - ii. Failing to provide a bus monitor for the Student pursuant to the Student's individualized education program (IEP); and
  - iii. Inaccurately reflecting the conduct for which the Student was disciplined in the District's records;
- b. And, whether the Parents are entitled to their requested remedies:
  - i. Amendment of the Student's educational records;
  - ii. Return of the Student to his last educational placement in the District;
  - iii. Additional tutoring;
  - iv. And/or other equitable remedies, as appropriate.

FINDINGS OF FACT

Background

1. The Student is seven years old and in the second grade. He takes daily medication at 6:00 a.m. for attention deficit hyperactivity disorder (ADHD). Exhibits D1, p. 8; D5, p. 3; Grandmother testimony. On the weekends, the medication typically wears off around 1:00 p.m. Grandmother testimony.

2. The District conducted an initial evaluation of the Student in February 2016, when he was in the first grade, and found him eligible for special education and related services under the other health impairment eligibility category. Exhibit D1, p. 3.
3. The District implemented an initial individualized education program (IEP) for the Student in February 2016, which provided occupational therapy and specially designed instruction in "social/emotional/behavioral" and reading. Exhibit D2, p. 11.
4. In March 2016, the IEP was amended to include special education transportation services and a "bus monitor." Exhibit D3. The frequency for the bus monitor was listed on the special education and related services matrix as being "30 minutes/2 times daily." *Id.* at 11. The prior written notice (PWN) stated that the Student had been suspended from the general education bus for "unsafe behaviors." Exhibit D3, p. 14. Neither the IEP nor the PWN identified the Student's unsafe behaviors on the general education bus or the specific purpose of the bus monitor. Nor did either document specify that a bus monitor was required only when other students were on the bus or identify that a bus driver could serve as the bus monitor if no other students were present. Exhibit D3. The Student's Grandmother understood that the bus monitor had been implemented to keep the Student safe and to model appropriate behavior to and from school because his behavior had been "all over." Grandmother testimony.
5. The amended IEP states that the Student spends 1800 minutes per week in school, which is an average of six hours per day. See Exhibit D3, p. 11.
6. After conducting a functional behavioral assessment (FBA), the District implemented a behavioral intervention plan (BIP) in April 2016. Exhibits D4, D5. The BIP stated that the Student "often displays behaviors that impede the learning of himself and others, especially on days when he has not received medical interventions for ADHD." Exhibit D5, p. 3. It noted that, "[o]n these days he will run around the classroom, jump over desks/chairs, refuse to sit down or join the group, and run from the classroom 3+ times per day." *Id.* The BIP states that the Student's "negative behaviors increase" when he has not taken his ADHD medication. *Id.* The BIP targets "aggressive behavior," described as pushing, hitting, and kicking peers in unstructured environments such as P.E. or recess and hitting and kicking adults when they confront him due to undesirable behaviors such as running in the halls. *Id.* The BIP also targets "unsafe classroom behavior" including being unsafe with scissors by running around the classroom and cutting things on other students' desks, leaving his desk, jumping on desks and chairs, intentional "self-soiling" and running out the classroom. *Id.* The BIP did not target or mention the Student's behavior on the bus or provide strategies for dealing with that behavior. *Id.* at 3-6.
7. The Student began living with his Grandmother outside the District in September 2016. Grandmother testimony. He continues to attend school in the District under the McKinney Vento Act, which addresses the needs of homeless youth. Grandmother testimony.
8. In November 2016, the Student was placed on emergency expulsion from November 4 to November 18, 2016, because of "allegations of sexual misconduct on the school bus." Exhibit P3, p. 1. A female student had moved to sit with the Student in his seat and he kissed her. Grandmother testimony. The emergency expulsion notice stated that the emergency expulsion

would end or be converted to another form of corrective action within ten school days. Exhibit P3, p. 1.

9. A manifestation determination meeting was held on November 18, 2016. Exhibit P5, p. 1. The team determined that the conduct in question did not have a direct and substantial relationship to the Student's disability. *Id.* at 2. However, the team determined that the conduct in question was a direct result of the District's failure to implement the IEP because the District had not provided a bus monitor on the day the incident took place. *Id.* at 2; Sampson testimony; Grandmother testimony. Accordingly, the team determined that the conduct was a manifestation of the Student's disability. Exhibit P5, p. 3.

