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

IN THE MATTER OF:	SPECIAL EDUCATION CAUSE NOS. 2013-SE-0017X 2013-SE-0018
PENINSULA SCHOOL DISTRICT	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

A hearing in the above-entitled matter was held before Administrative Law Judge (ALJ) Michelle C. Mentzer in Gig Harbor, Washington, on May 29, 30, 31, June 18, and June 20, 2013. The Parent of the Student whose education is at issue[1] appeared and represented herself. The Peninsula School District (District) was represented by Lance Andree and Parker Howell, attorneys at law. The following is hereby entered:

STATEMENT OF THE CASE

The Parent (all references to the Parent are to the Mother) filed a due process hearing request (complaint) in cause no. 2013-SE-0017X on February 13, 2013. The District filed a complaint in cause no. 2013-SE-0018 on February 26, 2013. The two cases were consolidated for purposes of hearing on the First Prehearing Order issued March 4, 2013. Also in that Order, the expedited status of cause no. 2013-SE-0017X was stricken. Other orders were issued on February 21, April 4, May 23, June 3, and June 21, 2013.

The due date for the written decision was continued to 30 days after the close of the hearing record, pursuant to a joint request for continuance made by the parties. *See* First Prehearing Order of March 4, 2013. The hearing record closed with the filing of post-hearing briefs on July 17, 2013. Filing was accomplished by briefs being either postmarked or received on that date. Thirty days after July 17, 2013 is August 16, 2013. The due date for the written decision is therefore August 16, 2013.

EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Court Exhibits:
C-1 through C-3;

Parent Exhibits:
P-1 through P-2;
P-4 through P-6;

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

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P-8 through P-19;
P-20 (only pages 2 - 3, 6 – 8, 10, 13 – 17, 19 - 20, 22, 24 - 25, 27 – 29, 35 – 42, 46, 49 – 53, excluding all handwritten markings on those pages);
P-21 (only pages 1 - 2, 5, 11, 14, 16, 30 – 35, 41 - 44, excluding all handwritten markings on those pages);
P-22 through P-23;
P-25 through P-26;

District Exhibits:
D-1 through D-24; and
D-26.

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

Rick Shaw, private educational consultant;
Christine Fitzgerald;
Timmy Milligan, Exceptional Family Member Program, Joint Base Lewis McCord;
The Mother;
Leah Kyaio, private educational consultant;
The Student;
Laurie Scherer, District general education teacher;
Jeff Newport;
Shannon Davis;
Dwight Robinson, Catholic Community Services;
Leslie Walker, District special education teacher;
Sandra Treick-Shipman, District general education teacher;
Katherine Burkart, District special education teacher;
Cheryl Cleven, PhD, District school psychologist;
Christine Poulton, District paraeducator;
Myka Cranford, District paraeducator;
Tabatha Hoffman, District paraeducator;
Holly Johnston, District paraeducator;
Laura Parker, Hands On Learning Solutions;
David Brooks, District principal;
Dustin Wiyrick, District school counselor;
Ron Sherman, District school psychologist;
Lisa Rodside, District program specialist; and
Niccole Griffin, District school counselor;

ISSUES

1. Whether the District violated the Parent's procedural rights under the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:

   a. Denying the Parent an opportunity to meaningfully participate in the development of the Student's December 2011 and December 2012 individualized education programs (IEPs);

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b. Denying the Parent an opportunity to meaningfully participate in the development of the Student's October 2012 evaluation revision, functional behavioral assessment (FBA), and behavior intervention plan (BIP);

c. Failing to include, in the Student's IEP team, District staff with sufficient knowledge about the Student's prior successful mainstreaming;

d. Failing to hold a manifestation determination meeting regarding the Student's emergency expulsion of September 27, 2012, which was converted to a suspension;[2]

2. Whether the District violated the Parent's substantive rights under the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:

a. Failing to offer appropriate educational placements to the Student beginning September 2011;

b. Conducting an inappropriate social/emotional/behavioral assessment as part of the Student's December 2011 evaluation, and denying the Parent's subsequent request for a reevaluation in that area;

c. Failing to provide appropriate services and accommodations in the Student's December 2011 and December 2012 IEPs;

d. Failing to place the Student in her least restrictive environment by placing her in a one-on-one educational setting beginning October 8, 2012;

e. Failing to properly implement the Student's IEPs beginning October 8, 2012, by having paraeducators teach the Student instead of certificated teachers;

f. Excluding the Student from non-academic classes and activities such as field trips and Parent Teacher Organization activities beginning September 14, 2012.

g. Adopting inappropriate BIPs that did not provide appropriate positive behavioral supports and interventions;

h. Changing the Student's BIPs and changing her placements before allowing sufficient time for the BIPs to be successfully implemented;

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[2] In the First Prehearing Order of March 4, 2013, the claim of failing to hold a manifestation determination meeting was listed among the claims of *substantive* violation of the IDEA. On reconsideration, it is more appropriately classified as an allegation of a *procedural* violation, since it is a claim for failing to hold a meeting.

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i. Failing to provide appropriate training in behavior management and Right Response to the paraeducators who worked with the Student and to the office staff who came in contact with her;

j. Significantly preventing the Student from benefiting from her education by causing her emotional trauma in the following ways:

(1) Interrogating her in a manner that implied her brother was molesting her;
(2) Making demeaning comments to her; and
(3) Showing her a film about fallen soldiers after being informed that her Father was serving in Afghanistan and she was having nightmares about him dying in combat;

3. Whether the Parent is entitled to the following requested remedies, or other equitable relief as appropriate:

a. An independent educational evaluation (IEE) at public expense;

b. Education and services to compensate the Student for the prior denial of FAPE, as follows:

(1) tutoring/academic therapy for four hours per day, five days per week, for a period of 33 weeks; and

(2) speech-language therapy for 30 minutes per week, for a period of 20 weeks;

c. Appropriate prospective placement and services, including: speech-language therapy; Applied Behavioral Analysis (ABA) therapy for social/emotional/behavioral skills acquisition; non-academic classes and activities including swimming lessons; training for staff who work with the Student on responding to behaviors that result from disabilities and behaviors that result from the stresses on military families; and possibly including tutoring by Hands-On Learning; and

d. A formal apology to the Student for the District's treatment of her, and outlining her value and worth, in order to restore her self-esteem.

See paragraphs 20 – 22 of the First Prehearing Order of March 4, 2013, as modified by agreement of the parties on the first day of hearing, and as modified on reconsideration in footnote 2, above.

FINDINGS OF FACT

Background

1. The Student is 9 years old and was in third grade during the 2012-2013 school year. She lives with her Parents and two older siblings within the Peninsula School District.

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2. The Student attended the first part of kindergarten at a Department of Defense school in Japan, where her Father was stationed with the military. The family then relocated to a series of residences in the Puget Sound area. The Student finished kindergarten in the Mukilteo School District, attended first grade in the Yelm School District, second grade at the Peninsula School District's Voyager Elementary School (Voyager), and third grade at Peninsula's Discovery Elementary School (Discovery).

3. The Student was first found eligible for special education by the Yelm School District when she was in first grade, in the 2010-2011 school year. The Student's eligibility category was a specific learning disability in written language. She received special education in the areas of reading (225 minutes per week), written language (225 minutes per week), and speech-language therapy for articulation errors (30 minutes per week). D-1; D-2. The Parent volunteered at school in Yelm most days, and this provided emotional support to the Student. Testimony of Parent.

4. The Yelm special education evaluation included cognitive testing. The Student's intelligence was found to be in the average range (IQ 94). The Yelm evaluation also included a behavioral assessment. The Parent and the Student's teacher completed the Behavioral Assessment System for Children (BASC). This assessment found the Student's ability to regulate her emotions to be within the normal range. The subsection of the BASC on learning problems, however, resulted in scores within the clinically significant range. No behavior problems were noted in the classroom observation done for the Yelm evaluation. D-1.

Second Grade (2011-2012)

5. When the Student transferred to the Peninsula School District (hereinafter referred to as the District) for second grade in the 2011-2012 school year, the District accepted the Yelm evaluation and the Yelm IEP. D-3. However, early in the school year the Student exhibited frequent behavioral problems such as refusing to transition to recess or to a class, refusing to work, leaving the classroom, engaging in disruptive behavior on the bus, and running into the school parking lot. D-4; P-20:2.[3] In early October 2011, the Parent requested an IEP meeting to consider adding social/emotional/behavioral services for the Student. *Id.*

6. Pursuant to this request, a meeting was held on October 11, 2011. The District agreed to reevaluate the Student not only in the social/emotional/behavioral area, but in academic areas as well, due to academic difficulties she was having. The District provided a consent form for the reevaluation to the Parent on or about October 13, 2011. The Parent signed and returned the form on November 3, 2011. D-4.

7. In the meantime, the school counselor, Dustin Wiyrick, addressed the Student's behavioral difficulties with some interventions. The Student was given the choice to either do her assigned activities in the place she was supposed to be, or go to Voyager's "Opportunity Room" where she could decompress and feel less overwhelmed. She would return to class when she indicated she was ready to resume class activities. The Student's noncompliance appeared to serve two purposes: to avoid work or a non-preferred activity, and to seek adult attention. She

[3] The citation format "P-20:2" refers to Parent Exhibit P-20, page 2.

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was getting such attention in a negative way, and Mr. Wiyrick replaced that with a system for getting that attention in a positive way. By being in the place she was supposed to be, the Student earned stickers that were converted into minutes of time with the counselor at the end of the day, usually playing a board game. He tightened the system as the Student's compliance increased, so that she had to demonstrate longer periods of appropriate behavior to earn playing time with him. The behavior problems seen in September and October 2011 decreased in November and December 2011. D-5; Testimony of Wiyrick, Walker. Mr. Wiyrick planned to start a friendship/social skills group in January 2012, and would invite the Student to participate. D-5.[4]

8. The classroom teacher, Laurie Scherer, wrote in the Student's report card in mid-November 2011 that the Student's emotions were much more in check. She still had occasional visits to the Opportunity Room, but they were much less often. Peer relationships had not meant much to the Student, but in November this began to change with the Student feeling more secure and able to think about others. In the month following the November 2011 report card, Ms. Scherer noted that the Student chose to leave the classroom only once or twice, and had more social interactions with classmates. *Id.* The same thing occurred in the Resource Room (special education classroom), where the Student chose to leave for the Opportunity Room less frequently over time. Testimony of Walker.

9. The District's reevaluation was coordinated by school psychologist Cheryl Cleven, PhD, and was completed at a meeting on December 13, 2011. Dr. Cleven conducted numerous classroom observations of the Student in November and December 2011. During each observation the Student was on task and appropriately working. She raised her hand to answer questions, participated in discussions, and asked for help. The Student worked more slowly than most others, and looked to the teacher for approval of her work, smiling when approval was given. When the teacher helped her correct something in her work, the Student readily accepted the help. D-5; D-23.

10. Dr. Cleven did not conduct a cognitive assessment because that had been done the prior year in Yelm. The academic assessments Dr. Cleven administered found the following. In reading, the Student greatly struggled with decoding. She was unable to comprehend text she could not decode, unless pictures were provided. In written language, she copied sentences well, but could only think of sentences for two of the seven words given. Her writing had errors in punctuation, capitalization and spelling. In math, by contrast, her skills were found to be in the average range. *Id.*

11. Dr. Cleven administered the BASC-2, the same behavioral assessment used in Yelm the previous year (though Yelm may have used an earlier edition, since its evaluation refers to the BASC). As in Yelm, the assessments were completed by the Parent and the classroom teacher. The results showed a significant increase in clinically significant and at-risk scores for behavioral problems. A second behavioral assessment, the Connors-3 (administered to the same persons), found similar elevated scores. *Id.*

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[4] There was no evidence in the record whether the Student participated in a friendship/social skills group at Voyager thereafter.

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12. The December 2011 reevaluation concluded that the Student continued to qualify for special education in the three areas previously served (reading, written language and speech-language). It concluded that she did not qualify for special education in the social/emotional/behavioral area because good outcomes were being achieved with general education interventions. The reevaluation report stated that if interventions become ineffective, the team might need to reconvene and reconsider whether social/emotional/behavioral goals should be added to the IEP. The Student's eligibility category was changed from Specific Learning Disability to Other Health Impairment. The Other Health Impairment category was based on a preexisting diagnosis of attention deficit hyperactivity disorder (ADHD). *Id.*[5]

13. Two days after the evaluation review meeting, an IEP was adopted on December 15, 2011.[6] The IEP provided for special education in reading (120 minutes per week), written language (120 minutes per week), and speech-language therapy (180 minutes per month, which equals a little more than 40 minutes per week). The Student's placement was in the general education setting 83% of the time. This was an increase in general education participation from the Yelm IEP, which had provided for 72% participation. The difference was mostly due to a decrease in reading and written language special education from 225 minutes per week each to 120 minutes per week each. D-6; D-2. The Student's special education time was reduced because of the progress she was making, and her general education time was correspondingly increased. Testimony of Walker.

14. The December 2011 IEP provided for the following "curricular adaptations" (also known as accommodations and modifications): preferential seating; small group instruction; shorter writing assignments; repeat/review/drill; short, frequent and repeated practice sessions; introducing one new concept at a time; guided instruction on completing assignments; cues to stay on task; and modified grades in reading and written language. D-6.

15. Although the Student's behavior improved after October 2011, she continued to have some behavioral incidents. On January 13, 2012, she refused to separate from her Mother, moved to different areas in the school, screamed, wrote on a table, and went outside the school. By 10:30 a.m. she resumed normal activities and had a successful day. P-20:19. On January 31st, the Student was given a half-day suspension for behavior that included pushing and hitting a guest teacher in the Resource Room, writing on a table, and physically attacking the school counselor as well as a door and a window. P-6:5. On February 9th, Ms. Walker reported to the Parent that the Student's behavior in the Resource Room had declined in the prior week. The Student had left class without permission, stacked two chairs and climbed on them, and stolen small items that she eventually returned. P-20:22, 24, 27-28. On February 13th, she refused to return to her general education classroom after her time in the Resource Room, played with items on a staff member's desk, pretended she had thrown up, refused to leave a bed in the Resource Room, and attempted to bite Ms. Walker. P-25:4.

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[5] There was no evidence concerning why the Student's eligibility category was changed. This did not appear to have any effect on the areas of service provided to her.

[6] The Parent did not attend the December 15, 2011 IEP meeting. This matter is discussed in the section below entitled "Parental Participation in Evaluation and IEP Meetings".

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16. Because of these incidents, on February 7, 2012, the Parent requested a reevaluation in the social/emotional/behavioral area. The team met on March 6, 2012, and declined to reevaluate for the following reasons. The Student's behavior had been improving, except that in the last month she was being noncompliant and aggressive in the Resource Room. The Resource Room, where the Student spent one hour per day, had previously been a preferred location for her. The team decided that more interventions would be tried in the Resource Room before conducting a reevaluation, especially since a reevaluation in the social/emotional/behavioral area had been completed less than three months earlier. D-7; Testimony of Walker. At the Parent's request, the Student's IEP was amended to change her transportation from a regular to a special education bus, due to recent safety concerns. D-8:9.

17. At the March 6, 2012 meeting, a "Response to Behavior" plan was adopted, listing progressive steps to address the Student's problem behaviors: ignore; distract; talk calmly and offer to help; give choices; remove audience; remove the Student, if necessary with a physical escort; have the Student spend time in the Opportunity Room or alternative placement; return to her assigned classroom; and consequences/restitution as needed. P-11.

18. Ms. Walker realized that the Student's behavior had deteriorated when her small group expanded from three children to five children. Ms. Walker therefore changed the groupings and staff assignments so that she (Ms. Walker) could work with the Student either alone or with just one other child. She also instituted an incentive sticker chart in the Resource Room similar to the one used by Mr. Wiyrick, the school counselor. The Student's behavior in the Resource Room improved thereafter. Testimony of Walker, Cleven. During the last two weeks of school in June 2012, her behavior spiked again, according to school counselor Mr. Wiyrick. The June spike was not sufficient to result in either school discipline or email traffic between school and home.[7]

Third Grade (2012-2013)

19. During the summer before the Student's third grade year, her family relocated within the District and now lived close to a different elementary school, Discovery. In late-August 2012, the District was notified that the Student and one of her brothers would be transferring from Voyager to Discovery to attend third grade and fifth grade, respectively.

20. The Student's new special education teacher at Discovery, Katherine Burkart, corresponded with Ms. Walker from Voyager to learn about the Student's needs, behavioral triggers, and the strategies that were most and least successful in helping her. P-25:2. Four meetings were held prior to and at the beginning of the school year to coordinate between the two schools and prepare Discovery staff to meet the needs of the Student and her brother, both of whom had behavioral issues. Testimony of Burkart, Shipman, Walker, Brooks.

