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

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| IN THE MATTER OF: | OSPI CAUSE NO. 2020-SE-0054 |
| | OAH DOCKET NO. 03-2020-OSPI-01033 |
| LAKE STEVENS SCHOOL DISTRICT | **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER** |

A due process hearing in the above matter was held before Administrative Law Judge (ALJ) Matthew D. Wacker in Lake Stevens, Washington, over two days on May 13 – 14, 2020. The Parents of the Student whose education is at issue[1] appeared and were represented by Shannon McMinimee, attorney at law. The Lake Stevens School District ("the District") was represented by Carlos Chavez, attorney at law. Also appearing for the District was Miriam Tencate, executive director of special services. A certified court reporter was present at the due process hearing.

## STATEMENT OF THE CASE

*Procedural History*

The Parents filed a Due Process Hearing Request ("the Complaint") on March 19, 2020. On March 24, 2020, a Scheduling Notice was entered, assigning this matter to ALJ Pamela Meotti. It also set a prehearing conference for April 16, 2020, and a due process hearing for April 30, 2020. On March 31, 2020, the District filed a Motion of Prejudice, seeking reassignment of this matter to another ALJ. On April 2, 2020, the District filed its Response to Hearing Request. On April 6, 2020, Senior ALJ Anne Senter entered an Order of Reassignment, granting the District's Motion of Prejudice and reassigning this matter to ALJ Matthew D. Wacker.

The prehearing conference was held as scheduled on April 16, 2020. Another prehearing conference was held on April 20, 2020, by agreement of the parties. On May 6, 2020, the First Prehearing Order was entered. The First Prehearing Order, in part, struck the due process hearing set for April 30, 2020, set a new due process hearing for May 13-14, 2020, and granted the District's motion to extend the due date for a written decision to the close of record plus thirty calendar days over the Parents' objection.

At the conclusion of the parties' cases in chief on May 14, 2020, the Parents moved for oral closing arguments. The District objected, and moved for written closing briefs/arguments. After hearing from the parties, the Parents' objection was overruled. The parties agreed to July

[1] In the interest of preserving the family's privacy, this decision does not use the actual names of the parents or the student. Instead, they are identified as the "Mother," "Father," or "Parents," and the "Student."



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6, 2020, as the due date for written closing briefs. The parties timely filed their closing briefs on July 6, 2020.

Due Date for Written Decision

The due date for a written decision in the above matter is the close of record plus thirty (30) calendar days. *See* May 6, 2020 First Prehearing Order. The record of the hearing closed with the filing of post-hearing briefs on July 6, 2020. Thirty calendar days from July 6, 2020, is August 5, 2020. Therefore, the due date for a written decision in the above matter is **August 5, 2020**.

## EVIDENCE RELIED UPON

The following exhibits were admitted into evidence:

Joint Exhibits: J1 - J3;

Parents Exhibits: The Parents offered no exhibits for the due process hearing;

District Exhibits: D1 - D2, D3pp5, 10-11, 15-18, 20-27, 30-31, 33, 36-41,[2] D6, D9 - D10, D13, D15, D17, D19 - D25.

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

Keri Joseph, District Director of Special Services;
Miriam Tencate, District Executive Director of Special Services;
The Mother of the Student;
The Father of the Student.

## ISSUES AND REMEDIES

The statement of the issues and requested remedies for the due process hearing is:

a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) beginning February 24, 2020, by failing to provide him with an educational placement that can provide all the

[2] The District offered Exhibit D3 at the due process hearing, and the Parents objected. The Parents' objection was taken under advisement, and the parties were informed the undersigned would rule on the objection in this Final Order. See Transcript, p.324. After careful review of all the other evidence of record, the Parents' objection is granted in part and denied in part. The Student's propensity for self-injurious, assaultive, and combative behaviors is strongly supported by the testimony of the Mother, Ms. Joseph, and Ms. Tencate, as well as in other admitted exhibits, including the Student's Individualized Education Programs, Behavioral Intervention Plans, and Emergency Response Protocols. In addition, identified pages of Exhibit D3 are admitted on the basis of their preparation as records in the normal course of the District's business.



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specially designed instruction and related services called for in his January 20, 2020 individualized education program (IEP);

b. And, whether the Parents are entitled to their requested remedies:

i. Declaratory relief finding that the District violated the IDEA and that the Student was denied FAPE by the District's actions;

ii. Compensatory special education and related services for the Student to allow him to obtain the educational benefit that he would have received but not for the District's violations of the IDEA and denial of FAPE consistent with 20 U.S.C. 1415(i)(2)(c)(iii);

iii. An educational placement moving forward that is reasonably calculated to enable the Student to receive an educational benefit considering his unique needs that includes all the specially designed instruction and related services that he needs;

iv. An Order that includes whatever additional relief the court may find just and equitable.

*See* May 6, 2020 First Prehearing Order.

## FINDINGS OF FACT

In making these Findings of Fact, the logical consistency, persuasiveness and plausibility of the evidence has been considered and weighed. To the extent a Finding of Fact adopts one version of a matter on which the evidence is in conflict, the evidence adopted has been determined more credible than the conflicting evidence. A more detailed analysis of credibility and weight of the evidence may be discussed regarding specific facts at issue.

General Background

1. The Student is presently 11 years old. Mother T121.[3] The Student's current diagnoses are Intellectually Developmentally Delayed, Autism Level III - highly impaired, Attention Deficit Hyperactivity Disorder (ADHD), Anxiety, Mood Dysregulation Disorder, Sensory Processing Disorder, Speech Delay, and Cognitive Delay. *Id.* at T122. The Student "self-harms, he's combative, and can be aggressive." *Id.* at T383.

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[3] Citation to the testimony of a witness is by last name and page number of the **T**ranscript. For example, citation to "Mother T121" is a citation to the testimony of the Mother at page 121 of the transcript.



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2. Although the exact time is unclear, the Student was enrolled in the District's developmentally delayed preschool classroom. Joseph T146.[4] The Student then left the District for a "few years." *Id.*

3. Although the exact time is unclear, the Parents enrolled the Student at Rising Star Academy for four years. D2p4.[5] "A significant decline in self control (sic) and increase in impulsivity was observed prior to his discharge from RSA." *Id.*

4. By March 2017, the Parents had placed the Student at the Center for Autism Related Disorders (CARD). D1p8; Joseph T147-T148. The Student was supported at all times by two Registered Behavior Technicians (RBTs) while attending CARD. D2p4. In August and September 2017, the Student underwent clinical evaluations at CARD. D1pp7, 8.