10. The District issued a PWN the same day proposing to convert the Student's emergency expulsion to an expulsion that would remain in place until a psychosocial risk assessment had been completed and the subsequent safety recommendations had been reviewed and implemented by the school team. Exhibit P5, p. 4. The PWN stated that the Student's family had declined consent for the proposed psychosexual risk assessment and expressed their desire to pursue due process. *Id.*

11. Despite the PWN proposing an indefinite suspension, the emergency expulsion was converted to a short-term suspension of ten days and the Student was returned to school on November 21, 2016. Exhibit D4, p. 1. No FBA was conducted after the manifestation determination meeting and the Student's BIP was not amended. Grandmother testimony.

#### January 2017 Bus Incident and Resulting Discipline

12. The incident at issue in this case took place on a day in January 2017.<sup>2</sup> It snowed that day and the District announced that there would be no out-of-District transportation provided. Grandmother testimony. The Grandmother took the Student to school and understood, based on a conversation with the District transportation office, that the District would transport him home after school. Grandmother testimony.

13. For unknown reasons, no bus arrived at the Student's school to take him home at the end of the day. Jordan testimony. Christian Jordan, the school principal, contacted the Student's Grandmother to see if she could pick him up but she was not available. Grandmother testimony; Jordan testimony. He then contacted District transportation and requested a bus and a bus monitor or a "solo bus," meaning a bus on which there would be no other students. Jordan testimony. Mr. Jordan believed a bus monitor was not necessary if there were no other students on the bus because he understood the purpose of the monitor was to be sure the

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<sup>2</sup> The evidence is not consistent about the day on which the incident occurred. The bus driver testified that it took place on January 10, 2017, which is the date on the video. Markovich testimony; Exhibit P16. The Grandmother testified the conduct took place on January 18, 2017, and the principal testified it took place on January 17, 2017. Grandmother testimony; Jordan testimony. The Student's emergency expulsion was issued at a meeting on January 18, 2017, to begin on January 19, 2017, suggesting that the conduct likely took place the day before on January 17, 2017. Exhibit D6. Despite the inconsistency about the date, it is evident that all witnesses and exhibits were referring to the Student's conduct on the snow day on which Ms. Markovich drove the school bus.

Student engaged in safe behavior with other students and, without other students on the bus, the driver could serve as the monitor. *Id.*

14. A bus driver, Tami Markovich, eventually picked up the Student in a bus with no bus monitor and no other students at approximately 5:15 p.m. Exhibit P16; Green testimony; Jordan testimony. This was long after the Student's ADHD medication would have worn off in the afternoon. See Grandmother testimony. The driver had never met the Student before, did not know that he had a disability or an IEP, and did not know that his IEP called for a bus monitor. Markovich testimony.

15. The bus ride to the Student's home took approximately 35 minutes and was recorded in its entirety by a video camera at the front of the bus, which had full view of the Student and driver at all times except to the extent the Student's body was behind the seat in front of him. Exhibit P16.

16. The Student initially sat in the seat directly behind the driver and remained there for nearly ten minutes. He then got up out of his seat and walked up the aisle to put something in the garbage can at the front of the bus. He briefly returned to his seat, then got up and hugged the driver before sitting down in the seat across from his original seat. He sat forward in the seat with his feet in the aisle, got partially up, and then sat back down with his feet in the aisle. Just a few minutes later, he got up and stood in the aisle next to the driver. He hugged her and then kissed her on the face and held on to her without getting up even though she asked him to stop. He then went back to his original seat but sat with his feet in the aisle. *Id.*

17. Just moments later, he crawled in the aisle and then returned to his seat but did not sit down. He got up from his seat again and leaned his body against the side of the driver's body from behind. He returned to his seat, but with his legs in the aisle, kicking. He fidgeted in his seat and in the aisle. He got up and squatted in the aisle before standing up and kissing the bus driver again. He returned to his seat with his feet in the aisle. He remained in his seat for several minutes but sitting forward in his seat with his legs in the aisle. *Id.*

18. The Student got up again and kissed the bus driver, leaning his body into her. He thrust his pelvis forward and back, making what was described at the hearing as a "humping" motion on the side of the driver's body. See Ceccet testimony. He did not immediately respond to the driver's direction to stop, but eventually returned to his seat and pulled the hood of his coat over his head. The driver distracted him for several minutes by allowing him to talk on the bus's microphone from his seat. Exhibit P16.