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[7] The Parent offered in evidence extensive email traffic between school and home regarding behavioral incidents in second and third grade. *See* P-20 and P-21. Only one email concerning an incident in June 2012 was offered: P-20:47. It was not among the pages of exhibit P-20 that the District stipulated as admissible. The Parent did not offer it in evidence later in the hearing, so it was never admitted. Even if it had been admitted, it reflects only one incident, not a serious one, and one that was caused by an unusual event: the Student's brother joining the Student for a party at school.

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21. Discovery's school counselor Niccole Griffin and principal David Brooks became heavily involved with the Student, because she had severe behavior problems beginning early in third grade. The Student frequently ran from her assigned location (including into the parking lot), refused to respond to staff attempts at redirection, was physically aggressive to persons and property, interfered with items on the desks of office staff, yelled and sang loudly in the hallways and from a deck above the library, and verbalized that she did not care what staff said, she would do what she wanted to do. While the Student had engaged in similar types of behavior at Voyager, they had been less severe, frequent and intense at Voyager than at Discovery.

22. Discovery staff used the tracker incentive system (stickers and rewards) that had been developed for the Student at Voyager, as well as other strategies learned from Voyager staff. Nevertheless, the Student's behavior problems demanded a level of attention from the Discovery principal not experienced by him during long career in education. The Student historically had difficulty when her Father was deployed overseas. Early in the school year, on September 11, 2012, he was deployed to Afghanistan. The Student had difficulty when there was a substitute teacher, but also had difficulty on other days.

23. Discovery's physical facility was less conducive than Voyager's to meeting the Student's needs. Discovery did not have an Opportunity Room, or the equivalent, which had been an important part of the Student's behavioral support program at Voyager. Also, Discovery is an open-concept school where most classrooms do not have doors. The Student's general education class did have doors, because it was located in a portable unit. However, that carried its own safety risk: the Student could run from the portable unit directly to the outdoors.

24. During September 2012, Discovery staff created new and altered systems to meet the Student's behavioral needs. They began with an incentive system where appropriate behavior earned the Student time in Win-Win Way (an indoor, alternative recess room with games). Staff thought a stronger incentive for the Student would be "Bunny Bucks" (the Student liked bunnies) that she could exchange for incentives such as one-on-one adult time. Staff modified the daily tracker they had received from Voyager to focus on three, and later two goal areas that were most important. The Student liked zebras, so staff created a Zebra Pass that she could use to initiate a break from the classroom when needed. When the Student spent too much time outside the classroom using the Zebra Pass (which was only intended for 10-minute breaks), staff created a calming space for the Student within the classroom called "Bunny Hollow". Bunny Hollow was somewhat screened off, but the teacher could still observe the Student. The objective was to allow the Student to have a five-minute break and regulate her emotions without leaving the classroom, so she would miss less instructional time and it would be easier to keep track of her whereabouts and safety.

25. None of these interventions was successful. If there had been some modicum of success seen they would have been tried for longer periods of time, but there was none. Both the Student's general education teacher, Sandra Treick-Shipman, and her special education teacher, Ms. Burkart, believe the Student did not notice the changes in the incentive systems described in the previous paragraph. Regarding breaks, the Student did not use Bunny Hollow. She continued to use the Zebra Pass to leave the classroom for increasing lengths of time, eventually not bothering to take the pass. Ms. Treick-Shipman estimates the Student missed half of class time because she left class so often. The Student did not disrupt Ms. Treick-Shipman's classroom significantly because she left it when there was a task she did not want to do. However, she significantly disrupted other areas of the school, due in part to its open-

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concept design. Because of behavior incidents on the day of a parent-teacher organization (PTO) movie night on September 14, 2012, the Student was not permitted to attend the movie.

26. The Student and her brother occupied so much of school counselor Ms. Griffin's time in September 2012, that the District assigned a second full-time counselor to Discovery so that Ms. Griffin could continue to work intensively with the family. Also in September, the principal requested paraeducator support for the Student on an emergency basis. Paraeducator support was put in place beginning October 8, 2012. (The paraeducator support is discussed in more detail below.)

27. On September 24, 2012, the Parent requested a reevaluation for the Student in the social/emotional/behavioral area. This request was quickly granted. Consent for the evaluation was signed by the Parent on September 27th. Meanwhile, the Student was suspended for half a day on September 25th. Her conduct on that day included running through the office disrupting office staff, crawling under desks, taking objects, pushing phone buttons, and scratching and attempting to bite special education teacher Ms. Burkart. The police were called. P-6:4.

28. On September 27, 2012, the Student was emergency expelled for her conduct on two days: On September 26th, she screeched in the halls, knocked on classroom windows, threatened to hit a child with a pillow, swung a strap with a buckle in front of others, and wrote on a door in permanent marker. On September 27th she made loud noises in the hallway and office, damaged some office equipment, stood on a table, ripped a page from a book, hit a glass tank, threw a pen at the principal, Mr. Brooks, and held up a rock and purposely dropped it on the floor in front of Mr. Brooks. P-6:1.

29. The Parent requested a manifestation determination, which is a meeting to determine whether the conduct for which a student was disciplined was a manifestation of his or her disability. Because the Student had not yet been removed from school for more than 10 school days during the school year, the District did not conduct a manifestation determination. Instead, the District proposed on October 2, 2012 that the Student return to school on a half-day basis as a temporary measure. They thought the Student could be more successful with shorter days, and they could build on these successes and return her to a full-day schedule in a couple of weeks. The Parent did not agree to this option.

30. The parties met again on October 3, 2012. At that meeting, the Student's expulsion was converted to a suspension. The principal originally decided on a 4.5 day suspension. Since a reentry meeting and arrangements for the Student's return took two school days, the Parent requested that those two days be counted as part of the suspension.[8] The suspension was therefore changed to 6.5 days. P-6:6.

31. Also on October 3, 2012, Discovery's school psychologist, Ron Sherman, wrote in an internal email that other school staff were talking about placing the Student in Discovery's REACH program. The REACH program is a classroom for a small number of students with

[8] The Parent did not testify to the reason for this request. However, if the Student were suspended again, she would reach the threshold for a manifestation determination sooner if those two days were included in the suspension.

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social, emotional or behavioral problems. Mr. Sherman cautioned that a reevaluation and a number of other steps would have to be undertaken before a change of placement to the REACH program could be considered. P-21:14.

32. Three District staff members – Mr. Brooks (the principal), Ms. Griffin (the school counselor), and Lisa Rodside (program specialist) decided on an alternative setting for when the Student returned to school. Neither the Student's general education teacher nor her special education teacher were involved in this decision. No IEP meeting was held to discuss it.

33. The alternative setting was as follows. The District assigned a one-on-one paraeducator to the Student and converted a small office for their use. (The office was formerly used by the school counselor). The District stresses that the Parent agreed to this alternative setting, so the absence of an IEP meeting and IEP amendment are of little consequence. However, the Parent testified that she understood the small office would be used like the Opportunity Room was used at Voyager. The Student had gone to the Voyager Opportunity Room when she or her teacher believed she needed a break from the classroom. The Parent's testimony as to this understanding is corroborated by Mr. Brooks' repeated references in his testimony to the office being like an Opportunity Room for the Student, a support piece for the classroom where she could go to decompress, and an alternative space for time-outs and cooling down. It is therefore found that the Parent's "agreement" to the one-on-one office setting was based on misinformation provided to her orally.

34. The Parent brought a rug and a large stuffed animal for the room. School staff equipped it with two desks and an array of appealing art and school supplies. Testimony of Hoffman, Griffin. Ms. Griffin, gathered a chest full of incentive items such as bunnies and dolls. Nothing was put in writing about how the office would be used, how long the arrangement would continue, or what curriculum the Student would pursue while there.

35. On October 8, 2012, the Student returned to school from her expulsion/suspension. She was delighted with her new room, which was called her "office". However, it did not function like the Opportunity Room at Voyager, for breaks from the classroom as needed. Instead, the "office" was the Student's primary learning location. The paraeducators were virtually her only instructors. The opportunity to participate in other settings within the school was dependent on good behavior. If the Student's behavior was good enough to permit such participation, that participation also depended upon whether the Student chose to leave her office for other locations.

36. Due to behavior problems, absences, and her lack of interest in participating in the larger school environment, recess was almost the only period when the Student participated with other children. Even lunch was almost always separate from other children. Ms. Burkart cannot think of any activities the Student did with her general education class after October 8, 2012.

37. Two paraeducators shared the job initially, dividing the day into morning and afternoon based on their other assignments with the District. One paraeducator testified she did not have the authority to take the Student to her general education class; that authority lay with the administrators. Testimony of Hoffman. The other paraeducator testified they did not have a choice to take the Student to non-academic classes such as music or art. Testimony of Johnson. Three months later, the final paraeducator to work with the Student testified the Student did "great" in the four days they worked together, but she was never told the Student

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could participate in the general education classroom; that was not an option at the time. Testimony of Cranford.

38. While the Student was placed in her "office," she was supposed to attend a social skills group with Ms. Burkart. The group started out meeting weekly, but became daily by the end of October 2012. The Student attended the group only twice. Attending the group was supposed to develop the skills she needed to return to her general education class, but that did not happen. She attended music class approximately three times with first-graders as part of the third-grade/first-grade buddy program. She never attended music with her own class.

39. There was one field trip during this period, to the Tacoma Art Museum on December 14, 2012. The Student was not permitted to attend due to safety concerns, primarily the risk of her eloping during the field trip, which was in downtown Tacoma. Alternative art-related activities were provided at school for students who did not attend the field trip.

40. During this period, the Parent thought the Student would be pursuing the general education curriculum from her third-grade class as well as her special education work. However, when the Parent received a class newsletter from Ms. Treick-Shipman about class activities such as working with magnets to make flashlights, burglar alarms, and power plants, singing a Parallel Perpendicular song, and doing a writing assignment about whether the rabbit *Bunnicula* was a dangerous vampire or a harmless pet, the Student reported she had done none of these activities with her paraeducator. The Parent wrote about this to the District, and asked: Who is overseeing and grading her work? Who is making the decisions on what work she does? If she is not doing the same work as the other children, what curriculum is she using? Why is she not able to participate in the same curriculum as the other students? P-21:32.[9]

41. Ms. Griffin worked with the paraeducators to train them during their first few days. Ms. Burkart, supervised and directed the paraeducators' work, and supplied them with the Student's work materials. She gave them reading and writing materials (which were the Student's two special education academic subjects) and also gave them math because the Student liked it. Ms. Burkart does not know whether the paraeducators were given work materials from Ms. Treick-Shipman, the general education teacher. This implies that Ms. Burkart herself did not give work materials from Ms. Treick-Shipman to the paraeducators; if she gave them herself she would have known they were given. The Student did not get science or social studies work, but got "remediation" (special education work) plus the extras that Ms. Burkart gave the paraeducators (such as math). Testimony of Burkart.

42. The District asserts that the Student was given material from her general education class (not just her special education class) while she worked in her "office". District Brief at 14, 28. However, Ms. Burkart's testimony indicates to the contrary, as discussed above. Ms. Trieck-Shipman, the general education teacher, did not testify to providing any work for the Student during this period. Mr. Brooks, the principal, testified that Ms. Burkart provided the Student's work; he did not state that any of it came originally from the general education teacher. Neither did the paraeducators testify that they received general education work to use with the Student.

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[9] There may have been a response to this email, which the Parent sent on December 4, 2012 to Mr. Brooks and Ms. Griffin, but there is no response in the record.

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One of the paraeducators at first indicated that some of the Student's work came from the general education class. She later corrected her testimony to say that she *assumes* some of it came from the general education teacher, but she does not know if it did. In contrast, she knows that she received special education work for the Student. Testimony of Hoffman. It is found that there is no evidence to support the District's assertion that the Student was given work from her general education class while in her "office" setting.

43. The Student's severe behavior problems continued in her "office" setting. On October 17, 2012, she was suspended for half a day due to hitting staff, throwing objects, and kicking and spitting at staff. D-12. On November 9th, she was suspended for half a day for pulling a child's hooded sweatshirt from behind against the child's neck and refusing to let go. After the counselor, Ms. Griffin, separated the girls, the Student followed them and grabbed the girl's hood again. The Student later bit and hit her paraeducator. She did the same to Mr. Brooks when he took away a lanyard the Student was swinging at the paraeducator. P-6:3. On December 11th, the Student was suspended for 1.5 days for running down the hall, being physically aggressive to her paraeducator, and threatening the paraeducator with a pencil. The Student had now been suspended a total of 9.5 days in the 2012-2013 school year. P-6:2.

44. As mentioned above, the District initiated a social/emotional/behavioral reevaluation on September 27, 2012. The reevaluation was completed on October 25, 2012, when the team met to review the results. Mr. Sherman, the Discovery school psychologist, coordinated the reevaluation. D-22; D-11.[10]

45. Part of the reevaluation consisted of observations by school staff. The Student's general education teacher, Ms. Treick-Shipman, reported on the Student's behavior during the first few weeks of school (the Student was expelled on September 27, 2012 and never returned to the general education class thereafter). Ms. Treick-Shipman reported that the student had poor behavior, asked to leave frequently, made noises during class that interrupted the learning of others, refused to leave the "class chair" when it was another child's turn, frequently refused to come into the class, and threatened other children. Ms. Treick-Shipman further reported that the Student had completed no reading work, and had only written a few sentences. She could work with one-on-one adult assistance for five minutes if she wanted to, but completed no independent work in class. Ms. Griffin, the school counselor, reported that the Student was noncompliant, ran, yelled and sang loudly in the halls, and ran away from adults inside and outside the building. Ms. Griffin reported that distraction worked to redirect the Student for a while, but had not worked well recently. D-11.

46. Also included in the October 2012 reevaluation was a letter from the Student's treating psychologist, Dr. Anna McDonald.[11] Dr. McDonald listed the Student's diagnoses as ADHD combined type and Disruptive Behavior Disorder not otherwise specified (NOS). She also found

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[10] The October 2012 social/emotional/behavioral reevaluation was not set forth in a separate document. Rather, the results from that reevaluation were integrated into the prior evaluation report of December 2011, to produce an updated evaluation. The pages of the updated evaluation, exhibit D-13, that contain the material from the October 2012 update are pages 1-3, 6-12, 15-16, and 18-20.

[11] The psychologist's letter is dated June 12, 2012, but was given to the District in the fall of 2012. D-11:19-20; Testimony of Sherman.

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symptoms of emotional dysregulation and social developmental delays. She recommended an environment with a high degree of structure, predictability, guidance, and one-on-one assistance. D-11:6, 19-20.

47. The same behavioral assessments used in the District's December 2011 reevaluation were used again in October 2012: the BASC-2 and Connors-3. The respondents were again the Parent and the classroom teacher, though it was a different teacher this year.

48. On the BASC-2, the Parent's scores indicated increased problems in three areas out of the 12 assessed, with the rest of the scores remaining approximately the same as in second grade. The teacher's scores indicated increased problems in six areas and decreased problems in two areas out of the 14 assessed,[12] the rest remaining approximately the same as the prior year. D-5; D-11.[13] Overall, these scores indicated increased behavioral problems in third grade.

49. On the Connors-3, the Parent's scores indicated increased problems in two areas and decreased problems in one area out of the six assessed. The teacher's scores indicated increased problems in one area out of the six assessed. Overall, the scores indicated increased behavioral problems in third grade. D-5; D-11. In the October 2012 reevaluation, Mr. Sherman added a student self-assessment from the Connors-3 that had not been utilized in second grade. The questions were read aloud to the Student by the school counselor, who recorded her oral answers. The Student's scores concerning herself were quite similar to those of her Parent and teacher, with the great majority being in the most problematic range. D-11.

50. Mr. Sherman also administered the Behavior Rating Inventory of Executive Function (BRIEF) to the Parent and classroom teacher. The BRIEF had not been used the previous year. The scores were highly elevated (highly problematic) in the ability to inhibit impulses (control impulses and stop behavior at an appropriate time). The scores were significantly elevated in the ability to control emotional responses. The scores were moderately elevated in four areas: shifting from one situation to another; working memory (the ability to hold information in mind to complete a task); planning/organizing for current and future activities; and organizing materials. The scores were in the average range in two areas: the ability to begin a task and generate ideas; and the ability to monitor oneself (monitor one's work to attain a goal and monitor the effect of one's behavior on others).