5. In December 2017, the District evaluated the Student. D1p3. Ms. Joseph identified this as the District's "original" evaluation of the Student. Joseph T146. After the evaluation, the Student attended school in the District for one day, after which the Parents removed the Student from the District and placed him back at CARD. *Id.* at T147-T148.

6. The Student returned to the District during October 2018. *Id.* at T148. The District served the Student at the District's Skyline Elementary School (Skyline) from October 15, 2018 through April 28, 2019. *Id.* at T158.

*November 29, 2018 IEP Meeting*

7. The Student's Individualized Education Program (IEP) team held a meeting on November 29, 2018. D1p3. At the time, the Student was nine years old and in fourth grade. *Id.* The Parents attended the meeting with their prior attorney, Nicholle Mineiro. D1p3. The District's current counsel, Carlos Chavez, was also present. *Id.* The Parents requested a residential placement for the Student. *Id.* at p5. The District did not have a residential placement for the Student, so the District continued to serve the Student at Skyline. Joseph T149.

8. The District placed the Student in his own classroom at Skyline, which the District designed for the Student based on what the District had observed at CARD. *Id.* at T156. The walls of the room and eventually the floor were fully padded. *Id.* at T157. There were always two staff present with the Student, with an additional third staff person present to conduct data collection. *Id.*; D1p11. This staffing was necessary due to the Student's self-injurious behaviors, aggression towards District staff, and elopement. D1p7. By the IEP meeting, the Student was already demonstrating self-injury and physical aggression multiple times per day at Skyline. D1p26.

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[4] Keri Joseph is the District's current director of special services. Joseph T145. This is her third year as the director. *Id.* Prior to her current position, Ms. Joseph was a District autism specialist for 12 years. *Id.*

[5] Citation to the exhibits of record are by party (**J**oint, **P**arents, **D**istrict) and by page number. For example, citation to "D2p4" is a citation to District Exhibit 2 at page 4.



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9. Despite this staffing in his classroom, the Mother raised concerns regarding the Student's safety, including allegations the Student suffered concussions and was burned while at Skyline. Joseph T159-T160. In response, the District instituted safety protocols, including documenting what the Student's body looked like when he arrived in the morning and when he left at the end of the day, and documenting any significant behaviors during the day that could have resulted in injury to the Student. *Id.*

10. The IEP team also developed an Emergency Response Protocol (ERP) for the Student at Skyline. D1p28. The ERP provided for the use of restraint with the Student when he presented an imminent risk of serious harm to himself or others. *Id.* The ERP permitted use of a helmet for the Student in the event of self-injurious behavior, and permitted placing arm splints on the Student's arms if he attempted to, or did bite his arms. *Id.* The Student also had two behavior technicians present with him when he rode the bus to and from school to ensure his safety. *Id.* The Parents signed the ERP, consenting to the provisions. *Id.* at p29.

11. The IEP team agreed that the Student required a residential placement in order for him to receive a free appropriate public education (FAPE). D1p26. The District would continue to serve the Student at Skyline until an opening at an appropriate facility became available. *Id.*

12. By the time of the IEP meeting, the District had already contacted three potential residential program providers: New England Center for Children (NECC), Heartspring, and Lakemary Center. *Id.* at p27.

13. Another IEP meeting was held on January 20, 2019. D2pp1, 3. The purpose of the meeting was to review additions to and amend the Student's Behavioral Intervention Plan (BIP). *Id*. at p2. The Mother, Parents' counsel - Ms. Mineiro, and District's counsel – Mr. Chavez, attended the meeting either by phone or in person. D2p31.

14. Ms. Joseph and Miriam Tencate[6] visited three potential residential program providers over February 17 – 19, 2019, to observe their programs and facilities: Heartspring, Lakemary, and Bancroft. Tencate T245.

15. In March 2019, the Parents filed a criminal complaint against District staff assigned to work with the Student after staff used a physical restraint, or "hold," on the Student on March 13, 2019. Joseph T161-T162, Tencate T307, Mother T383-T384. No criminal charges were filed against the District staff involved. Tencate T307-308. The District determined that the staff involved did not engage in any misconduct. *Id.* at 308.

16. Following the Parents' criminal complaint, the District "had to make a difficult decision that we would not put staff in danger of further…allegations." *Id.* at T306.

[6] Miriam Tencate is the District's current Executive Director of Special Services. She holds a bachelor's degree with a major in special education from Seattle Pacific University, a master's degree in administration and policy analysis from Stanford University, a continuing principal's credential, a superintendent credential, and a doctorate from Seattle Pacific University. Tencate T92.



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17. On March 25, 2019, the District issued a PWN to the Parents. D6. The PWN stated, in part, that:

> (The District) is proposing Heartspring as the primary location alternative for an appropriate residential facility, beginning by June 12, 2019. This option will be considered and finalized by the IEP team at a future meeting following additional confirmation of an appropriate setting for [the Student].
>
> Based on the site visits to Lakemary, Bancroft and Heartspring, the district determined Heartspring would most appropriately meet [the Student's] educational needs, residential needs, and afford him FAPE. Although Lakemary had a bed available in mid-April, Heartspring remains the district's recommended placement.
>
> (Rooms at Lakemary) are not equipped with cameras for monitoring student while in bedroom or asleep. This feature is necessary due to student's intensity and frequency of self injurious (sic) and aggressive behavior towards others.

D6p1.

18. The PWN went on to explain those features at Heartspring that made it the District's preferred residential placement. *Id.* at p2.

*The Student's Placement at Heartspring*

19. On April 29, 2019, the Student enrolled and began his residential placement at Heartspring. Joseph T169.[7] The Mother did not object to the Student starting at Heartspring. Mother T172. This was the first time the District had placed a student in a residential placement. Tencate T240. Heartspring conducted a reevaluation of the Student and developed a new proposed IEP for the Student. J1p38.

20. The Student's IEP team held a meeting on June 26, 2019. J1p4. Some team members were physically present at Heartspring and some members participated by telephone. Joseph T28, T172. Ms. Tencate attended the meeting by telephone even though she did not sign the IEP as attending. *Id.* at T30-T31, Tencate T93. The purpose of the meeting was to develop extended school year services for the Student, review a proposed IEP developed by Heartspring, and review the Student's BIP. J1p1. The new IEP noted that the Student "engages in severe problem behaviors such as physical aggression and self-injurious behaviors." J1p7. It went on to note that:

> Since enrollment (at Heartspring), [the Student] has engaged in physical aggression an average of 177 attempts/instances per month within the classroom environment and 91 attempts/instances per month within the group home environment.
>
> Since Enrollment (sic), [the Student] has engaged in self-injurious behavior an average of 339 instances per month within the classroom environment and 501 instances per month within the group home environment.