19. Soon though the Student began bouncing in his seat, standing in the aisle, and hitting the back of the bus seat across the aisle from him. He got up, lay down on his seat and kicked his feet in the air, stood up, and hit the back of the seat again. He sat in the seat, but with his body leaning out into the aisle, chanting and hitting the seat. He engaged in this type of behavior for several minutes, wiggling and singing. *Id.*

20. He got up out of his seat and again thrust his pelvis forward and back against the driver's body in a "humping" motion. He returned to his seat and did not touch the driver again during the last approximately ten minutes of the trip, although he alternated between sitting in his seat, standing in his seat, standing in the aisle between the seats, laying in the seat while kicking his feet in the aisle, bouncing in his seat, hitting the seat, crawling in the aisle, changing seats,

hanging forward over the front of his seat, standing next to the driver, and sitting on his knees on the seat. The bus eventually reached the Student's home and he exited the bus. *Id.*

21. The bus driver, the Student's teacher, the school psychologist, and the school principal all acknowledged that a bus monitor could have been helpful to keep the Student out of the driver area, prevent his unsafe behavior, and/or prevent the situation from escalating. Markovich testimony; Green testimony; Sampson testimony; Jordan testimony.

22. On January 18, 2017, the District placed the Student on an emergency expulsion from January 19 to February 2, 2017, because of "allegations of sexual misconduct on the school bus." Exhibit D6. The expulsion notice stated that the emergency expulsion would end or be converted to another form of corrective action within ten school days. *Id.*

### Manifestation Determination

23. A manifestation determination meeting was held on January 27, 2017. Exhibit D7. The team determined that the conduct in question did not have a direct and substantial relationship to the Student's disability because sexual misconduct is not a diagnostic feature of ADHD and is not behavior commonly observed in children diagnosed with the disorder. *Id.* at 4. It also determined that the conduct in question was not a direct result of the District's failure to implement the IEP because there were no other students on the bus so a bus monitor was not necessary. *Id.*; Green testimony; Sampson testimony; Jordan testimony; Woodward testimony. Accordingly, the District concluded that the Student's conduct was not a manifestation of his disability. Exhibit D7, p. 5.

24. The District converted the emergency expulsion to an expulsion for an additional 27 days, from February 2 to March 15, 2017. Exhibit D8.

25. The District agreed to provide the Student with ten hours of tutoring per week during his suspension for a total of 60 hours. Woodward testimony; Grandmother testimony. The purpose of the tutoring was to provide the Student with "access" while he was out of school. Woodward testimony. The District did not provide all the agreed tutoring during the time the Student was suspended but was providing the remaining amount at the time of the hearing. Woodward testimony; Grandmother testimony. The record does not contain a written agreement about the tutoring.

26. The Student returned to school on March 15, 2017. Grandmother testimony. In the meantime, the District had developed a new IEP and BIP in February when it was time for the annual review. Green testimony. The District did not complete a new FBA or reevaluate the Student. *Id.* There were 31 school days between the date of the manifestation meeting and the Student's return to school. See Exhibit P20.

## 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 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 Parents are seeking relief in this case, they have the burden of proof.

#### Manifestation Determination

3. The IDEA sets forth specific procedural requirements for the discipline of a student eligible for special education. When a school district seeks to expel a student or suspend him from school for more than ten days for violation of a code of student conduct, a review must be conducted within ten days of the decision to determine whether the misconduct is a manifestation of the student's disability. WAC 392-172A-05145(5)(a).

4. For purposes of this manifestation determination, conduct is a manifestation of a Student's disability:

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-05145(5)(a).

5. If it is determined that a student's misconduct was not a manifestation of his disability, the student is subject to the same sanctions for misconduct as a child without a disability. WAC 392-172A-05145(3). However, the student must continue to receive educational services that allow him to participate in the general education curriculum and to progress toward meeting the goals in his IEP. WAC 392-172-A-05145(4)(a).

6. If it is determined that the student's misconduct was a manifestation of his 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-05145(6)(a) and (b). The student must also be returned to the placement from which he was removed unless the parent and the school district agree to a change of placement. WAC 392-172A-05145(6)(c).

7. Here, the Student's IEP required a bus monitor and provided no exception for situations in which the Student was the only child on a bus. The "sexual" conduct for which the Student was disciplined took place in the context of him repeatedly leaving his seat on the bus and engaging in multiple behaviors that were unsafe for himself, the driver, and potentially other cars or pedestrians near the bus. All District witnesses acknowledged that a bus monitor could have been helpful to keep the Student in his seat and prevent his behavior from escalating. It is



determined that the misconduct for which the Student was disciplined was a direct result of the District's failure to implement the IEP by failing to provide a bus monitor as required by the IEP.