51. The October 2012 reevaluation concluded:

> In summary, [the Student] has demonstrated significant behavioral concerns. While she appears to choose her actions, gaining attention and/or work avoidance, these

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[12] On the BASC-2, parents assess students in 12 areas, while teachers assess them in 14 areas, the additional areas being school-related. D-5; D-11.

[13] In October 2012, six additional portions of the BASC-2 were utilized with the Parent and the teacher that had not been utilized the prior year. The teacher rated the Student as "at risk" in nearly all of them, while the Parent rated her as within normal limits on all of them. D-11.

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have become increasingly strong. With that being said, she does not appear to be out of control where her emotionality is concerned.

. . .

The results of this evaluation update indicate that [the Student] also qualifies for remediation in the areas of social/emotional/behavioral. Although her goals are seen as attention-seeking and work avoidance, rather than an innate severe emotional disturbance, her behaviors have been severe and mostly consistent since enrolling at Discovery. It is also possible that she needs a much longer time than most of her peers to adjust to a new school.

D-11:12, 15-16. The signature page of the reevaluation report invited team members to submit dissenting statements if they did not agree with the results of the reevaluation. D-11:18. The Parent did not do so.

52. At the time of the October 2012 reevaluation, the Student's IEP provided that her placement was general education 83% of the time, with pull-outs for special education services. D-6:8. Although she was spending almost all of her time in her "office" with a one-on-one paraeducator, there was no discussion of a different placement as part of the October 2012 reevaluation. Testimony of Treick-Shipman, Sherman. Nor was a change of placement documented in the October 2012 IEP, other than adding time for social/emotional/behavioral instruction. D-13:9. District witnesses acknowledged that the move to the "office" was either initially a change of placement (Testimony of Cleven), or became a change of placement as the Student remained there. Testimony of Brooks, Sherman, Burkart. The District acknowledges that the Student's IEP should have been amended to reflect the change, which it characterizes as "temporary" and "agreed". District Brief at 12, 14. District witnesses likewise acknowledged that the one-on-one office setting was inappropriate for the Student because it went on too long and/or because it was unsuccessful at achieving behavioral improvement. Testimony of Sherman, Rodside, Griffin, Burkart, Brooks; District Brief at 14.

53. Ms. Griffin, the school counselor who was deeply involved with the Student at Discovery, believes the Student made no academic progress and no behavioral progress during the school year. Testimony of Griffin. Mr. Brooks could not say whether the Student made any academic progress while in the one-on-one setting, because her behaviors got in the way of learning. Testimony of Brooks.[14]

54. An FBA[15] and BIP were adopted for the Student on October 25, 2012. Her IEP was amended to incorporate them. D-10:5, 9. The BIP focused on the "target behavior" of "refusal

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[14] The District's post-hearing brief asserts that Mr. Brooks and Ms. Rodside testified the Student made better progress (presumably meaning academic progress) in the office setting than in the general education classroom. District Brief at 15. Mr. Brooks did not testify to that. He testified as stated in text, above. Regarding Ms. Rodside, the ALJ cannot find in her notes of Ms. Rodside's testimony the statement attributed to her by the District's brief. If Ms. Rodside did make such a statement, she is not the best witness to have testified on this matter. She is a program specialist in central administration who advised school staff primarily about the Student's behavior. Ms. Griffin and Mr. Brooks had a better basis for their testimony on whether the Student made academic progress.

[15] The Parent alleges she was denied an opportunity to meaningfully *participate* in the development of the FBA and BIP, a matter that is discussed below. However, she challenges the *substantive*

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to follow directions which can lead to disruptive or aggressive actions." The desired "replacement behaviors" were for the Student to ask for clarification of instructions, ask for a break, or consult her schedule for upcoming transitions. D-10:6.

55. The BIP provided that the Student would receive direct teaching on how to identify and choose more positive behaviors at times when she loses interest in an activity or when she is given directions. Teaching was to be done through social skills training and role playing, both one-on-one and in small groups, with the opportunity to extend practice to the general education environment. The BIP noted that the Student responds best to one-on-one instruction. D-10:6-7.

56. Positive reinforcements in the BIP include: preferred activities; time with an adult with whom the Student has a positive relationship; praise and encouragement for approximations of desired behavior; tangible rewards; points on her behavior chart; and free choice time. Staff would respond to the target behavior by giving the Student choices and redirection, and may also ask her to take a break or may remove her from the setting. When able, the Student would confer with staff to verbally problem-solve the situation. The Student would practice self-management by assessing her own performance and behavior on her daily behavior chart. *Id.* All of the provisions of the BIP were already being employed with the Student, except for the direct instruction she would receive under the new IEP for 30 minutes per day. Testimony of Burkart; D-13:9.

57. The reevaluation, FBA and BIP were completed on October 25, 2012. A few days later, on October 29th, the Student's IEP was amended to add social/emotional/behavioral goals, 150 minutes per week of special education to address those goals, and an Aversive Intervention Plan (AIP). The amended IEP, like the prior IEP, provided that the Student's special education services would be "[m]onitored [b]y" a special education teacher. D-13:9. The only signature on the amended IEP of October 29, 2012 is that of Ms. Burkart, the special education teacher.[16]

58. The Student's placement in the October 29, 2012 amended IEP continued to be "General class with pull-out Special Education Services". *Id.* The IEP provided that the Student's placement was 75% in general education with 25% pull-out special education services, *id.*, despite the fact that the Student remained in a one-on-one educational setting (her office) for the next two-plus months, and spent no time in either her general education class or the Resource Room.

59. The amended IEP of October 29, 2012 contained the Student's first AIP. D-13:10. The AIP included the following "positive interventions": repeated directions; shortened assignments; the opportunity to express thoughts and feelings verbally and non-verbally; social stories to teach behaviors and problem-solving; limited distractions; engaging in preferred activities; intentional positive relationship with adults; praise and encouragement for approximations of

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appropriateness of only the BIP, not the FBA. Therefore, the substantive provisions of the FBA are not summarized here. The question of participation in the development of the FBA is addressed in the section below entitled "Parental Participation in Evaluation and IEP Meetings."

[16] The absence of any other signatures on the amended IEP of October 29, 2012 is addressed in the section below entitled "Parental Participation in Evaluation and IEP Meetings."

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desired behavior; tangible rewards; points on a behavior chart; and free choice time. The AIP permitted the use of isolation, physical escorts and physical restraints pursuant to Right Response training. Right Response is a de-escalation procedure. Selected staff receive certification in Right Response. Others receive training in it, which is a lesser level of expertise than certification. The AIP provided that the maximum duration of isolation or restraint would be 15 minutes. It also provided that aversive interventions would only be used if all other interventions had been exhausted first. After any physical intervention, an analysis would be done regarding the duration and intensity of the aggressive behavior that preceded it, as well as the intervention strategies used. D-13:10.

60. Three paraeducators served the Student for the vast majority of her time in the "office". The two who initially shared the job while a full-time paraeducator was hired were Tabatha Hoffman and Holly Johnston. The full-time paraeducator, Yvonne Wagster, started in mid-October 2012. She began on a part-time basis in order to transition with one of the prior paraeducators. Beginning October 24th, Ms. Wagster performed the job full-time. These three paraeducators had Right Response training and significant experience serving students with behavioral disorders. They had access to walkie-talkie communication with the principal and the counselor, neither of whom had Right Response training.

61. Two other paraeducators served the Student briefly: Christine Poulton for one day (as a substitute), and Myka Cranford for four days in January 2013. Neither had any behavioral incidents with the Student. Ms. Poulton did not receive Right Response training until shortly after the day she worked with the Student. Ms. Cranford had received similar training twice in the past outside of the District. She received Right Response training from the District after she worked with the Student.

62. Ms. Cranford was hired to replace Ms. Wagster, who left employment for personal reasons around winter break 2012. Ms. Cranford had many years of experience working with behaviorally challenged students. She worked with the Student for only four days because the Student was withdrawn from school on January 14, 2013. The principal, Mr. Brooks, explained that he was authorized to hire paraeducators for the Student on a 20-day emergency basis. However, this period must have been extended because the paraeducators served the Student for three months.

63. The Parent alleged that one or more paraeducators made demeaning comments to the Student such as: "How do you like not being able to go to class like normal kids". C-1:3; Testimony of Parent. The Parent testified that the Student told her about these remarks. The Parent called four paraeducators as adverse witnesses but did not ask any of them about this allegation.

64. On or about November 8, 2012, the school showed a film about fallen soldiers at its Veteran's Day Assembly. The Parent's complaint alleges the District caused the Student emotional trauma by showing her the film when it knew the Student's Father was deployed in a war zone. Neither the Parent nor the Student testified about this subject, but Mr. Brooks, the principal, testified about it. The Veteran's Day assembly was approximately 40 minutes long, with military family members from the school community invited to attend and honored for their service. The film was approximately 10 minutes long and was appropriate even for kindergarteners, who were in the audience. The Student sat on the Parent's lap during the assembly. There were many empty seats around them, so they could have left if the film was

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disturbing, but they did not do so. Testimony of Brooks. The Parent did not testify about the film or about her daughter's reaction to it. There was no evidence the film was inappropriate or that the Student suffered emotional trauma from it.

65. In mid-November 2012, the Parent presented the District with a written proposal that the District educate her three children in the family home using paraeducators. P-9; Testimony of Parent. The proposal contained three options for how the District could fund in-home education for her children, which would be supplemented with socializing in the community and speech-language therapy provided either at school or in the community. The Parent analyzed the cost of each of the three options, and compared that with the cost to the District of the children's current placements. While in-home education was not the Parent's first choice, she believed it would be better for them than the isolated, one-on-one settings that both the Student and her fifth-grade brother were presently experiencing at Discovery.

66. On November 19, 2012, the Student's IEP team met to discuss her future placement and program. The District proposed placing the Student at a private school for children with serious social/emotional/behavioral disorders, the Northwest School of Innovative Learning (NWSOIL), at District expense. NWSOIL is run by Fairfax Hospital. The school has a psychiatrist on staff, as well as a full-time mental health counselor and behavior interventionists. It has two wings, for younger and older students, with a locked door between the wings. The notice summarizing the November 19th meeting stated the Student required an intensive intervention setting to attain the social/emotional goals of her IEP. It also stated that the one-on-one setting she had been in since October 8th was too restrictive, and returning her to the general education and Resource Room setting would not meet her needs at this time. P-10.

67. The Parent agreed to visit NWSOIL. The District agreed to look into the requirements for in-home services; which is what the Parent proposed. The team agreed to reconvene on November 29, 2012 to review these options. *Id.*

68. When the team met on November 29, 2012, after the Parent had visited NWSOIL, the Parent shared her belief that it would be highly inappropriate for the Student. The differing contentions of the parties as to the appropriateness of NWSOIL are not summarized here because the District did not make a formal offer of placement at that school, due to the Parent's strong opposition to it.

69. Also at the November 29, 2012 meeting, the District declined the Parent's proposal to teach the Student and her siblings in the family home. The District declined this proposal because it could not legally be done using paraeducators (as opposed to teachers) and because it was not the Student's least restrictive environment (LRE). The Student's special education teacher, Ms. Burkart, testified persuasively that the Student needs to be in a classroom with other children in order to develop the behavioral skills needed to be successful in school. The Student's behavioral problems often arose in response to school work she wanted to avoid, and at times when she felt she was receiving insufficient attention from a teacher. Schooling at home, even if supplemented with socializing in the community, would not provide the classroom environment needed to work on these skills.

70. The District thereafter considered other options for the Student's placement. Discovery's REACH program had been discussed as a possible placement at least as far back as October 3, 2012. P-21:14. As mentioned above, REACH is a program for students with

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social/emotional/behavioral disorders. The REACH classroom at Discovery is the District's only such classroom at the elementary level. REACH is a self-contained class, which means the students spend the majority of their time in that class, but leave to participate elsewhere in the school based on their individual schedules and IEPs. In the 2012-2013 school year, REACH had five or six students, one teacher, two paraeducators, and a half-time behavior interventionist.

71. The District did not offer the Student placement in REACH for several reasons. The reason cited most consistently by District witnesses was that the District was considering placing the Student's fifth-grade brother in REACH. They did not want to place the siblings in the same classroom because their behavior becomes worse when they are together. The brother was never placed in REACH, and neither was the Student. The second reason cited by the District concerned the physical attributes of the site. The classroom has a door to the outdoors that cannot be locked due to fire regulations and that presents a safety risk for the Student eloping out the door. (It presents a safety risk for other students as well. One of them ran out the door and up into a tree this year.) Also, if she ran out the other door into the school building, the open-concept design of Discovery meant other students would hear her.[17] The third reason REACH was not offered was that it had a new teacher in the 2012-2013 school year. The program was undergoing changes that staff and students had to get used to, and Ms. Burkart felt the Student might have a negative impact on the classroom. Ms. Burkart explained that the third reason no longer exists: The new REACH teacher has created a dynamic and engaging program that would now be appropriate for the Student. Ms. Rodside stated that if it would facilitate the Student's return to school, the District would consider placing her in REACH. Testimony of Rodside.

72. At the annual IEP meeting of December 13, 2012, the District offered to place the Student in the OPTIONS program at Purdy Elementary School (Purdy). The Parent had not previously been told that OPTIONS was under consideration. OPTIONS is the District's program for low-functioning autistic children and low-cognitive level children. Testimony of Sherman. Like REACH, it is a self-contained classroom with participation elsewhere in the school dependent on each student's schedule and IEP. There are four elementary-level OPTIONS classrooms in the District.

73. The Parent objected to the OPTIONS placement and asked why the Student could not be placed in Discovery's REACH program. District staff stated the Student could not be placed in REACH because her fifth-grade brother might be placed there. The Parent responded that REACH was more appropriate for the Student than for her brother. The District members of the team nevertheless decided on placement in the OPTIONS program. The effective date of the

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[17] Mr. Brooks and Ms. Rodside testified there was another physical drawback to the REACH classroom, that it is less than half the size of a regular classroom. However, REACH had only five to six students. This is much less than half the number in a regular classroom. If the smaller-size classroom was appropriate for the other children in REACH, there is no evidence it would be inappropriate for the Student. There was no testimony the Student feels uncomfortable or acts out in smaller spaces, and in fact smaller spaces were designed purposely for her, e.g. Bunny Hollow and her "office".

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placement was delayed until January 7, 2013, so it would occur after the natural transition point of winter break and so the Parent would have time to visit the program. D-18:21-21.[18]

74. Mr. Sherman, the Discovery school psychologist, acknowledged that generally the Student is more appropriate for Discovery's REACH program than for the OPTIONS program. REACH is for students of average cognitive ability who have social/emotional/behavioral problems, whereas OPTIONS is for low-functioning autistic and low-cognitive ability students, who would not be a great peer group for the Student. Testimony of Sherman. REACH has more appropriate behavioral supports for the Student. *Id.* Nevertheless, Mr. Sherman believes that OPTIONS could be a good placement for her because of the strong abilities of the OPTIONS teacher at Purdy. *Id.* Also, OPTIONS was chosen because the Student could not be placed at REACH while her brother was also a candidate for REACH. *Id.*

75. The December 2012 IEP increased the Student's special education time in reading, written language, and social/emotional/behavioral skills. Reading and written language were each increased from 120 minutes to 225 minutes per week. Social/emotional/behavioral instruction was increased from 150 minutes to 900 minutes per week, reflecting the Student's placement in a self-contained class. D-13; D-18.[19]

76. In the social/emotional/behavioral area, the December 2012 IEP stated the Student had limited success in meeting her goals. (The goals in this area had been added to her IEP two months earlier, in October 2012). She was currently averaging 62% of the points available to earn during the school day for being safe, respectful and responsible. The area with the greatest impact on her performance of school work was being "responsible" (defined as being in her assigned area, following directions, managing time, and working on assigned tasks). She was earning an average of only 35% of possible points in being "responsible." D-18:3; P-14. The December 2012 IEP expanded her annual goals in the social/emotional/behavioral area from two to four goals. D-13:4-5; D-18:3-8. As mentioned above, the December 2012 IEP gave the Student significantly more service time to work on these goals.

77. The curricular adaptations (also known as accommodations and modifications) in the December 2012 IEP were expanded from those in the December 2011 IEP. D-6:6; D-18:11. Added to the previous ones (discussed above) were: extra time to transition between tasks and to complete tests/projects; frequent changes of activity; frequent breaks; shortened reading and writing assignments; visual examples; verbal and non-verbal signals from the teacher to stay on task; small group or individual instruction; focusing the Student's attention by isolating portions of assignments; and having only one person to talk the Student through de-escalation.