*Id.*

[7] In addition, the parties' counsel stipulated to this date. See T171.



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21. The new IEP updated the Student's annual goals, which principally addressed improving the Student's behavior and activities of daily living (ADLs), and provided the Student with ESY services. *See* generally J1pp11-31, p37. Both Ms. Tencate and Ms. Joseph agreed the Student continued to require a residential placement, and agreed with the provisions of the new IEP. Joseph T31, 33; Tencate T93-T94. The new proposed IEP was implemented effective June 26, 2019. Joseph T43-T44.

22. The Mother attended the meeting and raised no concerns about the Student's program at Heartspring. Joseph T172. The Mother never raised any concerns with the District regarding the Student's placement or program at Heartspring until December 16, 2019. *Id.* at T172-T173. To the contrary, Ms. Tencate understood the Student was making educational progress at Heartspring, and was receiving progress reports from Heartspring on a regular basis. Tencate T236-T237.

23. Heartspring developed a new ERP for the Student. J1p47. It identified the restraints or escorts that could be used at Heartspring with the Student. *Id.* It identified that seclusion could be utilized with the Student. In addition to restraint and seclusion, the ERP set out the safety equipment that the Student used to minimize the potential for self-harm: helmet, gloves (mitts), arm splints, kneepads, and leg splints. *Id.*

*The Parents' Concerns About Heartspring*

24. On December 16, 2019, the Mother, who considers herself a "strong advocate" for the Student, sent an "urgent" email to Ms. Tencate and Amy Beth Cook, the District's superintendent. Mother T135; D9. The email stated in part:

> Over the past eight months at Heartspring, [the Father] and I have personally observed an alarming decline in [the Student's] well being (sic)…What we have witnessed during our visits to Heartspring has been very difficult to watch. From the home to the classroom we have not seen proper attention put into addressing [the Student's] behavioral challenges…we have never seen staff tracking behavior data, and witnessed little to no behavior intervention implemented. Over the course of the last 8 months we have received frantic phone calls from [the Student's] teacher, home coordinator, and multiple staff whom are very concerned with [the Student's] well being (sic).
>
> He has become completely sedentary, has gained 28 pounds, and does not want to leave his bean bag, ever…at our last visit we watched him do nothing but; sit, self harm (sic), and eat. We want you to know that we are aware of a current CPS investigation at Heartspring involving another child from [another] school district here in WA state (sic). This child's neglect is very similar to what we are seeing with [the Student]. When the mom of this child confronted Heartspring, they simply sent the child home.
>
> Just to clarify, we too have tried to address our concerns with Heartspring and have observed a general sense of frustration from Heartspring in us doing so. There have been many unanswered questions in regard to [the Student] since his arrival at Heartspring. Some of those include: numerous ear infections without prompt or proper care, two separate seizure incidents ([the Student] had never had a seizure prior to entering Heartspring) without proper follow up, a 28 pound weight gain; which is a 40% body mass increase, a significant decline in desire for preferred activities, headaches and pain needs



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> being ignored following extreme self harm (sic), antecedents repeatedly not identified for extreme behaviors. These are serious issues.
>
> At this point, we have been communicating with Kennedy Krieger Institute, at the recommendation of Dr. Eric Boelter, PHD (sic) BCBA, from Seattle Children's Autism Center. [The Student] has been accepted into their world renown (sic) Bio Behavioral in patient (sic) program. As soon as a bed opens, [the Student] will transfer to their hospital. We do not feel [the Student] is safe nor that his needs are being met in this current placement.

D9.

25. When Ms. Tencate received the Mother's email on December 16, she was "shocked." Tencate T250, T105, T251. Prior to this email, Ms. Tencate had not heard any concerns about the Student at Heartspring from the Parents. *Id.* at T105, T334. As of December 16, the District had no concerns about the Student's medical care at Heartspring. *Id.* at T252. Ms. Tencate forwarded the Mother's email to Heartspring on December 16 to find out what was going on at Heartspring. *Id.* at T251. Ms. Tencate understood from the Mother's email that the Parents were requesting a different placement for the Student. *Id.*

26. Ms. Tencate forwarded the Mother's email to Ms. Joseph, who was "extremely surprised" because the District had not received any concerns from the Parents about Heartspring before the Mother's email. Joseph T173.

27. On December 18, 2019, the Mother sent another email to Ms. Tencate. D10p2. The email stated that:

> I wanted to update the team that [the Student] will be returning to WA state (sic) on December 28th with his Dad and I. [The Student] will be working with his team here in WA in order to address behavioral, psychological, and medical concerns that have come up over the past eight months since entering Heartspring. [The Student's] WA team will then coordinate care and help transition [the Student] to Kennedy Krieger Institute when a bed opens.

*Id.*

28. The next day, December 19, 2019, Ms. Tencate responded to the Parents via email. *Id.* The email stated, in part:

> The district is sorry to hear of your decision to unilaterally remove [the Student] from Heartspring, as based upon the information the district has received, [the Student] has made progress in his program and placement there. His Progress was such that earlier in October, Heartspring reported that he would be able to come home for a week to visit during the holidays. It is our understanding that you declined to have him return home for that visit.
>
> As you have nonetheless express (sic) concerns with his program, we have attempted to schedule an IEP team meeting with you and Heartspring…Unless and until the IEP team determines that Heartspring is no longer an appropriate program and placement, the district remains in support of [the Student] remaining at Heartspring.



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> Consequently, please understand that you will be solely responsible for choosing to unilaterally bring [the Student] home and place him at a different facility. While that is ultimately your right as parents, the district will not fund any costs associated with his unilateral transport home and/or placement at Kennedy Krieger or any other program not agreed upon by his IEP team.
>
> Please let me know if you are willing to reconsider meeting with the IEP team *prior* to making any unilateral program changes.

*Id.*, (emphasis in original).