8. The District argues that the failure to provide a bus monitor on the day in question was not a material failure to implement the IEP because "perfect adherence to the IEP" is not required." See *Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770 (9<sup>th</sup> Cir. 2007). And at least one District witness believed that the extenuating circumstances presented by the snow day should be considered in determining whether or not the Student's behavior was a manifestation of his disability. Green testimony. But the relevant question is whether the Student's misconduct was a direct result of the District's failure to implement the IEP on this particular day. The extenuating circumstances of the snow day and Mr. Jordan's diligence in ensuring that at least there would be no other students on the bus may demonstrate the District was doing its best under challenging circumstances to get the Student home, but the Student should not be disciplined for behavior that would likely not have occurred had the District provided a bus monitor as required by the IEP.

9. Because it is determined that the Student's conduct was a manifestation of his disability based upon the District's failure to implement the IEP, it is not necessary to determine if it was caused by or had a direct and substantial relationship to his disability.

#### Remedy

10. 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. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). It is a remedy intended to place a student in the position the student would have occupied if a school district had honored its duty to provide a free appropriate public education, and it must be based on a determination of each student's individual needs. 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. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9<sup>th</sup> Cir. 1994).

11. The Parents request as a remedy 316 hours of tutoring. The District argues that no additional tutoring is appropriate because the Student's family already accepted 60 hours of tutoring at a resolution meeting. The District's argument fails for several reasons. First, there is no copy of any resolution agreement in the record. Second, no witness testified that the agreement was made at a resolution meeting. Third, no witness testified that the 60 hours of tutoring was intended as a remedy for the inappropriate suspension of the Student as opposed to providing the educational services that a student eligible for special education is entitled to receive during an appropriate suspension. For these reasons, the agreement to 60 hours of tutoring does not bar the award of any additional tutoring as a remedy for the District's incorrect suspension of the Student.

12. The Parents calculate the requested 316 hours of tutoring at 47 days at 8 hours per day (minus the 60 hours to which the District has already agreed to provide). The ALJ does not adopt this formula. The Student should have been returned to his placement following the manifestation meeting on January 27, 2017. Thus, he was removed from school either as part

of the emergency expulsion or long-term suspension for 31 days when he should have been in school. The Student spends 6 hours per day in school. Thus, he missed a total of 186 hours, 60 of which the District has already agreed to provide tutoring for, leaving 126 hours. Students are generally able to progress much more rapidly when tutored one-to-one rather than receiving instruction in classrooms with other students. For that reason, an hour-for-hour award, without evidence to support such, is not appropriate. Instead, the District shall provide one hour of tutoring for each two hours of missed school. Thus, the District shall provide the Student with 63 hours of tutoring in addition to the 60 hours it already agreed to provide.

13. These compensatory services shall be provided by fully certificated District staff with the education, training, and experience to provide such instruction. The compensatory instruction may be delivered at any time in the calendar year following the entry of this decision, at the duration and frequency determined appropriate by the Parents and the District. 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 not able to attend. Without such notice and in the absence of an emergency, that session will count towards the compensatory education award.

#### Other arguments and requested remedies

14. The Parents argue that that the ALJ should order the District to remove the references to inappropriate sexual misconduct from the Student's disciplinary records. The ALJ does not have the authority to do this. WAC 392-172A-05215 sets forth a mechanism for parents to seek to amend information in educational records when they believe it is inaccurate, misleading, or in violation of a student's privacy or other rights. Under that provision, the parents make the request of the school district and may request a hearing from the school district. *Id.*; WAC 392-172A-05220. Neither OSPI nor OAH are involved in that hearing process. Because the ALJ lacks the authority to amend District records, the Parents' request in this regard is denied.

15. The Parents also argue that the Student's suspension was too long even under standards that apply to general education students and that the District's request that the Student undergo a sexually aggressive youth evaluation was not appropriate. As these issues were not raised in the Parents' Complaint or identified in the statement of the issues, they are not considered.

16. The Parents request as an additional remedy an independent educational evaluation (IEE) consisting of a full psycho-educational evaluation and an FBA and BIP. This request is denied. When an FBA has already been conducted, there is no requirement to conduct a new FBA when it is determined that a Student's conduct was a manifestation of his disability, only to modify the BIP. The District has modified the BIP since the January manifestation determination. Nothing in this order prevents the Parents from requesting that the Student be reevaluated or requesting an IEE based on their disagreement with a prior evaluation.

### ORDER

1. The Student's conduct in January 2017 that led to his emergency expulsion and long-term suspension was a manifestation of his disability.

2. The District shall provide the Student with compensatory services in the form of 63 hours of one-on-one tutoring to be delivered as set forth above.

Signed at Seattle, Washington on April 20, 2017.



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.



Parents



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