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[18] The District asserts that the Parent's objection to OPTIONS was based on transportation concerns. District Brief at 22. This was the objection she raised at the meeting of December 13, 2012, which was the first time she heard that the OPTIONS program was being considered. It is unknown whether the Parent understood at that meeting that OPTIONS was for low-functioning autistic and low-IQ students. Her closing brief objects that OPTIONS is for cognitively low functioning children, and the Student is not that. Her closing brief makes not objection based on transportation.

[19] The December 2012 IEP reduced the Student's speech-language therapy from 180 minutes to 90 minutes per month. D-13; D-18. There was no evidence in the record as to why this change was made. The Parent offered no evidence that the reduction was inappropriate.

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78. The AIP in the December 2012 IEP placed more stress on using physical interventions as a last resort, but this requirement was present in the December 2011 AIP as well. The maximum duration of an aversive intervention was changed. It was previously 15 minutes. It was now only as long as needed to move the Student to a safe location, and she was to be released upon demonstrating physical control, even if she was not yet demonstrating verbal control. Persons using aversive interventions with the Student would have to be certified in Right Response, not just trained in it. Finally, the AIP would now be reevaluated for effectiveness three times a year, or sooner if needed. D13:10; D-18:17.

79. A new draft FBA and BIP were prepared for the December 2012 IEP. However, the team did not have time to review them at the IEP meeting and so they were not finalized. D-16; D-17. Testimony of Rodside.

80. Despite the adoption of the December 2012 IEP and its change of placement, the Parent did not send the Student to OPTIONS on January 7, 2013. Instead, the Student continued attending her one-on-one placement at Discovery on January 7th and 8th. P-14:68-69. On January 10th, 11th and 14th, the parties participated in mediation but were unable to reach a resolution. (The mediation concerned both the Student and her fifth-grade brother. Testimony of Brooks.)

81. On January 14, 2013, the Parent withdrew all three of her children from District schools when she learned that the school counselor, Ms. Griffin, had made a report to Child Protective Services (CPS) about an incident in the home. The CPS report concerned the following: The Student came to school on January 11th with cuts on her body, which the Parent explained to the school nurse were cuts from falling into a mirror. The Student told Ms. Griffin that her fifth-grade brother had poked his finger all the way in her bottom while she was sitting on a bannister, and she fell into the mirror when she tried to grab his hand. She also told Ms. Griffin that her brother pokes her in the bottom regularly. Testimony of Griffin.

82. The Parent testified that the Student told her Ms. Griffin badgered her (the Student) with repeated questions about her brother's touching. Ms. Griffin testified to asking very few questions, and only asked them once. The Parent alleges Ms. Griffin's CPS report was inaccurate and dishonest. Ms. Griffin alleges she filed the report accurately, and filed it because she heard significantly inconsistent accounts from the Student and the Parent. Ms. Griffin is a mandatory CPS reporter.

83. Ms. Griffin is found to be a credible witness, and her testimony about the questions she asked the Student is found reliable. The Student testified at the hearing, but not about this event. CPS ultimately found that negligent treatment or maltreatment did not occur or that there was insufficient evidence to conclude that it occurred. P-18. This finding has no implication concerning whether Ms. Griffin was required to make a report given the information she had received from the Student and the Parent. Nor does it in any way establish that Ms. Griffin asked inappropriate questions of the Student.

84. Regarding the allegation that the Student experienced emotional trauma from the incident, the emotional trauma appears to have occurred subsequent to the Student's interaction with Ms. Griffin. After she left school that day, the Student learned that children can be removed from families for doing things of the nature that she had described. The Parent subsequently

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telephoned the school and put the Student on the line with Ms. Griffin. The Student was very upset at that point, telling Ms. Griffin that her brother really hadn't done it, and that kids can get removed from families if they do things like that. The Student went on and on about this. Testimony of Griffin.

85. After the Parent withdrew her children from school on January 14, 2013, she did not enroll them in any other school. The District informed the Parent that under compulsory attendance laws, if the children are not enrolled in a public or private school, the Parent must submit paperwork to home-school them. P-19:1-4. The Parent has done none of these things.

86. When the Student had been absent from school for 20 consecutive days, the District dropped her from enrollment as required by state law, but informed the Parent that the Student was welcome to reenroll at any time. P-19:1. Having been unsuccessful at persuading the Parent to either enroll the Student in a school or file paperwork for home-schooling, the District filed a truancy petition (known as a Becca petition) in juvenile court. On June 11, 2013, the court scheduled a hearing for September 10, 2013, stating it was setting the matter over to await the outcome of this due process hearing. P-19:1-4; P-26.

87. After withdrawing her children from school, the Parent hired part-time in-home tutors for them. She assisted the tutors and also took the children on field trips and socializing activities. The Parent first hired a college student who tutored the three children for a total of 10-15 hours per week. The Parent then replaced this tutor with a retired teacher who had a teaching certificate from another state. She tutored the three children for a total of 12 hours per week until mid-May 2013. Since that time the Student has had no tutor and no schooling.

88. The Parent and two of the Student's Sunday school teachers observed that the Student is much more relaxed and has many fewer behavior problems since she has been staying home from school. Testimony of Parent, Fitzgerald and Davis.

89. Regarding the Student's LRE, the Parent testified that in October 2012, the Student should have continued in her general education placement, but with the addition of paraeducator support. Only if this arrangement proved unsuccessful, the Parent testified, should anything more restrictive have been considered. However, a number of District witnesses testified that a general education class was inappropriate for the Student in October 2012 and thereafter, even had a one-on-one paraeducator been added. The Student's behaviors were extreme, unsafe, and she was largely not responding to adult redirection. No witness who observed the Student at school testified to the contrary. (The Parent did not observe her at school.) An experienced paraeducator who developed good rapport with the Student after only one week stated that she (the paraeducator) could not have kept other children from being hit by the Student if she (the paraeducator) had been assigned to a general education class to support the Student. Testimony of Johnston. The Parent also faults the District for not taking other intermediate steps (such as the Discovery REACH program) instead of jumping straight from a general education placement with no paraeducator to one-on-one isolation.

90. The Parent presented several witnesses in support of these positions. Rick Shaw is an experienced special education teacher and a board certified behavior analyst (BCBA) who now runs an educational consulting business. He is also president of the Northwestern Association for Applied Behavior Analysis (ABA). Mr. Shaw opined that the Student's LRE is the general education classroom plus one hour per day of ABA social skills training. His did not contrast

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ABA with other methodologies for teaching social skills or explain why ABA was the appropriate method. Mr. Shaw also opined that the District should have found the Student qualified for social/emotional/behavioral services based on its December 2011 evaluation.

91. Mr. Shaw has adequate education and experience to provide opinions regarding such matters in general, but in this particular case he lacked adequate information about the Student to do so. He has never worked with the Student or observed her in the classroom. It appears he has never communicated with any of the Student's teachers or paraeducators, since neither he nor they testified to any such contact. Mr. Shaw is acquainted with the Student because he provides in-home ABA therapy to the Student's eldest brother. Mr. Shaw has never done an evaluation of the Student, nor did he see the District's December 2011 evaluation (which he testified came to the wrong conclusion) prior to testifying. He also had seen none of the Student's discipline records (which go into great detail about her behaviors) prior to testifying. He had not read the Student's FBA or BIP, and did not know if such documents existed. He incorrectly assumed the Student's first-grade evaluation from Yelm (which he did not read) showed behavioral problems. He also incorrectly believed that the behavioral interventions used at Voyager stopped when the Student transferred to Discovery. For all of these reasons, and not because of his qualifications, Mr. Shaw's opinions are not given weight in this case.

92. Leah Kyaio also testified for the Parent. She has a master's degree in special education and has completed coursework for a doctorate in administrative leadership in education. She taught special education for six years and is currently self-employed as an educational consultant. Ms. Kyaio supports the Parent's argument that it was wrong to move the Student from a very unrestrictive environment to a highly restrictive one without attempting intermediate steps to determine her LRE. Like Mr. Shaw, Ms. Kyaio provides in-home ABA therapy to the Student's eldest brother and has not worked with the Student, evaluated her, or observed her in class. Unlike Mr. Shaw, she did review the Student's special education documents prior to her testimony. She also attended three days of mediation with the Parent in January 2013, where she presumably heard information and viewpoints from the District about the Student's placement. Her opinion is given some weight because she has some knowledge about the Student, but because she has never worked with the Student, evaluated her, or observed her at school, Ms. Kyaio's opinion is of limited value in this case.

93. Jeff Newport also testified for the Parent. Mr. Newport was an elementary school principal for 27 years in another school district in Washington. He met the Parent at an education conference. He testified to no acquaintance with the Student, either personally or through reviewing her records. Mr. Newport is a strong advocate for the mainstreaming of students with disabilities. He testified to the negative messages that students internalize if they are not served in the general education environment, and especially if they are served in isolation. Testimony of Newport. Because Mr. Newport testified to no knowledge about the Student or her feelings, his testimony is not given weight despite his qualifications.

94. The Student testified at the Parent's request. She expressed great fondness for her teachers and for the school counselor, Ms. Griffin. The Student had been happy in Ms. Treick-Shipman's third-grade class, and was miserable and sad in the small room, where she felt like a caged animal. She believes that after she was expelled, her classmates did not like her anymore and made up stories about her. In the small room she did artwork, reading, math, and one other subject, but not science. She liked when the paraeducators worked with her. She is happy staying home, where she does not have to feel like she doesn't belong and everyone

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hates her. She talked about the pain she felt while her father was in Afghanistan (he recently returned home). Her dream is to go back to school in a class of about eight kids, where everyone cares about her feelings. Testimony of Student.

95. The Parent testified that the Student expressed strong dislike for being confined in her "office" and became increasingly angry about it. Testimony of Parent. School staff testified to the contrary: the Student expressed that she liked her office, and opportunities to participate elsewhere in the school soon stopped being a motivating factor for her. Testimony of Treick-Shipman, Burkart. Ms. Treick-Shipman and Ms. Burkart would ask the Student if she wouldn't rather go back to class and be with her friends. The Student would reply no, that she was happy in the office. *Id.* It is found that each of these witnesses testified credibly: The Student expressed both good and bad feelings about her office. It was a safe place where she did not have to be exposed to classmates who she believed hated her, but it was also a segregated place that contributed to her feeling of not belonging at the school.

Parental Participation in Evaluation and IEP meetings

96. The Parent alleges she was denied the opportunity to meaningfully participate in the development of the Students IEPs and evaluations. District witnesses testified persuasively to the Parent's extensive participation in the evaluation and IEP meetings she attended, and that the District considered her input both during and outside of those meetings. The Parent invited advocates to some meetings, and they attended. The District made a number of changes to evaluation reports and IEPs in response to the Parent's input. It deferred to her views on placement by not placing the Student in a half-day program upon her return from expulsion/suspension, and later by not placing her at NWSOIL. However, the District did not defer to the Parent's views on some significant matters, which have been discussed above.

97. On those matters, the evaluation and IEP teams ultimately made different decisions than the Parent wished. One of her advocates, Dwight Robinson of Catholic Community Services, who attended two IEP meetings in late 2012, testified that at the final IEP meeting on December 13, 2012, the District made what appeared him to be a final offer. Testimony of Robinson; *see also* P-21:33. This is correct. The District did ultimately make a final offer and adopted an IEP and placement that day. The District held extended meetings and discussions until the day before the expiration of the prior IEP before making its final decision. *See* D-13. By December 13, 2012, the Parent had provided extensive input and the parties had several lengthy meetings, including a meeting of more than three hours that day. D-15.

98. There were, however, two IEP documents adopted without the Parent's participation. The first was the IEP of December 15, 2011, when the Student was at Voyager. The District had notified the Parent in mid-November 2011 of an IEP meeting to be held on December 15th, and the Parent confirmed she could attend. The prior year's IEP was to expire on December 15th. Then on December 13th, a written invitation to the December 15th meeting was sent to the Parent. Testimony of Walker; D-6:10.[20] However, the Parent had attended an evaluation

[20] The written invitation for the December 15, 2011 IEP meeting was issued on December 13, 2011. However, the date on the written invitation in the District's computer system was later changed to December 16, 2011, because a prior written notice connected with the same IEP was issued on December 16th. Testimony of Walker; D-6:10.

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review meeting on December 13th, and she thought there was only one meeting that week, not two. She therefore did not attend on December 15th.

99. Ms. Walker, the Student's special education teacher at the time, testified the when parents do not appear for an IEP meeting, it is her practice to contact them and ask how they wish to proceed. She asks if they want the meeting to go ahead without them, with her sending a copy of the IEP and notes of the meeting, or if they wish to reschedule the meeting to another date.

100. Ms. Walker testified that she does not remember what specifically happened regarding the Parent's non-appearance on December 15, 2011. However, she believes she would have followed her customary practice and telephoned the Parent. She does not recall anything further. She did not testify whether she succeeded in reaching the Parent or what the Parent said. On the signature page of the December 15, 2011 IEP, the words "parent unable to attend" are written. D-6. There is no notation there or elsewhere about whether Ms. Walker attempted to reach the Parent, succeeded in reaching her, whether a voice mail was left, or whether the Parent consented to the meeting going forward without her.

101. The Parent testified she always attends IEP meetings and did not receive a call on December 15th concerning her non-attendance. The day after the meeting, December 16th, the District sent the Parent a prior written notice stating that the District's IEP would be implemented, and enclosing a copy of the IEP. D-6:11; Testimony of Walker.[21] The Parent thought the notice pertained to the December 13th meeting, which she did attend. Testimony of Parent. She did not thereafter request another meeting to ask questions about, or to modify the IEP. The IEP did not contain social/emotional/behavioral goals, but the Parent knew from the evaluation meeting that the District had decided against goals in that area.

102. The second time an IEP document was adopted without the Parent's participation was on October 29, 2012. On that date, her IEP at Discovery was amended to add social/emotional/behavioral goals, service times for those goals, and an AIP. D-13. Each of these items was new and had never been in the Student's IEP before. A few days earlier, on October 25th, the evaluation team, with the Parent present, had decided the Student qualified for services in the social/emotional/behavioral area. However, there is no evidence a meeting was held on October 29th, or any other date, to amend the IEP to adopt goals and service times for that area.

103. The only person who signed the amended IEP of October 29, 2012 was Ms. Burkart, the special education teacher. D-13:11. The Parent testified she was not present on October 29, 2012 and never saw the amended IEP of that date until she received it as an exhibit for the due process hearing. Ms. Burkart did not testify about why the amended IEP contains only her signature, or how the IEP came to be adopted. No District witness testified to a meeting at which this IEP was adopted, on October 25th, October 29th, or any other date.

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[21] The District's post-hearing brief states that the Parent alleges she never received a copy of the December 15, 2011 IEP. District Brief at 4. However, the ALJ cannot find such an allegation in her notes of the Parent's testimony. Nor is it in the Parent's complaint. C-1. The Parent alleged that she never received a copy of a different IEP, the October 29, 2012 amended IEP from the following school year. That is discussed below.

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104. The record contains no meeting invitation for either the October 25, 2012 evaluation meeting or an October 29, 2012 IEP meeting. A number of other meeting invitations are in the record. *See* D-5:11; D-6:10; D-7:2; D-14. The Parent was present for the October 25, 2012 evaluation review meeting despite the absence of a meeting invitation in the record. (She was also present at a meeting concerning a later IEP of December 13, 2012, despite the absence of a meeting invitation in the record.) However, there is no evidence that the IEP signed by Ms. Burkart on October 29, 2012 was reviewed at any meeting, whether on October 25th, October 29th, or some other date. Nor was there any evidence that the Parent and the District agreed to amend the IEP without convening an IEP meeting.

105. The record is devoid of any evidence that a meeting was held to review the amendments to the December 2011 IEP that were adopted on October 29, 2012. The Parent was given no opportunity to participate in their review or adoption.

106. The final issue about parental participation concerns the IEP meeting of December 13, 2012 held at Discovery. In advance of the meeting, the Parent sent an email requesting that the Voyager IEP team attend as well as the Discovery IEP team. She wrote that the Voyager team knew the Student better and had successfully found ways to enable her to function in the classroom, whereas the Discovery team had chosen to isolate the Student away from the classroom. The Parent wrote that if it would be overwhelming to have the full Voyager team attend, then she requested that two of them attend: the classroom teacher Ms. Scherer, and either the school counselor Mr. Wiyrick or the special education teacher Ms. Walker. P-21:44. Mr. Wiyrick was the only Voyager staff who attended the December 13, 2012 IEP meeting.

Facts Concerning Requested Remedies

107. The Parent's complaint did not request reimbursement for the in-home tutors she employed from January through May 2013. The Parent instead requested tutoring going forward, as compensatory education for a denial of FAPE. The complaint requested tutoring "per parent's choice." C-1:3. It did not specify a particular tutoring agency, but the Parent presented evidence concerning one, Hands On Learning Solutions of Gig Harbor, Washington.