29. Later on December 19, the Mother called Ms. Tencate and they spoke on the phone. Tencate T256. The Mother clarified for Ms. Tencate that it was not her intent to unilaterally remove the Student from Heartspring. Rather, it was her intent to make sure the Student received medical care. *Id.*

30. Ms. Tencate followed her phone conversation with the Mother with an email to Heartspring and the Parents. D10p1. Ms. Tencate stated in her email that:

> As per my conversation with [the Mother], she will NOT be unilaterally removing [the Student] from Heartspring. She does still continue to have some questions. As such, I believe it's important that we have a meeting to discuss her concerns and clarify the situation. [The Mother] indicated that she is involved in monthly meetings with Heartspring. I believe it's important that we are involved in those conversation as well. When you schedule the next meeting, please make sure that Keri and I can participate.

*Id.*, (emphasis in original).

31. The Mother responded with her own email to Ms. Tencate and Heartspring the same day. D10p1. The Mother stated:

> As Miriam [Tencate] stated in the previous email; [the Father] and I do not intend to unilaterally place [the Student]. It is our intent to have [the Student] remain at Heartspring. We will plan to visit this coming week. Hopefully we can schedule a time for us all to discuss our concerns and work together on them as a team.

*Id.*

32. The Mother arrived at Heartspring on December 26, 2019. The following day, Heartspring staff and the Mother, along with Ms. Tencate and Ms. Joseph appearing by telephone, participated in a meeting requested by Heartspring. The purpose of the meeting was to discuss a newly drafted communication plan between the Parents and Heartspring staff.[8] D13p1. Heartspring felt it was necessary to draft a communication plan that all parties could agree to. *Id.* The Mother verbally agreed to the communication plan at the meeting. *Id.*

[8] Prior to this meeting, Ms. Tencate expressed the Mother's concerns about the Student's medical care to Heartspring staff. Tencate T258. In turn, Heartspring staff expressed their concerns about communication with the Parents, which is why Heartspring drafted a communication plan. *Id.* at T258, 259; see D13p3.



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33. At the meeting on December 27, 2019, the Mother also raised behavioral and medical concerns about the Student's program at Heartspring, and reported that the Student remained on the waiting list for Kennedy Krieger.[9] *Id.*

34. Ms. Joseph characterized the tone of the meeting as "difficult." Joseph T176. She opined that the Mother's "aggressiveness in the meeting towards Heartspring made it very difficult to come out with some good outcomes and some good next steps." *Id.* at T177. "There were a lot of accusations made by [the Mother] about what was or was not going on at Heartspring without a lot of questions being asked to try to really resovle the issues at hand." *Id.*

35. Ms. Tencate opined that at the meeting "the tone wasn't problem-solving collaboration. [The Mother] expressed her concerns very strongly…which is fine…I feel a parent has the right to advocate for their child. But also, on the flip side, we need to be able to problem-solve any issues that might arise. So they went through the communication plan." Tencate T259.

36. The team agreed to hold another IEP meeting in January 2020. *Id.*; D13p1. Ms. Tencate requested a Release of Information from the Mother so she could speak with Kennedy Krieger about timing of a placement for the Student, but the Mother did not respond. Tencate T262-T263.

37. On January 9, 2020, the Mother emailed Ms. Tencate and Heartspring a list of the Parents' concerns over the last eight months. *Id.* at T260, T264.

38. Ms. Joseph travelled to Heartspring over January 14 and 15 to see if she could confirm the Mother's concerns.[10] Joseph T77, T181. She wanted to see the Student in his program and ensure that what the District was providing at Heartspring was an appropriate educational placement for the Student. *Id.* at T182. Based on her observations, Ms. Joseph had no concerns for the appropriateness of his educational program at Heartspring. *Id.* at T186. Ms. Joseph opined, "I absolutely saw a different child than had left us here in Lake Stevens. He had made an enormous amount of progress." *Id.* at T186.

39. On January 20, 2020, the Parents' attorney, Scot Johnston, wrote a letter to Ms. Tencate. J2pp47-50. In part, the letter set out the Parents' proposals to amend the Student's IEP. *Id.* Mr. Johnston also stated that it "should also be noted that [the Student] will be going to the Kennedy Krieger institute (sic) for medical reasons when a bed there becomes available. The revised IEP will thus be in effect during the interim period before he leaves, and when he returns to Heartspring or another placement." *Id.* at p50.

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[9] Ultimately, the Student never went to Kennedy Krieger. Mother T397-T398.

[10] Ms. Joseph gave somewhat inconsistent testimony regarding the dates she visited Heartspring. She first testified that she was at Heartspring on January 14 and 15. Joseph T77. Later, she identified January 15 and 16. *Id.* at T181. Ms. Joseph's notes from her trip to Heartspring are dated January 15, 2020. D15p1.The PWN for the January 22, 2020 IEP Amendment meeting stated Ms. Joseph observed the Student at Heartspring on January 14 and 15, 2020. J2p46. It is found more likely than not that she visited on January 14 and 15, 2020.



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40. As of January 20, 2020, the Parents were not questioning that the Student would return to Heartspring after going to Kennedy Krieger. Mother T406. The Parents have "never disputed Heartspring as a placement." *Id.*

*The January 22, 2020 IEP Amendment Team Meeting*

41. On January 22, 2020, the Student's IEP team held a meeting to consider amending the Student's IEP. J2p3. Ms. Tencate, Ms. Joseph, the Mother, and counsel for the parties all participated by telephone from the same location. Joseph T47-T49, Tencate T97-T98.

42. The team updated the Student's present levels of performance and created new goals for the Student, as he had already achieved many of his annual IEP goals. J2p45, *see generally* J2pp8-36. The team also added consultation with a Board Certified Behavioral Analyst (BCBA) and paraeducator training on the principals of Applied Behavior Analysis (ABA) to the Student's IEP. *Id.* at p45. The IEP amendment noted, "[the Student] has developed positive trusting relationships with staff in the classroom and with students in the classroom." *Id.* at p19.

43. The IEP team determined that the Student continued to require a residential placement in order to obtain FAPE. Joseph T49, T52, Tencate T100; J2p42.

44. At the end of the IEP meeting, Ms. Tencate informed the Parents that Heartspring would no longer serve the Student. Tencate T103, T266, Mother T433-T434, Joseph T56.

45. Heartspring staff had asked Ms. Tencate the day before the IEP meeting to communicate to the Mother that it was going to terminate the contract with the District to serve the Student. Tencate T103, T266, T102. It was not the District's decision to remove the Student from his residential placement at Heartspring. Tencate T279-280.