108. Hands On Learning Solutions is owned by Laura Parker. Ms. Parker holds a bachelor's degree and an out-of-state teaching credential. She taught school for seven years. In addition to herself, the agency employs two other tutors. One has never held a teaching credential in any state. The other does have a teaching credential. None of the three tutors is endorsed to teach special education.

109. Ms. Parker met with the Student once for four hours, and produced an evaluation with programming recommendations. Ms. Parker did this without reviewing any of the Student's special education evaluations, observing the Student at school, or speaking with any of her teachers. Testimony of Parker; P-5.

110. Ms. Parker recommends at least 615 hours of academic therapy from Hands On Learning Solutions to be delivered over a period of at least 50 weeks in a one-on-one setting, as follows: 15 hours per week for the first 33 weeks, 10 hours per week for the next seven weeks, and finally five hours per week for the next 10 weeks, or until the Student is reading at grade level.

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P-5:17-18. Each hour of tutoring costs $75.00. Testimony of Parker. The Parent requests a different allocation of hours: 20 hours per week for 33 weeks.

111. Although Ms. Parker did not address this matter, 15 hours per week is such large amount of time that the Student could not also attend school, at least not full-time. Ms. Parker did not address the matter of the Student's least restrictive environment. However, she testified that home-schooling is not a restrictive environment.

112. The Parent also requests speech-language therapy as compensatory education, specifically 30 minutes per week of therapy for 20 weeks. This would be in addition to ongoing speech-language therapy to be delivered as part of the Student's prospective program. When the Student was placed in the one-on-one office setting at Discovery, her speech-language therapy services continued. After the Parent withdrew the Student from school on January 14, 2013, the Parent chose not to continue with speech-language therapy.

113. Regarding prospective placement, among the items the Parent requests are: ABA therapy in social/emotional/behavioral skills; swimming lessons; training for staff who work with the Student on responding to behaviors that result from disabilities; and training for these staff on responding to behaviors that result from the stresses on military families.

114. The Parent offered very little evidence on ABA therapy for social skills. Testimony of Shaw. She offered no evidence that it was particularly appropriate for the Student or that other methodologies to teach social skills were inappropriate for her. No evidence was offered concerning swimming lessons. No evidence was offered that school staff need training on how to respond to behaviors that result from disabilities. The staff who worked with the Student had extensive experience working with students with behavioral disabilities, and there was no evidence they performed inadequately or should be ordered to receive more training. The Parent alleged that paraeducators were aggressive and mean to the Student. However, the Parent never observed the Student at school. The Parent's allegations about the paraeducators are hearsay from the Student and that hearsay is unreliable: The Student resisted direction from paraeducators if the direction was to do something she did not want to do. Her behaviors escalated easily if she did not achieve what she wanted, and paraeducators had to address these behaviors. The Parent's report that the Student said the paraeducators were aggressive and mean is unreliable hearsay in these circumstances, and there is no evidence to corroborate this hearsay.

115. Regarding the stresses on military families, Timmy Milligan of Joint Base Lewis McCord testified that studies have found one-third of children experience behavioral issues when a parent is deployed. She also testified that the military offers education for school districts on issues that arise for military families. Testimony of Milligan. Military stresses may be a root cause of the Student's behavior problems, but that does not establish that school staff responded to the Student's behavior inappropriately. Nor is there evidence school staff was insensitive to the stresses on military families. The inclusion of military family members (and not just students) in the Veteran's Day assembly, and the selection of a film about fallen soldiers, indicate the District was sensitive to the situation of military families. The Parent believes the District should not have changed the Student's placement so quickly because her behavior in September was exacerbated by her Father's deployment. Whether the District should have changed the Student's placement is a separate matter that will be discussed below. The Parent

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presented no evidence that school staff require training on military family issues in order to provide FAPE to the Student.

CONCLUSIONS OF LAW

The IDEA

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 USC §1401 *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) § 300 *et.seq.*, and Chapter 392-172A Washington Administrative Code (WAC).

2. 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 *Hendrick Hudson District Board of Education vs. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), the Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the Act, as follows:

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

Rowley, supra, 458 U.S. at 207;102 S. Ct. at 3051.

3. 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 education instruction specifically 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 of the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Rowley, 458 U.S. at 188-189;102 S. Ct. at 3041-3042.

4. For a school district to provide FAPE, it is not required to provide a "potential-

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maximizing" education, but instead a "basic floor of opportunity" that provides "some educational benefit" to the Student. *Rowley,* 458 U.S. at 200 - 201; 102 S. Ct. at 3048. "District must provide Student a FAPE that is 'appropriately designed and implemented so as to convey' Student with a 'meaningful' benefit". *J.W. v. Fresno Unified School Dist.*, 626 F.3d 431, 432 - 433, (9th Cir. 2010); *see also J.L. v. Mercer Island School Dist.*, 575 F.3d 1025, 1038, n. 10, (9th Cir. 2009).

5. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Parent. *Schaffer v. Weast,* 546 US 49, 126 S. Ct. 528, 163 L. Ed. 2d 387, 44 IDELR 150 (2005).

Procedural Compliance with the IDEA

6. Procedural safeguards are essential under the IDEA:

> Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. Parents not only represent the best interests of their child in the IEP development process, they also provide information about the child critical to developing a comprehensive IEP and which only they are in a position to know.

Amanda J. v. Clark County Sch. Dist., 267 F.3d 877, 882, 103 LRP 53170 (9th Cir. 2001).

7. Procedural violations of the IDEA amount to a denial of FAPE 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 decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
> (III) caused a deprivation of educational benefits.

20 USC §1415(f)(3)(E)(ii). *See, W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23,* 960 F.2d 1479, 1484 (9th Cir. 1992); *accord R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938 (9th Cir. 2007).

Did the District deny the Parent an opportunity to meaningfully participate in the development of the IEPs of December 2011 and December 2012?

December 15, 2011 IEP

8. The Parent was not present at the meeting where the December 2011 IEP was adopted. She had been invited and confirmed that she could attend. However, she confused the meeting with another and did not attend. The evidence is insufficient to establish that the District telephoned the Parent to ask whether she wanted the meeting to go ahead without her or have it rescheduled. While this is Ms. Walker's usual practice, she did not make any notation to this effect. She wrote only "parent unable to attend." If she had spoken to the Parent and obtained her agreement to proceed without her, Ms. Walker logically would have written more, such as: "Parent unable to attend. Parent stated meeting could proceed without her."

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9. Ms. Walker states she has no memory of what occurred. I credit the Parent's testimony that she did not receive a call from the IEP team that day, and that she wanted to attend all IEP meetings.

10. Conducting an IEP meeting without parental attendance is not allowed unless the parents "affirmatively refuse to attend." *Drobnicki v. Poway Unif'd Sch. Dist.*, 358 Fed. App'x 788, 790, 53 IDELR 210 (9th Cir. 2009, unpublished), citing *Shapiro v. Paradise Valley Unif'd Sch. Dist.*, 317 F.3d 1072, 1078 (9th Cir. 2003). WAC 392-172A-03100(6) provides that an IEP meeting may be conducted without a parent if the district "is unable to convince the parents that they should attend." The regulation goes on to state that if a district is unable to convince the parents to attend, it must keep detailed records "of its attempts to arrange a mutually agreed on time and place". *Id; see* 34 CFR § 300.322. Once a parent unexpectedly does not appear at an IEP meeting, there is no longer a mutually agreed-on time and place.

11. Here, the District cannot show it was unable to convince the Parent to attend. The Parent manifested that she *did* want to attend by confirming that she planned to do so at the appointed date and time. In fact, she believed she *had* attended the meeting. There is no evidence of her having missed any IEP meetings in the past. This is not a case where a parent states she is available at the chosen date and time, but expresses ambivalence about whether she wants to attend, and then does not appear. Nor is this a case where a parent has abused the system by repeatedly scheduling and not appearing at meetings, only to ask for them to be rescheduled. Behavior of these types is evidence that would tend to establish the District was unable to convince the parent to attend.

12. The District also cannot show that it kept "[d]etailed records of telephone calls made or attempted and the results of those calls." WAC 392-172A-03100(6)(a). Ms. Walker does not recall whether she telephoned the Parent, as she normally does in this situation, but most importantly she did not make any record of an attempted call. In order to show that it was unable to convince a parent to attend, a school district must, *in the factual situation presented here* (but not necessarily in other factual situations such as those discussed above), make and document an attempt to contact a parent who confirmed that she would attend an IEP meeting but did not appear at the appointed time and place. The fact that the Student's IEP was about to expire does not necessarily outweigh parental participation rights. *See Doug C. v. State of Hawaii, Dept. of Educ.*, ___ F.3d ___, 61 IDELR 91 (9th Cir. 2013) (where IEP was about to expire and parent cancelled attendance at IEP meeting due to illness, the district should have considered which course of action was less likely to result in a denial of FAPE: delaying the meeting past the IEP expiration date and continuing to provide services or denying the parent an opportunity to participate).

13. The District asserts that once a mutually agreed time and place are set, there is no requirement to postpone or delay a meeting while attempting to contact parents to find out why they did not attend. District Brief at 4. The District notably does not cite any case authority for this assertion. Nor does it address subsection (6) of WAC 392-172A-03100, quoted above.

14. Although it was a procedural violation of the IDEA to go forward with the IEP meeting of December 15, 2011 without the Parent, the Parent has not established that this violation gave rise to a denial of FAPE. The Parent's active participation in the decisionmaking process for her daughter's education was not significantly impeded for the following reasons. First, the Parent had attended the evaluation review meeting two days earlier, where she had the opportunity to

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argue that the Student should receive special education in the social/emotional/behavioral area. The District had not accepted this argument, so she knew the IEP would not include goals in that area. Second, the Parent already knew from the evaluation report that the team had decided to continue the Student's general education placement with pull-out services for special education in reading, written language and communication, and with ongoing general education behavior interventions. D-5:9. This represented no change in her placement. Finally, any other aspects of the IEP that were not discussed at the evaluation review meeting were made known to the Parent via the prior written notice and a copy of the IEP that were sent to her the day after the meeting. After receiving the IEP, she did not request another meeting to ask questions about it or seek to modify it.

15. Under these circumstances, it cannot be said that the Parent's absence at the December 15, 2011 IEP meeting resulted in a significant impeding of her opportunity to participate in the educational decisionmaking process for the IEP. The Parent has not carried her burden of proving that a denial of FAPE occurred.

October 29, 2012 amendment to the December 2011 IEP

16. On October 29, 2012, the District made significant amendments to the Student's December 2011 IEP without holding an IEP meeting and without involvement by the Parent. The IEP bears only one signature, that of the special education teacher Ms. Burkart. There is no evidence the IEP amendments were discussed at the reevaluation meeting a few days earlier, on October 25th. The October 25th meeting had a full agenda (review of reevaluation, and adoption of the Student's first FBA and BIP). No one testified to the IEP having been discussed that day, let alone finalized.[22]

17. The IEP amendments adopted on October 29, 2012 were significant. For the first time, the Student was given annual goals in the social/emotional/behavioral area. There is no evidence the Parent had an opportunity to see the draft goals before they were adopted. She testified that she never received a copy of the IEP after it was adopted, so she had no opportunity to review the goals after-the-fact and ask for a meeting if she wanted to propose revisions. The Parent's testimony that she never received a copy of this IEP is credible; the IEP was odd in that it bore only one signature. This is something the Parent would likely have noticed and remembered if she had received it. The October 29th IEP amendments also contained the Student's first AIP, which is a significant document creating the rules for the use of physical restraints and isolation. The Parent was deprived of the opportunity to see these rules before they were adopted, or have input on them.

18. The Parent has carried her burden of proof that she was denied an opportunity to participate in the development of important amendments to the December 2011 IEP that were adopted on October 29, 2012, and that this constituted a denial of FAPE.

December 13, 2012 IEP

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[22] Districts may combine evaluation and IEP meetings. *See* WAC 392-172A-03110(2)(e); 34 CFR § 300.324. However, there is no evidence that the October 25, 2012 evaluation meeting included any discussion of the IEP that was signed on October 29th.

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19. The Parent participated actively in the lengthy IEP meeting of December 13, 2012, and was assisted by several advocates at the meeting. The District had been considering the Parent's views on placement and attempting to reach agreement with her for more than two months. The Student's IEP was expiring, the Student was in an inappropriate placement, and the District needed to come to a decision with or without the Parent's agreement.

20. School districts are obligated to solicit and consider input from parents, but they are not required to adopt the parents' views. Decisions about a student's program are ideally achieved by consensus on the IEP team, but school districts have no obligation to grant parents a "veto" on team decisions. *See Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131-1132 (9th Cir. 2003), *cert. denied,* 544 U.S. 928, 125 S. Ct. 1662 (2005). Rather, school districts must inform parents of their right to seek mediation and/or a due process hearing if they are not satisfied with the outcome of an IEP meeting.

21. The Parent has not carried her burden of proving that she was denied an opportunity meaningfully to participate in the development of the Student's December 2012 IEP.

Did the District deny the Parent an opportunity to meaningfully participate in the development of the October 2012 evaluation revision, FBA and BIP?

22. The Parent attended a meeting on October 25, 2012 and actively participated in decisionmaking regarding the reevaluation report, the FBA and the BIP adopted that day. The reevaluation was conducted in response to her request, she provided written consent for it, and her input was sought on the BASC-2 and Connors-3, where she provided extensive information on her views about the Student. The team also considered a letter the Parent provided from the Student's treating psychologist, Dr. McDonald, and included a copy of that letter in the reevaluation report.

23. After signing the reevaluation report on October 25, 2012, the Parent did not submit a dissenting statement, as the signature page invited her to do. The record reflects no major disagreement between the parties concerning the three documents adopted that day. If there were any, the principle cited above would apply: school districts have a duty to receive and consider parental input, but the IDEA does not grant parents a veto on team decisions. *Ms. S. v. Vashon Island Sch. Dist., supra.*

24. The Parent has not carried her burden of proving that she was denied an opportunity to meaningfully participate in the development of the October 2012 evaluation revision, FBA or BIP.

Did the District violate the IDEA by failing to include, in the IEP team, District staff with sufficient knowledge about the Student's prior successful mainstreaming?

25. The Parent requested that at least two staff members from the Student's second-grade IEP team at Voyager attend a December 2012 IEP meeting held during the Student's third-grade year at Discovery. The Parent requested the attendance of Ms. Scherer (second-grade general education teacher) and either Mr. Wiyrick (school counselor) or Ms. Walker (special education teacher). The Parent's purpose was for the Voyager staff to share their knowledge about the Student's successful mainstreaming at Voyager. Of the Voyager staff the Parent requested, only [redacted] attended.

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26. Certain school staff are mandated to attend IEP meetings, including a general education teacher of the Student. WAC 392-172A-03095(1)(b); *see* 34 CFR §300.321. The District fulfilled this obligation by having Ms. Treick-Shipman, the Student's current general education teacher, attend the meeting. Another general education teacher was not required. Other individuals may attend IEP meetings at the discretion of a parent or school district:

> (1)(f) At the discretion of the parent or the school district, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate;
>
> . . .
>
> (3) The determination of the knowledge or special expertise of any individual invited pursuant to subsection (1)(f) of this section must be made by the party who invited the individual to be a member of the IEP team.

WAC 392-172A-03095; *see* 34 CFR § 300.321(a)(6) and (c). The Parent was free to invite to the meeting anyone who, in her view, had knowledge or special expertise regarding the Student. However, the District was under no obligation to secure the presence for the Parent of such optional attendees. The regulation quoted above cannot mean that parents have the right to command the appearance of any and all school district staff from several different schools at IEP meetings.

27. The Discovery staff had already received a great deal of information from the Voyager staff about the Student's experience at Voyager, through multiple meetings, emails, and reviewing the documentation produced the previous year. In addition, [redacted] (who was heavily involved with the Student during her year at Voyager) was present at the meeting to provide further input about her experience at Voyager.

28. The Parent has not carried her burden of proving that the District failed to include in the IEP team persons with sufficient knowledge about the Student's prior successful mainstreaming.

Did the District violate the IDEA by failing to hold a manifestation determination meeting regarding the Student's emergency expulsion of September 27, 2012?

29. Special education students who violate a school code of conduct may be disciplined, but once they have been removed from their educational placement for more than 10 consecutive school days[23] a manifestation determination must be made. The district, the parents, and relevant members of the IEP team must determine whether: (1) the conduct that led to the discipline was caused by, or had a direct and substantial relationship to, the student's disability;

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[23] The threshold for a manifestation determination may also be reached if a student is removed from his or her placement for more than 10 *non*-consecutive school days in a single school year. If the behavior that led to the various removals was substantially similar, they constitute a pattern of removal that triggers the manifestation determination requirement. Additional factors to be considered in determining whether a pattern exists are: the length of each removal, the total time the student has been removed, and the proximity of the removals to one another. WAC 392-172A-05155; *see* 34 CFR § 300.536.

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or (2) whether the conduct was the direct result of the district's failure to implement the student's IEP. If the answer to either of these questions is yes, then the conduct is considered a manifestation of the student's disability. WAC 392-172A-05145; *see* 34 CFR § 300.530. In making this determination, the team must consider not only the disability category under which the student is eligible for special education, but any other disabilities the student is known to have. *See Richland Sch. Dist. v. Thomas P.*, 32 IDELR 233 (W.D. Wisc. 2000); *Murrieta Valley Unified Sch. Dist.*, 53 IDELR 108 (SEA CA 2009); *Quincy (WA) Sch. Dist.*, 52 IDELR 170 (OCR Seattle 2009); *Snohomish Sch. Dist.*, 103 LRP 38279 (SEA WA 2003).

30. The authority of school districts to act unilaterally with regard to special education students who are disciplined is strictly limited by the IDEA. The section of the IDEA that addresses these matters is titled: "Authority of school personnel" and it serves to limit that authority once removal from a placement exceeds 10 school days. 20 USC § 1415(k)(1). As the Supreme Court stated:

> We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or; as a last resort, the courts.

Honig v. Doe, 484 U.S. 305, 323-324, 108 S. Ct. 592 (1988) (italics in original). Since *Honig* was decided, Congress added an exception to the statute that does allow school districts such unilateral authority, though only for 45 school days. That exception pertains to weapons, illegal drugs, and the infliction of serious bodily injury. 20 USC § 1415(k)(1)(G). *See Joshua A. v. Rocklin Unif'd. Sch. Dist.*, 559 F.3d 1036, 1039, n. 1 (9th Cir. 2009) That exception does not apply here, so unilateral removal from the Student's placement for more than 10 school days could not lawfully be accomplished by the unilateral authority of the District with no manifestation determination, no IEP team meeting, and no IEP change of placement.

31. In the present case, if the manifestation determination team found that the conduct underlying the Student's expulsion/suspension was *not* a manifestation of her disabilities, and if the District wanted to retain her in the one-on-one office setting, then it was required to convene the IEP team to determine the appropriate services she should receive in that setting because the setting was a change of placement. *See* WAC 392-172A-05145(3) and (4)(a), (c), (f); 34 CFR §300.530. The District did not do this.

32. If, on the other hand, the manifestation determination team found the Student's conduct *was* a manifestation of her disabilities, then the District was required to do a number of things including "return the student to the placement from which the student was removed" unless: (1) the parent and the district agreed to a change of placement as part of the modification of the student's BIP, or (2) the student's conduct involved a weapon, illegal drug, or the infliction of serious bodily harm. WAC 392-172A-05145(6) and (7); *see* 34 CFR § 300.530. Since neither of these things occurred, the District was required to return the Student to the placement called for in her IEP. It did not do so.

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33. District witnesses contended that while in the one-on-one office setting, the Student was still in her current educational placement (which was 75% general education with Resource Room pull-outs) because there was a *possibility* of being in these settings, depending on her behavior and personal choices. A mere possibility is not a placement. Moreover, the possibility of participating in either general education or the Resource Room came to fruition only a tiny fraction of the time called for in her IEP.

34. The District also argues it was not required to make a manifestation determination because the Student was not *suspended* for more than 10 consecutive school days (and had not been suspended for more than 10 total days in the school year). However, suspension is not the only form of removal covered by these regulations. Removal occurs when a student is removed "from his or her current placement *to an appropriate interim alternative educational setting, another setting, or suspension*". WAC 392-172A-05145(2)(a) (italics added). *See* 34 CFR § 300.530. This makes sense, because if only a suspension triggered school district duties under these regulations, then districts could avoid the obligation to conduct a manifestation determination and return a student to his or her current educational placement by simply removing the student to "another setting" and not labeling the removal a "suspension".

35. The law prevents this end-run around the regulations in another way as well. U.S. Department of Education comments to its 2006 regulatory changes explained as follows: If a student is placed in an in-school suspension (rather than an out-of-school suspension), and is removed from his or her current educational placement to another setting within the school, this constitutes a removal for purposes of the manifestation determination regulations unless all three of the following conditions exist:

- The student is afforded the opportunity to continue to appropriately progress in the general curriculum;
- The district continues to provide the services specified in the student's IEP; and
- The student continues to participate with nondisabled students to the same extent as he does in his current placement.

See 71 Federal Register (Fed. Reg.) 46,715 (2006). In the present case, neither the first nor the third conditions existed: The evidence does not establish that the Student was provided with material from her general education class to work on while in the one-on-one office setting, except for some math work provided to her by the special education teacher (which work may have come from the general education curriculum, or may have been special education material that Ms. Burkart had on hand.) The third condition clearly did not occur: the Student did not continue to participate with nondisabled students to the same extent as in the educational placement provided for by her IEP. Thus, it cannot be argued that the manifestation determination regulations were inapplicable because the Student's status was at most an in-school suspension, not an out-of-school suspension, beginning October 8, 2012.

36. In the present case, the Student was removed from the educational placement set forth in her IEP for 60 days, from September 27, 2012 (the beginning of her expulsion/suspension) until January 7, 2013 (when her educational placement was changed to the OPTIONS program and she was free to move from the one-on-one office setting to OPTIONS).

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37. The District was obligated to conduct a manifestation determination after October 10, 2012, the 10th day of removal from the placement called for in the Student's IEP.[24] If the Student's conduct was found to be a manifestation of her disabilities (one of which is Disruptive Behavior Disorder), then the District was required to return the Student to the placement from which she was removed unless it reached agreement with the Parent to change that placement as part of modifying (or in this case creating) her BIP. WAC 392-172A-05145(6); *see* 34 CFR § 300.530. The parties adopted a BIP on October 25, 2012. It did not contain an agreement to change the Student's placement. Nor was that placement changed in the IEP adopted on October 29, 2012.

38. There was another lawful way for the District to change the Student's placement. It could have filed for an expedited due process hearing and asked an ALJ to order her placement changed to an interim alternative education setting (IAES) for up to 45 school days. The grounds for such a request are that maintaining the current educational placement "is substantially likely to result in injury to the student or others". WAC 392-172A-05160(2); *see* 34 CFR § 300.532; *Braintree Public Schools*, 108 LRP 16708 (SEA MA 2008) (IAES approved for first-grader who pushed, tripped, punch, threw furniture and threatened classmates with scissors and pencils); *Fort Bragg Unif'd Sch. Dist.*, 52 IDELR 84 (SEA CA 2008) (approving IAES for 9-year old who engaged in a lot of physical aggression including against his teacher). The 45-day period may be repeated if it is demonstrated to an ALJ that the substantial likelihood of injury continues at the conclusion of the first 45-day period. *Id.* The District cited many safety risks presented by the Student's conduct, including running into parking lots, climbing onto stacked chairs, kicking, biting, and hitting other persons, and threatening them with objects such as rocks and pencils. Instead of asking an ALJ to make the required determination of safety risk, the District took for itself the authority to make this determination and move the Student to a temporary, emergency placement.

39. IDEA regulations place strict boundaries on the authority of school districts to change the placement of special education students who violate the school code of conduct. They explicitly deny school districts the authority to do what the District did here: remove a student from her educational placement to another setting for a prolonged period, greatly in excess of 10 school days, without a decision by the IEP team, without a manifestation determination, without obtaining authorization for such a removal from an ALJ, and without the 45-school-day time limitation. The 45th school day was exceeded here. It was reached on November 30, 2012. The Student's removal from her IEP placement continued for another 15 school days thereafter.

40. Because the failure to hold a manifestation determination meeting is a procedural violation, in order to prevail on this claim the Parent must also show that the violation resulted in a denial of FAPE. The Parent has done that because the violation significantly impeded her participation rights. The Parent asked for a manifestation determination to be made but this was denied to her. Had there been a manifestation determination, it would have been made by a team including the Parent, instead of by three administrators. The legal requirement for a return

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[24] The Student had a previous half-day suspension on September 25, 2012.. If the conduct that led to that suspension was found to be similar enough to constitute a pattern with the September 27, 2012 expulsion/suspension, then the 10th total day of removal in the school year was exceeded mid-day on October 10, 2012.

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to the Student's prior placement would have followed if a manifestation was found, except if the Parent *agreed* to a change of placement. Even if a manifestation was *not* found, the Parent would have had participation rights that were denied here: The IEP team, *including her*, would have convened to determine the appropriate services the Student should receive in the alternative placement.

41. The District argues that the Parent agreed to the one-on-one office placement, so her participation rights were not significantly impeded. However, as discussed above, the one-on-one office setting was only discussed orally. The District did not present it as a change of placement, which it was, and did not put anything in writing. The Parent came away with a significantly different understanding than what actually occurred of the circumstances under which the office would be used, and what curriculum would be taught to the Student during times she was in the office. Had a manifestation determination been made, any agreement on a change of placement was required to be in writing as part of the Student's BIP. *See* WAC 392-172A-05145(6); *see* 34 CFR § 300.530. The Parent's participation rights were significantly impeded by not receiving in writing the alleged agreement to an alternative placement.

42. The Parent has carried her burden of proving that the District violated the IDEA and denied the Student a FAPE by failing to make a manifestation determination once the Student was removed from her educational placement for more than 10 consecutive school days.[25]

Substantive Compliance with the IDEA

Did the District fail to offer appropriate educational placements beginning September 2011?

Educational placement September 2011 through October 10, 2012

43. The Parent presented no evidence that the Student's placement was inappropriate during the period September 2011 through October 10, 2012. (As discussed above, October 10, 2012 was the 10th school day that the Student was removed from her educational placement.) This period includes all of second grade and the beginning of third grade, during which time two different IEPs were in effect.

44. The first IEP was the one adopted from Yelm, which the District utilized from September 2011 until it conducted a reevaluation and annual IEP revision in December 2011. Under the Yelm IEP, the Student's placement was 72% in general education plus special education services. Under the District's IEP, adopted December 15, 2011, the Student's placement was 83% in general education plus special education services. The District decreased the Student's time in special education reading and writing, and increased her time in speech-language

[25] There is another potential procedural violation of the IDEA that the Parent did not articulate in her complaint. The District changed the Student's placement as of October 11, 2012 without providing the Parent prior written notice and without convening an IEP meeting. Issues not raised in a complaint may not be adjudicated without the other party's agreement, which has not been given here. *See* WAC 392-172A-05100(3); 34 CFR § 300.512. However, the change of placement was addressed in the context: the failure to make a manifestation determination after the Student had been removed from her placement for 10 consecutive school days.

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therapy and general education. The Parent presented no evidence that these changes were inappropriate.[26]

45. The Parent has not carried her burden of proof that the District failed to provide the Student an appropriate educational placement during the period September 2011 through October 10, 2012.[27]

Educational placement October 11, 2012 through January 6, 2013

46. October 10, 2012 was the Student's 10th school day of removal from the educational placement required by her IEP. As discussed above, the District thereafter failed in its obligation to make a manifestation determination. It then failed to take the steps that would have been required following a finding of no-manifestation, or the steps that would have been required following a finding of manifestation. The Student's placement became unlawful[28] beginning October 11, 2012.

47. The District argues that the one-on-one office setting was needed as a temporary, emergency setting while it conducted a reevaluation and determined an appropriate long-term placement for the Student. As discussed above, there were a number of lawful ways the District could have removed the Student to a temporary, emergency placement. It did not utilize any of them. The IDEA expressly denies school districts the authority to unilaterally do what the District did here.

48. Moreover, once its reevaluation was complete on October 25, 2012, the District did not end the Student's "temporary, emergency" placement, but continued it for a total of three months. When it amended her IEP in October 2012 following the reevaluation, it did not change either her actual placement in the one-on-one office or her official IEP placement of mostly general education with pull-out special education services.

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[26] The Parent did present evidence concerning the appropriateness of the District's decision not to add social/emotional/behavioral services to the December 2011 IEP. This is discussed below, in the section concerning whether the District failed to provide appropriate services and accommodations.

[27] The Student's expulsion/suspension occurred during this period, from September 27 through October 5, 2012. (October 6th – 7th was a weekend; the Student returned to school on Monday, October 8th.) A disciplinary removal does not constitute a change of educational placement unless it exceeds 10 school days, which this did not. *See* WAC 392-172A-05145; 34 CFR § 300.530. Therefore, the Student's educational placement during her expulsion/suspension remained the one set forth in her December 2011 IEP, which placement was appropriate at that time.

[28] The word "unlawful" is used herein regarding the Student's placement from October 11, 2012 to January 6, 2013, because there was an unlawful change of placement without a manifestation determination. This is distinct from an "inappropriate" placement, which is one that is substantively inappropriate because it is not reasonably calculated to meet the individualized needs of a student. The Student's placement in OPTIONS beginning January 7, 2013, for instance, was not "unlawful" because it was made pursuant to an IEP meeting with parental participation. However, as discussed below, the OPTIONS placement was substantively "inappropriate".

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49. The District mistakenly relies on *Tacoma Sch. Dist.*, 109 LRP 13843 (SEA WA 2008) in support of its use of a temporary, emergency placement. In *Tacoma Sch. Dist.*, this ALJ found a procedural violation of the IDEA where a school district changed the student's placement on a temporary, emergency basis without convening an IEP meeting, and then let more than two months pass before completing its reevaluation and adopting a long-term placement. In *Tacoma Sch. Dist.*, this procedural violation was found not to result in a denial of FAPE primarily because the temporary, emergency placement was, in fact, the Student's appropriate LRE. It became his long-term placement when the IEP was amended, and the ALJ upheld that placement as appropriate. In the present case, the temporary, emergency placement is adjudicated as part of a substantive violation of the IDEA, so the harmless-error analysis for procedural violations does not apply. Even if it did apply, the error here would by no means be found harmless: The Student was denied FAPE by being placed in an inappropriate, isolated and unsuccessful one-on-one office setting for three months. The ultimate placement found appropriate for her is not the same as the temporary, emergency placement, but a very different one, discussed below.

50. Once the reevaluation was completed on October 25, 2012 and the Student became eligible for special education in the social/emotional/behavioral area, the appropriate and least-restrictive placement for the Student was a self-contained program for students with emotional/behavioral disorders (EBD).[29] The District has established that returning her to a general education classroom, even with a one-on-one paraeducator, would not have been appropriate at that time, given how escalated her behavior was and given that she so often refused to accept redirection from paraeducators. The only self-contained EBD program at the elementary level in the District was the REACH program at Discovery. If the District was unable to place the Student there, and did not wish to move REACH to another location, then it was obligated to offer an out-of-district self-contained EBD program, either in a neighboring district or a private school. The District did none of these things. Instead, it let the Student languish in an inappropriate, isolated, and unsuccessful placement that violated her IEP for another two-plus months while it was locked in disagreement with the Parent concerning a more appropriate placement.[30]

51. The District argues it should not be penalized for its efforts to reach agreement with the Parent. District Brief at 23. However, the District had a duty to provide FAPE to the Student. If this cannot be achieved by consensus among all IEP team members, then the team has an obligation to move forward and adopt a placement that provides FAPE. School districts are not permitted to sacrifice a student's right to receive FAPE in a prolonged effort to avoid a due process hearing. To satisfy its parental participation obligations, a school district must provide a

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[29] The designation "EBD" is more commonly used to refer to such self-contained programs than "SEB" (social/emotional/behavioral). EBD is therefore used herein to refer to the type of self-contained program that is found appropriate for the Student.

[30] The school psychologist, Mr. Sherman, testified that once a BIP is adopted, four to six weeks are normally allowed to see if it is sufficient to address a student's behavior before a change of placement is recommended. However, the Student's behavior was so severe, and the BIP mostly contained interventions that had already been tried. Waiting another four to six weeks before deciding on a change of placement might have been appropriate if the Student had been in a lawful placement that was otherwise providing FAPE. That was not the case here.

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draft IEP, convene an IEP meeting and consider parental input, then issue a prior written notice stating its decision. There is no obligation to engage in a three-month struggle with a parent prior to reaching a decision, especially where a student is being denied FAPE during that period.