46. The day after the IEP meeting, Megan Swett, the division director for Heartspring, wrote a letter to Ms. Tencate. J2p47. Ms. Swett wrote in part:

> It has become increasingly clear over the past few months that Heartspring does not have a collaborative working relationship with [the Student's] mother, and we are not optimistic that such a relationship can be developed. This is particularly noticeable in the area of the medical care provided to [the Student] while enrolled at Heartspring. We do not seem to be able to provide a level of care that is acceptable to [the Mother], despite the fact that our standards and practice are at otherwise acceptable levels.
>
> Based on this, we are issuing a 30-day dismissal notice for [the Student] effective on the date of this letter. Heartspring will not provide services for [the Student] beyond February 23, 2020.

*Id.*

*The District's Search for a New Residential Placement*

47. By this time, Bancroft, a residential placement facility Ms. Tencate and Ms. Joseph first visited in February 2019 during the search that finally resulted in the Student's placement at Heartspring, had been approved as a Non-Public Agency (NPA). Tencate T266; D19p9. This allowed the District to seek financial assistance through the Washington State Office of



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Superintendent of Public Instruction (OSPI) to assist with the cost of placing the Student at Bancroft. Bancroft had been the District's second choice behind Heartspring during the initial search for the Student's residential placement. Joseph T73. Ms. Tencate and the Parents focused on Bancroft as a potential provider for the Student's residential placement. Tencate T266, T274-T275, Mother T411.

48. The Mother signed a Release of Information (ROI) at the IEP meeting, which allowed Ms. Tencate to communicate with and send the Student's records to Bancroft. *Id.* at T266, T270. Ms. Tencate contacted Bancroft by January 24, 2020. *Id.* at T274-T275; D21p59. Ms. Tencate arranged to visit Bancroft again with Ms. Joseph in February 2020 to observe the program and speak with staff. Tencate T275.

49. After the IEP meeting, Parents' counsel, Mr. Johnston, sent Ms. Tencate a list of possible residential placement providers the Parents wanted the District to consider. *Id.* at T267.

50. On January 28, 2020, Bancroft informed Ms. Tencate that it would not be able to admit the Student before February 24, 2020, the day after Heartspring would stop serving the Student. D21p64. At that time, Bancroft was "looking at possibly a spring admission" for the Student. *Id.*

51. Ms. Tencate contacted the Anderson Center regarding a placement for the Student on January 31, 2020. Tencate T358-T359; D20p15. The same day, Ms. Tencate contacted the Monarch Center for Autism about a possible placement. Tencate T362; D25p15.

52. Ms. Tencate and Ms. Joseph visited Bancroft for two days in February 2020. Tencate T277. They determined that Bancroft could implement the Student's IEP, and Bancroft agreed. Tencate T279. Bancroft hoped to have space for the Student by mid-April to mid-June. *Id.* at T279, T281.

*The Student Returns Home From Heartspring*

53. The Student returned from Heartspring to the Parents' residence in the District on February 24, 2020. D17p1.

54. On March 5, 2020, the Mother sent Ms. Tencate an email. D17. The email stated in part:

> As you know [the Student] has been home since February 24th. During this time we have been able to address much of the medical concerns which arose during [the Student's] time at Heartspring. Within the next two weeks all of [the Student's] medical needs will have been addressed.
>
> This morning I had a conversation with Kennedy Krieger. There is no timeline as to when a bed will be available for [the Student]. Because we have addressed [the Student's] medical concerns here in WA, **we feel confident moving forward with commiting (sic) to send [the Student] to Bancroft as soon as a bed opens**. The Bancroft program is very similar to Kennedy Krieger and will be able to meet [the Student's] needs. We do not plan to pursue Kennedy Krieger any further at this time.

*Id.*, (emphasis added).



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55. The Mother's email was the first notice to Ms. Tencate that Kennedy Krieger was no longer a potential placement for the Student. Tencate T286.

56. Ms. Tencate responded via email the same day, stating, "We are continuing to work with Bancroft regarding a placement for [the Student]. I will be in touch when we know more information." D17.

57. On March 12, 2020, Governor Inslee issued Proclamation 20-08.[11] That proclamation prohibited public school districts, charter schools, and private schools in King, Pierce, and Snohomish counties from conducting in-person educational, recreational, and other K-12 programs in their school facilities because of the Covid-19 pandemic.

58. On March 13, 2020, Governor Inslee issued Proclamation 20-09, which extended the provisions of Proclamation 20-08 to all counties of Washington State.

59. On March 13, 2020, OSPI issued Bulletin No. 019-20, regarding guidance for long-term school closures. In part, the Bulletin provided that:

> Districts should communicate the expectation and plan to meet with Individualized Education Program (IEP) teams, including parents, when school resumes, to address student-specific needs resulting from the closure. This might include discussions of compensatory education and extended school year (ESY) services, made on a case-by-case basis. **Any need for compensatory services related to school closure or inability to fully implement a student's IEP will be addressed after school resumes.** When educational services are provided, districts will want to collect progress data for IEP goals in order to inform parents and IEP teams and assist in compensatory service decisions later.
>
> **Districts should prioritize health and safety of students, staff, and communities**. Districts should identify and acknowledge service delivery limitations, as well as the need for districts to "make every effort to fully implement a student's IEP or 504 plan" once school resumes.2 This requirement to "make every effort…" does not allow a district to decline all services to students with an IEP and only offer compensatory services at a later date.
>
> Districts should clarify their expectation and plan to meet with IEP teams, including parents, **when school resumes** to address student-specific needs resulting from the closure. **This might include discussions of compensatory education** and extended school year (ESY) services made on a case-by-case basis. **Any need for compensatory services related to school closure or inability to fully implement a student's IEP will be addressed after school closures end.**

Bulletin No. 019-20, pp4-6, (internal footnotes omitted, emphasis added).

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[11] Proclamation 20-08 was not offered as an exhibit at the due process hearing. However, the parties' counsel agree that this administrative tribunal may take official notice of such proclamations as judicially cognizable facts pursuant to Revised Code of Washington (RCW) 34.05.452(5). In addition, the parties' counsel agree that official notice may be taken of published guidance by the U.S. Department of Education, and the Washington State Office of Superintendent of Public Instruction. *See* Parents' Post-Hearing Brief at page 10; District's Post-Hearing Brief at page 12.



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60. The Student was [redacted] " *Id.*

61. On March 16, 2020, the District "closed" because it "could no longer hold in-person services" pursuant to the Governor's proclamations. Tencate T304, T370.

62. On March 19, 2020, the Parents filed their Due Process Hearing Request (the Complaint).

63. On March 19, 2020 via email, Ms. Tencate followed up with Bancroft, asking "Is Bancroft still accepting new residents or are you waiting until COVID-19 subsides?" D21p14.

64. Bancroft replied on March 20, stating in part "As of now we are planning to admit youth, however, many of the youth who were pending discharge to other programs have been put on hold as those programs are not taking new admissions for the foreseeable future." *Id.*

65. On March 23, 2020, Governor Inslee issued Proclamation 20-25, the "STAY HOME – STAY HEALTHY" Order. The Order permitted only individuals in designated "essential businesses" to work outside of their homes. School district employees providing direct, in-person services to students were not identified as able to work outside their homes.

66. On April 2, 2020, the District filed its Response to the Complaint. In part, the Response informed the Parents that:

> Parent and the District have agreed that Bancroft Neurohealth in New Jersey…a current NPA, has the qualifications to implement the Student's IEP…Once a new facility is identified that is qualified and available to implement the Student's IEP, the District will work with Parent and that facility to consider any appropriate compensatory education services at that time.

Response pp3-4. Ms. Tencate confirmed at the due process hearing that once the Student is admitted to an appropriate residential facility, the District is prepared to consider any appropriate compensatory education for the Student. Tencate T325-T326.

67. On April 2, 2020, the District received ROIs from the Mother for four potential residential providers. D20p4, D22p11, D24p4, D25p5. The Mother offered to sign ROIs because "I was frustrated that the District, even though they brought up these different options, had not pursued them, but instead only pursued one option." Mother T421-T422. The District "already said they were looking at other options." *Id.* at T423.

68. By April 2, Ms. Tencate did not believe there were any spaces available for Student at Melmark, Monarch, Anderson Center, or NECC. Tencate T376. Because of this, she did not think it was necessary to send ROIs to the Parents prior to this date. *Id.* Additionally, by this date Bancroft "had already accepted Student." *Id.* at T377. Bancroft was hoping to enroll the Student by mid-April to mid-June, and Ms. Tencate had communicated to the Parents that Bancroft was willing to serve the Student. *Id.*

69. After receiving the four ROIs, Ms. Tencate contacted Grafton, a potential residential provider, on April 3, 2020. D22p10; Tencate T360. On April 29, 2020, Grafton declined to serve the Student. D22p3.



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70. Ms. Tencate contacted Melmark, another potential residential provider, again on April 3, 2020.[12] D24p4; Tencate T361. On April 16, 2020, Melmark declined to serve the Student because it did not have an appropriate program to meet the Student's needs. D24p2.

71. On April 6, 2020, Governor Inslee issued Proclamation 20-09.1, which extended the provisions of Proclamations 20-08 and 20-09, through June 19, 2020, effectively closing all schools statewide through the end of the 2019-2020 school year. The proclamation also extended the Stay-Home Stay-Healthy Order, but provided that:

> FURTHERMORE, if a public school or private school determines that the provision of in-person educational services on the premises of a school facility is essential and necessary under state or federal law, nothing in this order precludes the school from providing the services on site. However, **schools are prohibited from providing these essential and necessary services unless state Department of Health guidelines for social distancing and proper hygiene practices are followed at all times.**

(Emphasis added)**.**

72. On April 7, 2020, Ms. Tencate contacted Monarch, another potential residential provider. D25p11. At that time, Monarch was still taking new admissions. Tencate T363. On April 21, 2020, Monarch declined to serve the Student because the Student required a higher level of intervention than Monarch was able to provide. D25p2.

73. On April 8, 2020, OSPI issued Bulletin No. 031-20, regarding guidance for long-term school closures. In part, the Bulletin provided that:

> If districts determine that the use school facilities to provide educational services is essential and necessary under state or federal law, the following guidelines must be followed:
>
> Any gatherings within school facilities must comply with applicable social distancing directives and health guidelines. Districts must continue to monitor and implement guidance from state and local health officials.

OSPI Bulletin No. 031-20, pp2-3.

74. On April 20, 2020, the Anderson Center for Autism, another potential residential provider, declined to serve the Student because it determined he required a higher level of staffing support than it could provide. D20p2.

75. From February 24, 2020, when the Student returned to Washington State, through the due process hearing on May 14, 2020, the District has not offered any compensatory education services for the Student. Joseph T82, Tencate T114, Mother TT127-T128. The District has offered the Parents "interim" services. Joseph T82. The interim services were services provided by a BCBA to the Parents to assist them with providing behavioral supports for the Student at their home while schools are closed during the COVID-19 pandemic. *Id.* at T82-T83. The Parents

[12] Ms. Tencate initially attempted to contact Melmark on January 31 and February 4, 2020. TencateT293; D24p17.



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declined the District's offer of interim services because they were already working with a BCBA. *Id.* at T84.

*The District's Consideration of Developing Its Own Placement for the Student*

76. Based upon the experience of District staff working with the Student at Skyline Elementary School before he was placed at Heartspring, and their understanding of the current restrictions imposed by Governor Inslee closing schools and imposing social distancing, Ms. Tencate and Ms. Joseph do not believe the District can provide the direct, in-person services required in order to provide an appropriate education placement for the Student. Joseph T85, Tencate 315.[13]

77. Ms. Joseph explained her opinion in greater detail, stating:

> We would need to be able to have access to [the Student] in person. And at the moment the health and safety related needs of students are paramount. We don't feel like we can serve [the Student] and maintain the health of staff members or be sure to maintain [the Student's] health during the current COVID circumstances.

Joseph T209.

78. Ms. Tencate explained her opinion is based on the experience of District staff working with the Student at Skyline Elementary School, including the Student's aggressiveness, the need for staff to be in close proximity to the Student, the need for staff to physically restrain the Student during escalated periods, and staff being injured working with the Student. Tencate T315, T325.

79. The Mother confirmed that at least one member of the Student's treatment team here in Washington State is also unable to provide direct, in-person services to the Student during the COVID-19 pandemic. Mother T122 ("Due to the COVID (Dr. Boelter) has not seen [the Student] in the clinic. He's only doing phone conferences.").

## CONCLUSIONS OF LAW

### The IDEA and Jurisdiction

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and subject matter of this action for the Superintendent of Public Instruction as authorized by 20 United States Code (USC) §1400 *et seq*., the Individuals with Disabilities Education Act (IDEA), Chapter 28A.155 Revised Code of Washington (RCW), Chapter 34.05 RCW, Chapter 34.12 RCW, and the regulations promulgated thereunder, including 34 Code of Federal Regulations (CFR) Part 300, and Chapter 392-172A Washington Administrative Code (WAC).