52. Finally, the District also argues it could not place the Student in REACH because it needed to resolve both the Student's placement and her brother's, and they could not be assigned to the same classroom. This does not excuse keeping the Student in an inappropriate placement for a prolonged period. If two children – regardless of whether they are related – require the same placement, and only one of them can be accommodated in that placement, then the school district is required to provide appropriate placements for both of them. If that means opening a second site for a particular program, offering an out-of-district placement in a similar program, or adding staff or other interventions to mitigate the anticipated behavioral escalation if the two children are placed together, then the district must do one of these things. Both children must be offered a FAPE as individuals, regardless of whether they are related.

53. The Parent has carried her burden of proof that the District failed to provide the Student an appropriate educational placement during the period October 11, 2012 through January 6, 2013.

Educational placement beginning January 7, 2013

54. From January 7, 2013 to the present, the Student's placement has been the OPTIONS program, though the Parent has never elected to send her there. OPTIONS is a program for low-functioning autistic and low-cognitive level students. The Student has an IQ of 94 and she is not on the autism spectrum. The District school psychologist, Mr. Sherman, acknowledged that REACH was a more appropriate placement for the Student than OPTIONS. He also acknowledged that OPTIONS was not a good peer group for her.

55. It is telling that the District first chose a private, out-of-District school, NWSOIL, as the preferred placement for the Student, and only selected OPTIONS after the Parent rejected NWSOIL. The fact that the District turned to this extraordinary and significantly more restrictive choice over OPTIONS shows that even the District did not find OPTIONS particularly appropriate for the Student. District team members thought that a very talented teacher in the Purdy OPTIONS class could make it work for the Student, despite other indicia of inappropriateness. However, the appropriateness of a placement must be judged by the placement itself, not by the attributes of a particular staff member. There are four OPTIONS classes at different elementary schools in the District. An educational placement is not tied to a particular school building or teacher; an educational placement consists of the programs, services, and place on the LRE continuum occupied by the chosen placement. *See K.L.A. v. Windham Southeast Supervisory Union*, 371 Fed. App'x 151, 54 IDELR 112 (2nd Cir. 2010, unpublished); *S.M. v. Taconic Hills Cent. Sch. Dist.*, 60 IDELR 217 (N.D.N.Y. 2013); *P.V. v. Sch. Dist. of Philadelphia*, 60 IDELR 185 (E.D. Pa. 2013); *N.S. v. State of Hawaii, Dept. of Educ.*, 54 IDELR 250 (D. Haw. 2010). A teacher may leave employment at any time or be reassigned. A student's educational placement must be appropriate for her based on the nature of the program itself, not based on the presence of a particular staff member.

56. Not all self-contained programs are alike. They are not fungible. They serve different populations with different needs. Simply because REACH and OPTIONS are both self-contained programs, with options to participate in the general education and Resource Room

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settings, does not mean that placement in one is appropriate if placement in the other would be. Indeed, the purpose of a self-contained class is to provide programming specifically targeted to the needs that children with certain types of disabilities may (but do not necessarily) have in common. If a particular child does not share those disabilities or those needs, it is pointless to assign them to that program. The only point might be to segregate them from the general education population.

57. The Parent has carried her burden of proof that the District failed to provide the Student an appropriate educational placement during the period January 7, 2013 to the present.

Did the District conduct an inappropriate social/emotional/behavioral assessment in December 2011, and inappropriately deny the Parent's subsequent request for reevaluation in that area?

58. The declaration and testimony of Dr. Cleven establish that the reevaluation of December 2011 met the requirements of WAC 392-172A-03020 through -03040. Regarding the only disputed conclusion reached in that reevaluation – that the Student did not qualify for special education in the social/emotional/behavioral area -- the Parent has failed to establish that this conclusion was in error. The Student had problem behaviors and some elevated scores on her behavioral assessments, but the interventions used at Voyager were successful in improving her behavior, helping her spend more time in class, and allowing her to begin establishing relationships with peers.

59. Adding another area of special education service to the Student's schedule would have meant a greater degree of removal from the general education environment. Removal from the general education environment is permitted "*only* if the nature or severity of the disability is such that education in general education classes *with the use of supplementary aides and services cannot be achieved satisfactorily.*" WAC 392-172A-02050(2) (italics added); *see* 20 USC § 1412(a)(5)(A); 34 CFR § 300.114. The IDEA does not allow removal where education in the general education environment can be achieved satisfactorily by the use of interventions (supplementary aides and services) short of special education. That is what occurred here.

60. The Student's behavior improved markedly through the use of general education interventions at Voyager from November 2011 to February 2012. In February 2012, her behavior declined during the one hour per day that she spent in the Resource Room. Her Resource Room teacher, Ms. Walker, successfully determined what had triggered that decline, and addressed it by reducing the number of children in the Student's group and by introducing an incentive sticker system similar to one used by the school counselor. The Student's behavior recovered thereafter.

61. The following school year, when the Student's behavior did not respond to general education interventions tried by school staff during September 2012, the District promptly agreed to a reevaluation in the social/emotional/behavioral area. Consent for the reevaluation was obtained on September 27, 2012.

62. The District has carried its burden of proof in cause no. 2013-SE-0018 by establishing that its reevaluation of December 2011 was appropriate.

63. The Parent has not carried her burden of proof in cause no. 2013-SE-0017X that the District inappropriately denied her subsequent requests for reevaluation. Those subsequent

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requests were appropriately denied during the remainder of the 2011-2012 school year (second grade). They were appropriately granted on September 27th of the following school year, 2012-2013.

Did the District fail to provide appropriate services and accommodations in the IEPs of December 2011 and December 2012?

64. The Parent challenges the December 2011 IEP for failing to provide services in the social/emotional/behavioral area. This challenge is rejected for the same reasons that the Parent's challenge to the December 2011 evaluation was rejected above: The Student had behavioral problems in second grade, but those problems responded positively to the general education interventions that were adopted. As discussed above, the IDEA's LRE mandate prohibits the addition of special education services -- which result in a decrease in general education participation – if a child's needs can be satisfactorily addressed by supplementary aides and services without decreasing her general education time. 20 USC § 1412(a)(5)(A); WAC 392-172A-02050; 34 CFR § 300.114.

65. The December 2011 IEP continued in effect during the fall of the Student's third-grade year. The services in that IEP were reasonably calculated to provide her FAPE based on what was known at the time the IEP was written, and based on the Student's experience in second grade after it was written. Shortly after the Student started third grade, it became apparent that the IEP might no longer be appropriate, and the District promptly attempted a number of interventions to remedy the situation. Its efforts early in the school year were reasonably calculated to address the behavioral problems that interfered with the Student's learning, though they were not ultimately successful. The IDEA does not mandate success; it mandates that districts provide IEPs that are "reasonably calculated" to be successful. A district's actions are not judged with the benefit of hindsight; they are judged based on what was objectively reasonable at the time. *See Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999).

66. Regarding accommodations provided in the December 2011 IEP, the Parent presented no evidence that those accommodations were inappropriate, nor that any additional accommodations were needed.

67. Turning to the December 2012 IEP, the Parent presented no evidence that either the services (which now included social/emotional/behavioral services) or the accommodations were inappropriate. Rather, she challenged the *placement* provided for in that IEP. That has been addressed above.

68. The Parent has not met her burden of proving that the District failed to provide appropriate services and accommodations in the IEPs of December 2011 and December 2012.

Did the District fail to place the Student in her least restrictive environment by placing her in a one-on-one educational setting beginning October 8, 2012?

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69. As discussed above, there were three lawful ways the District could have achieved an emergency, temporary placement of the Student in a one-on-one setting.[31] Such a setting might have been her LRE until October 25, 2012, when a reevaluation was completed and she became eligible for special education in the social/emotional/behavioral area. At that point the Student's LRE became a self-contained EBD program, as discussed above. This is a less restrictive setting than a one-on-one office setting, where the Student was taught alone. (It is also a much more appropriate setting, where the Student would have been taught by a certificated teacher with a special education endorsement and experience teaching EBD children.)

70. The Parent has carried her burden of proving that the District failed to place the Student in her LRE by keeping her in a one-on-one educational setting until January 7, 2013. During the period October 11 through October 24, 2012, the IEP team or the manifestation determination team might have determined that a one-on-one setting was the Student's LRE on a temporary, emergency basis pending reevaluation, had the District convened the IEP team or the manifestation determination team. However, it failed to do so. Beginning October 25, 2012, a self-contained EBD program was the Student's LRE, but the District did not offer this placement.

Did the District fail to properly implement the Student's IEPs beginning October 8, 2012, by having paraeducators teach the Student instead of certificated teachers?

71. The Student's IEPs have provided that her special education services are to be "Monitored By" a special education teacher. D-6:8; D-13:9. The paraeducators were supervised by special education teacher Ms. Burkart, and thus the use of paraeducators did not violate the Student's IEP. It also did not violate the IDEA: Paraprofessionals "may assist in the provision of special education and related services, provided that the instruction is designed and supervised by special education certificated staff". WAC 392-172A-02090(1)(g); *see* 34 CFR §300.156.

72. The Parent has not carried her burden of proving that the District failed to properly implement the Student's IEPs beginning October 8, 2012, by having paraeducators teach the Student instead of certificated teachers. It must be acknowledged that had the Student been in the appropriate placement of a self-contained EBD program after October 25, 2012, she would not have been taught exclusively by paraeducators, but would primarily have been taught by a certificated special education teacher. However, that is an issue concerning the Student's appropriate *placement*. The issue presented here is whether the use of paraeducators constituted a *failure to implement the Student's IEP*. It did not.[32]

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[31] To summarize, those three lawful ways are: (1) The IEP team could have done a temporary amendment to the Student's IEP, changing her placement pending completion of the reevaluation that was commenced on September 27, 2012; (2) After a manifestation determination, the Parent and the District could have changed the Student's placement by agreement; or (3) An ALJ could have ordered the use of an IAES for up to 45 school days if the District had filed for expedited due process hearing and established that returning the Student to her prior placement would have been substantially likely to result in injury to herself or others.

[32] Likewise, there appears to have been a different failure-to-implement violation than the one raised by the Parent: It appears that the District failed to implement the *placement* provisions of the Student's IEP beginning October 11, 2012. However, the Parent did not articulate this as an issue in her complaint so it is not adjudicated here, nor is a separate remedy provided for it. *See* WAC 392-172A-005100(3); 34 CFR

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Did the District violate the IDEA by excluding the Student from non-academic classes and activities beginning September 14, 2012?

73. The non-academic classes (as distinct from activities) to which the Parent refers in this claim are general education classes such as music, art and physical education. The Student's IEP provided she would be removed from the general education setting for three special education subjects plus speech-language therapy. All of the rest of her time was to be spent in general education.

74. The Student's placement was unlawfully changed beginning October 11, 2012. Whatever non-academic general education classes were part of her schedule prior to this unlawful change should have continued after that date, unless and until her placement was lawfully changed.

75. The Student did not have a legal right to attend any *particular* general education classes such as music or art. She was entitled to a certain percentage of time in the general education environment (and that such percentage be maximized under LRE principles), not to particular general education classes. If her special education subjects happened to be scheduled in such a way as to preclude her attendance at music or art, the Student would not have had a legal right to those classes. However, in this case the elimination of general education music and art classes from the Student's schedule occurred due to the unlawful placement change, not due to any scheduling conflict with her special education class times. Therefore, the elimination of those classes was part of an unlawful change of placement.

76. Physical education (PE) has a different status in the IDEA than classes such as music and art. Special education students have a legal right to PE. WAC 392-172A-02030 provides that PE must be made available to every student receiving FAPE. They must be afforded the opportunity to participate in general education PE except in two situations, neither of which is applicable here. *See also* 34 CFR § 300.108.[33] The Student's placement was unlawfully changed to one in which she was only given the opportunity to attend PE under certain conditions, depending on her behavior outside of PE. Those conditions were not part of her prior placement. Witnesses testified to one instance of the Student attending PE during the three months of one-on-one placement, which instance occurred in October (and was very unsuccessful). Perhaps there were other isolated instances of the Student attending PE that are not mentioned in the record, but the unlawful change of placement changed the availability of PE to the point where she virtually did not receive it due to her behavioral disability.

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§ 300.512. However, essentially the same matter is adjudicated in the section on manifestation determination, above.

[33] The two exceptions to the requirement that general education PE be made available to special education student are where a student is enrolled full time in a separate facility, or where their IEP requires specially-designed PE (which is sometimes referred to as adaptive PE.) *See* WAC 392-172A-02030; 34 CFR § 300.108.

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77. Extra-curricular activities are subject to yet another legal analysis. WAC 392-172A-02025 addresses non-academic[34] and extracurricular activities. It provides that districts must:

> take steps, *including the provision of supplementary aids and services determined appropriate and necessary by the student's IEP team*, to provide nonacademic and extracurricular services and activities in the manner necessary to afford students eligible for special education an equal opportunity for participation in those services and activities.

Id. (italics added); *see* 34 CFR § 300.107.

78. The Student's IEP team made no determination of what supplementary aids or services, if any, were appropriate and necessary for her to participate in non-academic and extra-curricular activities after she was moved to the one-on-one setting. This is because the District unlawfully changed the Student's placement without convening a manifestation determination team or the IEP team. Under the regulation quoted above, it was the role of *the IEP team* to determine what supplementary aids or services, if any, were appropriate and necessary to afford her an equal opportunity to participate in non-academic and extracurricular activities. The regulation does not give the principal the authority to make that determination himself. The IEP team might have come to the same decision he did with regard to field trips, that the Student's habit of elopement did not allow her to safely participate (at least on a field trip to a busy place in downtown Tacoma) and there were no supplementary aids or services that were appropriate or necessary to afford her an equal right to participate as non-disabled students have. However, the IEP team might have come to a different decision, finding that she could participate if certain supplementary aids or services were provided. Because the principal made the decision about extracurricular participation unilaterally, and did not give that decision to the IEP team, the District failed to comply with WAC 392-172A-02025.[35]

79. The PTO movie night cited by the Parent occurred on September 14, 2012, prior to the Student's expulsion/suspension. The decision to bar her from the movie was an *ad hoc* disciplinary decision that was within the principal's authority. If it was anticipated that the Student would continue to be excluded from such extracurricular activities due to her behavioral disability, then the IEP team should have addressed the matter, as set forth in WAC 392-172A-02025, regardless of the fact that there had not yet been a change of placement. However, the movie occurred on the eighth school day of the year. It would not have been reasonable to anticipate continued exclusion from such activities at that early date. School staff were attempting a variety of interventions and were hopeful of their success at that point.

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[34] The regulation uses the term "nonacademic" in a different way than the Parent used it in her complaint. In the regulation, the term does not refer to classes such as music and art. Rather, it refers to activities such as athletics, counseling services, recreational activities, and school clubs. WAC 392-172A-02025; *see* 34 CFR § 300.107.

[35] It should be noted that the Tacoma Art Museum field trip of December 14, 2012 did not occur during the Student's out-of-school suspension that began December 11, 2012. That suspension was for 1.5 days. *See* P-6:2. If the Student had missed the field trip because she was on an out-of-school suspension on the day of the field trip occurred, then this would have been within the disciplinary authority of the principal.

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80. The Parent has carried her burden of proving that an unlawful change of placement denied the Student participation in music, art and PE classes after October 10, 2012. The Parent has also carried her burden of proving that the District violated the IDEA by failing to have the IEP team determine whether supplementary aids or services were appropriate and necessary to afford the Student an equal opportunity to participate in extracurricular activities after October 10, 2012.

Did the District adopt inappropriate BIPs that did not provide appropriate positive behavioral supports and interventions?

81. The Parent presented no evidence that the Student's BIP was inappropriate. (There was only one BIP adopted. It was adopted in October 2012. A revised BIP was drafted by the District in December 2012, but it was never finalized.) The BIP contained positive behavioral supports and interventions.

82. The Parent has not met her burden of proving that the District adopted inappropriate BIPs for the Student that did not provide appropriate positive behavioral supports and interventions.

Did the District change the Student's BIPs and change the Student's placements before allowing sufficient time for the BIPs to be successfully implemented?

83. The District never changed the Student's BIP, which was adopted in October 2012. From the evidence presented at the hearing, it appears that this claim was intended to refer to the period in September 2012, when the District attempted a number of behavioral interventions in a short timeframe and then moved the Student to a one-on-one setting on October 8, 2012. The Parent contends that the interventions were changed too quickly and were not given time to succeed, especially in light of the Student being distressed by her Father's recent deployment.

84. District teachers and psychologists testified persuasively that it was appropriate to quickly change the Student's behavioral interventions during September 2012. None of the interventions showed signs of even a small degree of success. Also, a number of the changes were tweaks in the interventions that the Student did not appear to notice or be affected by.