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief, in this case the Parents. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

[13] The Parents objected to Ms. Tencate's testimony on this matter at the due process hearing. After careful consideration of the all the evidence presented at the hearing, the Parents' objection is overruled, and Ms. Tencate's testimony on this matter is admitted.



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

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

*Rowley,* 458 U.S. at 206-207 (footnotes omitted). For a school district to provide FAPE, it is not required to provide a "potential-maximizing" education, but rather a "basic floor of opportunity." *Rowley,* 458 U.S. at 200 - 201.

4. The Supreme Court recently clarified the substantive portion of the *Rowley* test quoted above:

> To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. . . [H]is educational program must be appropriately ambitious in light of his circumstances . . .

*Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999-1000 (2017). The Ninth Circuit has explained the *Endrew F.* standard as follows:

> In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child's disabilities so that the child can "make progress in the general education curriculum," 137 S. Ct. at 994 (citation omitted), taking into account the progress of his non-disabled peers, and the child's potential.

*M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1201 (9th Cir.), *cert. denied*, 583 U.S. ___, 138 S. Ct. 556 (2017).

5. Procedural safeguards are essential under the IDEA. The Ninth Circuit has stated:

> 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 (9th Cir. 2001).

6. Procedural violations of the IDEA amount to a denial of FAPE, and therefore warrant a remedy, only if they:



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(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.

WAC 392-172A-05105(2). *See also* 34 CFR §300.513; 20 USC §1415(f)(3)(E)(ii).

*Did the District violate the IDEA and deny the Student FAPE beginning February 24, 2020, by failing to provide him with an educational placement that can provide all the specially designed instruction and related services called for in his January 20, 2020 IEP?*

7. The District expressly concedes it has been unable to implement the Student's January 2020 IEP Amendment from February 24, 2020, when the Student returned to Washington State, through the current time. District's Post-Hearing Brief, p.16. This is a procedural violation of the IDEA. Under the facts in this case, the procedural violation clearly denies the Student FAPE because it is a complete failure to implement his IEP. Accordingly, it is concluded the Student is owed a remedy for the denial of FAPE.

8. Although the Student has been denied FAPE, it is concluded that the denial of FAPE is due to no fault of the District. The District did not terminate the contract with Heartspring. Furthermore, given the facts in this case it is concluded that once the District learned of Heartspring's intent to terminate the contract, the District undertook a diligent and sustained search to identify and place the Student in a new residential placement that could implement his IEP. But for the unforeseeable emergence of the COVID-19 pandemic and resultant impact on school districts and other educational providers across the entire nation, the District's efforts more likely than not would have resulted in the Student being placed in a new, appropriate residential facility by now. However, as the Parents correctly argue, "impossibility" is not a defense that relieves the District of its obligation to provide the Student FAPE. *See*, e.g., *District of Columbia Pub. Schs*., 120 LRP 8116 (SEA DC 01/03/20)(School districts cannot use an "impossibility" defense to thwart a parent's claim of FAPE denial where no private school will accept a child), *citing Schiff v. District of Columbia.,* 2019 WL 5683903 (D.D.C. Nov. 1, 2019).

*Are the Parents entitled to compensatory education and related services to allow the Student to obtain an educational benefit considering his unique needs that includes all the specially designed instruction and related services he needs?*

9. 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), *cited with approval in R.P. v. Prescott Unif'd Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011). 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. 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.



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10. Given that an award of compensatory education is an equitable remedy, the unique circumstances leading to any denial of FAPE to a student may be considered when determining the appropriate type and quantum or amount of a compensatory award. In the Student's case, consideration of the circumstances does not support the Parents' assertion that the period for any compensatory award should begin with the Student's return to Washington State on February 24, 2020. While the Student returned from Heartspring that day, the evidence is clear that the Student was not able or available to receive any special education services while he was receiving necessary medical services. Tellingly, the Mother confirmed that as of [redacted] Having concluded that the District was not at fault for the denial of FAPE, it would be inequitable to hold the District accountable for failing to implement the Student's IEP during a period of time when the Student was clearly unable to participate in any implementation of his IEP. Accordingly, it is concluded that the period at issue for determining an appropriate compensatory remedy begins March 16, 2020, giving all the benefit of the doubt to the Parents that the Student would have sufficiently [redacted] the day prior to be ready and able to participate in any implementation of his IEP.

11. Any award of compensatory education must be based on the evidence, and that evidence must provide reasonable certainly to determine what kind and how much compensatory education a student is entitled to. Absent such reasonably certainty, there is authority supporting a denial of any compensatory education despite a demonstrable violation and denial of FAPE. *See e.g*., *Bethel Sch. Dist*., 109 LRP 39477 (SEA WA 2009). In that case, the parent established a violation of the IDEA that warranted an award of compensatory education. However, the evidence was not sufficiently certain to determine the type or quantum of compensatory education the student would be entitled to *at some point in the future*. Determining that the requested compensatory education remedy to be provided at some future time was too speculative, the parent was denied any compensatory education award.

12. In this case, the District makes a similar argument that an appropriate compensatory education award cannot be determined based on the evidence *at this time*. District's Post-Hearing Brief, pp. 19-20. The Parents concede that it is difficult to craft "an appropriate remedy for the clear violation of the IDEA this case presents." Parents' Post-Hearing Brief, p17. The Parents concede that because the Student's January 2020 IEP Amendment provides the Student with "twenty-four hours a day of educational services year-round…traditional compensatory services, such as additional hours for tutoring outside of the school day or school year, is simply not appropriate." *Id*. at pp.18-19. The Parents propose as an appropriate equitable remedy that the District be ordered to provide 24 hours of compensatory services to the Student for each day the Student has gone without services. *Id*. at p.19. This is effectively a request for an hour-for-hour compensatory remedy. The Parents then propose the Student have access to these services at some point in the future if the Student's need for services "is reduced to a more traditional school week during a more traditional school year." *Id*. In the alternative, the Parents propose the Student access the compensatory education services after his twenty-first birthday if he continues to be enrolled in a year-round educational residential placement. *Id*. Given the Student is presently 11 years old, under the Parents' proposal it is possible the Student would not access any compensatory education award for nearly a decade. For the following reasons, the undersigned concludes that the Parents' proposed award of compensatory services is too speculative, and should be denied *at this time*.