85. The Parent has not established that the District changed the Student's behavioral interventions without allowing sufficient time for them to be successfully implemented. The District did change the Student's placement, but the propriety of that change is addressed elsewhere in the decision, above.

Did the District fail to provide appropriate training in behavior management and Right Response to the paraeducators who worked with the Student and to the office staff who came in contact with her?

86. There is no requirement of any specific type of training paraeducators must receive. WAC 392-172A-02090(1)(f) provides in pertinent part:

> Paraprofessional staff and aides shall present evidence of skills and knowledge necessary to meet the needs of the students eligible for special education, and

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shall be under the supervision of a certificated teacher with special education endorsement or a certificated educational staff associate . . .

87. The Parent has not established any lack of appropriate training on the part of the paraeducators who worked with the Student. There were only five days when paraeducators who did not have Right Response training worked with the Student. On none of those five days did the Student have any behavioral incidents. On four of those days Ms. Cranford was on duty. She had taken trainings similar to Right Response twice in the past.

88. Neither the IDEA nor its implementing regulations mandates a particular level or type of training for paraeducators. It is possible that a denial of FAPE may come about if a paraeducator fails to implement an IEP or in some other way deprives a student of educational benefits. However, that has not been established here.

89. The Parent has not carried her burden of proving that the District failed to provide appropriate training to the paraeducators who worked with the Student. Regarding office staff, the IDEA contains not provisions on the qualifications or training of office staff.

Did the District significantly prevent the Student from benefiting from her education by causing her emotional trauma in three ways?

90. As discussed in the Findings of Fact above, the Parent has not established any of the three factual allegations on which this claim is based. She has not established that school staff interrogated the Student inappropriately regarding her brother's touching of her, that school staff made demeaning comments to her, or that the Student was shown an inappropriate film.

91. The Parent has not carried her burden of proving that the District significantly prevented the Student from benefiting from her education by causing her emotional trauma in any of these three ways.

Remedies

Independent Educational Evaluation

92. Because the District has established that its evaluation of December 2011, as well as the revision of that evaluation in October 2012, were appropriate, the Parent is not entitled to an IEE. *See* WAC 392-172A-05005; 34 CFR § 300.502.

Compensatory Education

93. Compensatory education is a remedy designed "to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Reid v. District of Columbia*, 401 F.3d 516, 524 (D.C. Cir. 2005). Compensatory education is not a contractual remedy, but an equitable one. "There is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 1497 (9th Cir. 1994). Flexibility rather than rigidity is called for. *Reid v. District of Columbia, supra*, 401 F.3d at 523-524.

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94. Compensatory education is an equitable remedy, meaning the tribunal must consider the equities existing on both sides of the case. *Reid v. District of Columbia, supra,* 401 F.3d at 524. For its part, the District exercised unilateral authority that the IDEA expressly denies to school districts, then kept the Student in what it soon realized was an inappropriate placement for three months before adopting another inappropriate placement. It also adopted significant amendments to the Student's December 2011 IEP in October 2012 without parental participation. The District's errors, however, consisted of its IDEA violations. The District did not engage in any additional negative conduct beyond those violations that would affect the comparative equities between the parties. The Student was extremely difficult to handle and District staff acted with good intentions and a great deal of compassion and professionalism, both toward the Student and the Parent. As difficult as the Student was, however, it would not have been difficult for the District to comply with the IDEA while attempting to find a solution for her situation.

95. For her part, the Parent was generally cooperative and worked collaboratively with the District prior to January 14, 2013. On that date she withdrew the Student from school based on a legitimate CPS report made by a mandatory reporter. The Parent then knowingly refused to comply with state compulsory education laws by declining to enroll the Student in any school district, any private school, or the state's home-schooling option. The Student received only a few hours of tutoring per week from a part-time tutor whose time was divided between three children, and who was not supervised by any school or accountable to any lawful home-schooling program.

96. The District argues that no remedy should be awarded for any period after the January 14, 2013 withdrawal from school. District Brief at 38. However, the educational placement the District adopted for the Student in December 2012 was inappropriate and constituted a denial of FAPE. The Parent would be entitled to a remedy for the period following adoption of the December 2012 IEP whether or not she withdrew the Student from school. The withdrawal from school is simply irrelevant to the remedial award, which is based on the District's inappropriate placement offer, not based on the Parent's actions.

97. The Parent requested two types of compensatory education: tutoring and speech-language therapy. They are addressed separately.

98. Regarding speech-language therapy, the Student continued to receive this therapy after October 8, 2012, while she was in the one-on-one office placement, and until the Parent withdrew her from school on January 14, 2013. Although the Student's January 7, 2013 placement in the OPTIONS program was inappropriate, the Parent chose not to bring the Student to school even for speech-language therapy. The Parent could have brought the Student for her speech-language therapy sessions without bringing her to the OPTIONS classroom. Because the Parent, rather than the District, chose to discontinue speech-language therapy after January 14, 2013, the Parent is not awarded compensatory speech-language therapy.

99. Regarding tutoring, the District argues the Student was not denied educational services for which academic tutoring would provide a replacement, and that there was no evidence the Student failed to make academic progress toward her IEP goals. District Brief at 37. On the contrary, the evidence showed that the Student's behaviors significantly interfered with her learning. She had severe behavioral problems while working in the one-on-one setting with the

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paraeducators. She earned only 35% of the possible points for being "responsible," which encompassed being in her assigned location and working on assigned tasks. Ms. Griffin, the school counselor at Discovery who was heavily involved with the Student's education, believes the Student made no academic progress during third grade. Mr. Brooks, the principal, who was also heavily involved with the Student, could not say whether she made any academic progress in the one-on-one office setting because her behaviors interfered with her learning. Academic tutoring is therefore an appropriate remedy for the loss of education the Student experienced.

100. Compensatory education in the social/emotional/behavioral area would theoretically be another appropriate remedy in this case. However, it is not awarded for three reasons. First, the Student's prospective placement will be a self-contained EBD program. In that program the Student will receive a large number of hours of special education in the social/emotional/behavioral area. Adding to that large number of hours is not found likely to provide significant additional benefit to the Student. Second, there is the practical problem of how such compensatory education would be implemented: Unlike academic tutoring, the social/emotional/behavioral services the Student needs are not effectively delivered one-on-one, but involve group participation. Given that the Student will be participating in an EBD program, it is unknown what supplementary group she could participate in. Third, adding this form of compensatory education to the Student's academic tutoring would excessively extend her instructional day.

101. The period of denial of FAPE for which compensatory education is awarded begins October 11, 2012 (the day when the Student's removal from her educational placement exceeded 10 consecutive school days) and continues through June 18, 2013 (the last day of school). The Student's IEP does not provide for extended school year services during the summer, and the Parent has not argued that it should have done so. Therefore, the period for which a remedy is awarded ends on June 18, 2013.[36]

102. There were 54 school days in the period October 11, 2012 through June 18, 2013. School days are normally 6.6 hours long,[37] but on average they are slightly shorter due to late starts on Wednesdays and early dismissals on a few other occasions. Using an estimated overall average of six hours of school per day, there were approximately 324 hours of school during the period October 11, 2012 through June 18, 2012 (54 x 6 = 324). Tutoring will be awarded at a rate of one hour for every three hours of school missed, since tutoring can achieve more concentrated learning, assuming a child's behavior does not interfere with the tutoring. The Student will therefore be awarded 108 hours of tutoring (324 ÷ 3 = 108) to commence as soon as practicable following issuance of this decision. The IEP team will determine whether it is more beneficial for the Student to begin tutoring during August 2013, or wait until the start of the school year. Tutoring shall begin, in any event, no later than the start of the school year in September 2013.

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[36] The award for failing to obtain parental involvement in the October 2012 IEP amendments is consolidated with the award for the other IDEA violations. An additional period of tutoring is not awarded because the purpose of compensatory education is to compensate the Student for her loss of FAPE; it is not to punish the District in proportion to the number of its violations.

[37] The Student's school day was normally from 8:50 a.m. to 3:30 p.m., or 6.6 hours. *See* P-14.

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103. The Parent requests that the Student receive tutoring for four hours per day, five days per week, for a period of 33 weeks. Four hours per day of tutoring does not allow the Student to attend a regular school day. The Student should be returned to school as soon as possible. In order to make behavioral progress, she needs to be in a class with other students where she can be taught how to successfully deal with the behavioral challenges that arise in the school setting.

104. The IEP team will determine how many hours per day of after-school tutoring the Student would tolerate and benefit from. There was no evidence on this matter at the hearing. It is assumed tutoring will occur five days per week, but the IEP team may decide that fewer days per week would be more beneficial for the Student, who may wish to participate in other extracurricular activities after school. The IEP team will also determine whether tutoring will continue during school breaks and the summer, or during some portion of those break times. If the Student has behavioral issues that interfere with her learning during tutoring, the IEP team is obligated to address those issues just as it would if the same issues arose during her normal school day.

105. The District has the choice of using its own staff to provide the tutoring or using an outside agency.[38] The District has the educational expertise to determine what qualifications the tutor must have, and will make that determination.

106. If the District chooses to use its own staff (which includes contracting with an individual to be supervised and directed by the District), the location for the tutoring will be at the school the Student attends, unless the parties mutually agree on a different location. If the District chooses to use an outside tutoring agency, the location for tutoring will be determined between the tutoring agency and the Parent.

107. If the District chooses to use its own staff, the exact schedule for delivery of the tutoring (i.e., the time of day and days of the week, such as 4:00 p.m. on Monday through Thursday) are to be mutually agreed between the Parent and the District. The schedule of tutoring will comply with the parameters decided upon by the IEP team regarding the number of minutes per day and number days per week of tutoring that the Student can tolerate and benefit from. If the intended tutor is not available on the mutually agreed schedule, the parties will look for another tutor. If the parties are unable to reach agreement on a schedule for tutoring, they will submit the matter to OSPI for decision.[39]

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[38] Hands On Learning Solutions is not found to be an appropriate tutoring agency for the Student, based on the Findings of Fact about that agency set forth above.

[39] The schedule that is to be mutually agreed, or else submitted to OSPI for decision, is the exact time of day and days of the week for tutoring (e.g., 4:00 p.m. on Monday through Thursday). This is distinct from the parameters discussed earlier, concerning the number of minutes per day and the number of days per week of tutoring that the Student can tolerate and benefit from (e.g., 60 minutes per day, four days per week) which decisions will be made by the IEP team. A decision by the IEP team is different from a decision by mutual agreement. A decision by the IEP team means District members may adopt a decision with which the Parent does not agree, though hopefully consensus will be achieved.

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108. If the District chooses to use an outside tutoring agency, the schedule for delivery of the tutoring will be determined between the agency and the Parent, but will comply with the parameters decided by the IEP team concerning how many minutes per day and days per week the Student will tolerate and benefit from tutoring.

109. If the District chooses to use its own staff, and the Parent cancels a scheduled tutoring session without giving 24 hours advance notice of cancellation, then the missed session will count against the Parent's compensatory education award. If the District chooses to use an outside tutoring agency, then the Parent must comply with the cancellation policy of that agency or else the missed session will be counted against the Parent's compensatory education award.

Prospective Placement

110. For the reasons set forth in the Findings of Fact above, the Student's prospective placement will be the District's REACH program, a self-contained EBD program, with participation in the general education and Resource Room environments according to her December 2012 IEP (or any subsequently adopted IEP). This placement, rather than the more restrictive placement of a special day school such as NWSOIL, is the Student's LRE. The District may decide whether it wishes to move the current REACH classroom to a different room in Discovery, to another school that has an appropriate room, or whether it can employ modifications to keep REACH in its current classroom (such modifications may be physical changes or may involve additional staffing to try to eliminate the risk of students eloping). Although the Student's wishes cannot be accorded a great deal of weight given her age and ability to understand what is in her best interests, it is noted that REACH resembles the ideal classroom the Student testified she wants: a class of about eight children where everyone cares about her feelings.

111. The Parent's proposed placement of general education plus a paraeducator is not adopted. As set forth above, District witnesses testified persuasively that the Student requires more behavioral support than this, and would not be successful in this setting. Returning the Student to the general education setting is the ultimate goal, and a goal that can be immediately worked on when she returns to school in the fall: In the REACH program, she and her classmates will be mainstreamed to the general education environment to the extent of each of their capabilities, and hopefully to an increasing extent as her behavioral skills are addressed in this EBD program.

112. The Parent's proposed in-home placement is also not adopted. As explained by the Student's special education teacher, the Student is deficient in skills that arise in the school and classroom setting. She cannot advance in these behavioral skills if she remains at home. The fact that the Student was more relaxed and happy when she was allowed to remain at home beginning January 2013 does not support an in-home placement. At home, she was no longer confronted with the two situations that triggered her behaviors: work avoidance and having to share adult attention with a larger group of children. These are both situations that she needs to learn the skills to cope with. She was also no longer in a school where her expulsion and segregation contributed to her belief that other students hated her. The fact that she was relieved at being removed from this stressful situation does not lend support to an in-home placement, which is among the most highly restrictive of all placements. It is not the Student's LRE.

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113. Finally, the Parent's proposed placement of 20 hours per week in one-on-one instruction with Hands On Learning Solutions is not adopted for many of the same reasons. It is too restrictive of an environment. In addition, Hands On Learning Solutions is not found to be an appropriate educational provider for the Student, having no special education teacher on staff.

114. The Parent requested that a number of items be included in the Student's prospective placement. Speech-language therapy will be part of her placement because it is part of her current IEP. Regarding ABA therapy to teach social/emotional/behavioral skills, the Parent presented no evidence to support the use of this methodology over other methodologies. Regarding non-academic classes and activities, the Student will be afforded access to such classes and activities in conformity with the regulations discussed above, WAC 392-172A-02025 and -02030. Regarding training for staff who work with the Student, no deficiency in training has been established, so the District will continue to determine what training staff receive.

Formal Apology

115. The Parent requests a formal apology to the Student for the District's treatment of her, which apology should outline her value and worth in order to restore her self-esteem.

116. An apology is not generally an appropriate IDEA remedy, and some tribunals hold it can never be ordered. *See Uncompahgre Bd. of Coop. Educ'l. Servs.*, 104 LRP 28949 (SEA Colo. 2004); *Montgomery County Bd. of Educ.*, 102 LRP 27608 (SEA Ala. 2002); *Lauderdale County Bd. of Educ.*, 36 IDELR 178 (SE Ala. 2002); *Carl Junction R-I Sch. Dist.*, 102 LRP 10902 (SEA Mo. 2000). It is especially inappropriate given that the Parent failed to establish that the District caused the Student emotional trauma by engaging any of the three types of conduct the Parent alleged. No apology will be ordered.

ORDER

1. The District violated the IDEA and denied the Student a FAPE by:

   a. Denying the Parent an opportunity to participate in the review and adoption of amendments to the Student's December 2011 IEP, which were adopted on October 29, 2012;

   b. Failing to hold a manifestation determination meeting after October 10, 2012, when the Student's placement was changed because she had been removed from her educational placement for more than 10 consecutive school days;

   c. Failing to offer the Student appropriate educational placements after October 10, 2012,

   d. Failing to place the Student in her least restrictive environment after October 10, 2012;

   e. Denying the Student participation in music, art and PE classes based on an unlawful change of placement after October 10, 2012; and

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f. Failing to have the IEP team determine whether supplementary aids or services were appropriate and necessary to afford the Student an equal opportunity to participate in extracurricular activities after October 10, 2012.

2. The District shall provide compensatory education to the Student in the form of 108 hours of academic tutoring on the terms set forth in the Conclusions of Law, above;

3. Prior to the start of the 2013-2014 school year, the District shall amend the Student's IEP to place her in the REACH program, the District's self-contained program for students with emotional/behavioral disorders.

Signed at Seattle, Washington on August 8, 2013.

Michelle C. Mentzer
Administrative Law Judge
Office of Administrative Hearings

Final Decision

Further Appeal Rights: Information About Your Right To Bring A Petition For Reconsideration And Your Right To Bring A Civil Action

Reconsideration

This is a final administrative decision. Pursuant to RCW 34.05.470, either party may file a petition for reconsideration within 10 days after the ALJ has served the parties with the decision. Service of the decision upon the parties is defined as the date of mailing of this decision to the parties. A petition for reconsideration must be filed with the ALJ at his/her address and served on each party to the proceeding. The filing of a petition for reconsideration is not required before bringing a civil action under the appeal provisions of the IDEA.

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. If a timely petition for reconsideration is filed, this ninety-day period will begin to run after the disposition of the petition for reconsideration pursuant to RCW 34.05.470(3). The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Administrative Resource Services.

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CERTIFICATE OF SERVICE

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

Parent
[redacted]

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

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