13. Under the more typical fact-pattern, if a presiding ALJ determines there is a violation of the IDEA and awards compensatory education, that award is intended to make a student "whole"



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for some denial of FAPE *up to the point in time the ALJ enters his/her order*. That is because if there is a continuing violation and denial of FAPE at the time the ALJ enters his/her order, the ALJ will order a school district to correct the continuing violation. Compensatory education is essentially a remedy for a violation that occurred from some point of time in the past up to entry of an ALJ's decision, while the remedy for any ongoing denial of FAPE is an order for a District to cure the violation going forward. Here, the Parents argue they should receive a compensatory education award that would continue to accrue for some undetermined period of time *after* entry of this Final Order. Such an award is problematic for multiple reasons.

14. The Parents address the uncertainty of how long it may be until the Student is returned to an appropriate residential placement by asking for what amounts to an hour-for-hour compensatory education award – that is to say 24 hours of compensatory education for each day until the Student returns to an appropriate placement. However, as discussed above, there is no legal obligation to provide a day-for-day or hour-for-hour compensatory education award for time missed. Parents of Student W*., supra.* Indeed, such an hour-for-hour analysis to determine an appropriate compensatory education award has, over time, generally become a disfavored analytical framework. The primary rationale for this is that it is not an *individualized* determination, taking into account any other circumstances of a disabled student. Such an individualized determination of a compensatory education award is clearly more consistent with the essential nature of the IDEA itself – that a student must be provided with an education *individualized* for that unique disabled student.

15. Given the unprecedented impacts of the COVID-19 pandemic across the nation, the current legal mandates prohibiting schools from providing even essential and necessary services unless state Department of Health guidelines for social distancing and proper hygiene practices are followed at all times, and the individual needs of the Student requiring multiple staff to be in direct physical contact likely multiple times each day, it is simply impossible at this time to reasonably estimate when the Student might be able to return to an appropriate educational placement. Accordingly, it is concluded that awarding the Parents what amounts to an open-ended compensatory award going forward is not reasonable or supported under the law.

16. Attempting to determine a compensatory education award for the Student at the present time may ultimately be to the Student's detriment. At this time, it cannot be determined how long it will be until the Student can return to an appropriate residential program. Consequently, it cannot be determine at this time how much regression the Student may experience due to a lack of appropriate services, or how long it may take for the Student to recoup any lost skills or progress he has made. It is possible that by the time the Student can return to an appropriate placement, he could require *more than* an hour-for-hour compensatory education award. It is also possible that by the time the Student is able to return to an appropriate placement his need(s) for services available to him under the IDEA may have materially changed. Due to the impact of the lack of an appropriate placement for some undetermined period of time going forward, the Student may need to be evaluated before an individualized determination of compensatory education can be made.

17. Guidance from the U.S. Department of Education (DOE) also supports a conclusion that it is not appropriate or in the best interests of the Student to attempt to determine a compensatory education award at the present time. DOE guidance advises that if a student misses school due to the COVID-19 pandemic, the Student's IEP team must make an individualized determination whether the Student requires compensatory education *once the student returns to school*.



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*Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak,* 76 IDELR 77 (EDU 2020).

18. In summary, the evidence does not support a determination or award of compensatory education *at the present time*. To the extent the Parents request such determination or award at the present time, the Parents' request is denied.

19. Although no award of compensatory education will be granted at the present time, the Student is nonetheless entitled to an award of compensatory education for his ongoing denial of FAPE, as concluded above. Accordingly, within twenty school days[14] of the Student returning to an educational placement that can implement his January 2020 IEP Amendment, or this then-current IEP, the District shall convene the Student's IEP team. The IEP team will decide what further action, if any, is necessary in order to determine the type and amount of compensatory education the Student is entitled too. If the IEP team believes the Student requires a reevaluation in order to determine his compensatory education award, the reevaluation will be conducted in compliance with all applicable regulations in chapter 392-172A WAC. Within ten school days of completing the reevaluation, the Student's IEP team will reconvene and determine an appropriate compensatory education award. If the Parents disagree with the IEP team's determination, they shall have the right to request a due process hearing to contest the determination. The period at issue to determine the Student's compensatory education award shall begin March 16, 2020, and continue through the day before the District returns the Student to an educational placement that can implement his January 2020 IEP Amendment, or the Student's then-current IEP should the Student's IEP be amended in the interim.

*Are the Parents Entitled to an educational placement moving forward that is reasonably calculated to enable the Student to receive an educational benefit considering his unique needs that includes all the specially designed instruction and related services that he needs?*

20. It is concluded that the Parents are entitled to an educational placement moving forward that provides the Student FAPE. That is the heart and soul of the IDEA. The critical question is how can such an educational placement be provided now in light of the COVID-19 pandemic? At present, the evidence does not support finding there is any appropriate residential placement available at which the District could place the Student. However, the District is ordered to continue a diligent and sustained search for such a residential placement, and as quickly as possible pursue placement of the Student at such placement once identified.

21. It is unclear from the Parents' Post-Hearing Brief if, rather than asking for a new, appropriate residential placement like Heartspring or Bancroft, they are asking for the District to create its own appropriate placement for the Student, as the District did at Skyline Elementary School. If the Parents are asking that the District create its own residential placement for the Student at the present time, that remedy is denied. Both state and federal guidance emphasize the primacy of ensuring the health and safety of all students and school district staff during this pandemic. Given the current restrictions due to the pandemic, including the need to maintain social distancing, and the Student's unique needs for very frequent and very intensive physical

[14] Twenty school days is permitted in order to provide the Student with a reasonable period of time to acclimate to his new educational placement, and to provide feedback to the IEP team.



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interventions, it is concluded that it is likely not feasible at the present time to develop and implement such an appropriate program while also ensuring the health and safety of the Student and any District staff that would serve the Student.

22. The Parents' request for any additional relief this tribunal may find just and equitable is denied.

## ORDER

The Lake Stevens School District has violated the Individuals with Disabilities Education Act and denied the Student a free appropriate public education. The Parents are awarded the remedy in Conclusions of Law, paragraphs 19 and 20, above. The Parents' remaining requested remedies are denied.

Signed on the date of mailing.

MATTHEW D. WACKER
Administrative Law Judge
Office of Administrative Hearings

## Right To Bring A Civil Action Under The IDEA

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



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One Union Square, Suite 1500
600 University Street
Seattle, WA 98101-3126
(206) 389-3400 1-800-845-8830
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that today I served this document on each of the parties listed below. I emailed via secure email or mailed a copy to the parties at their addresses of record using Consolidated Mail Services or U.S. Mail.

Parents
[redacted]

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Dated August 5, 2020 at Seattle, Washington.

*lan*

Representative
Office of Administrative Hearings
600 University Street, Suite 1500
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cc: Administrative Resource Services, OSPI



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