

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Yelm School District

Docket No. 11-2023-OSPI-02091

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

Agency: Office of Superintendent of
Public Instruction

Program: Special Education

Cause No. 2023-SE-0185X

A due process hearing was held before Administrative Law Judge (ALJ) Pamela Meotti on January 22 and 23, 2024, in Yelm, Washington. The Parent of the Student whose education is at issue¹ appeared and was represented by Matthew Ramsey, Rule 9 Intern, and Gregory McBroom, attorney at law. The Yelm School District (District) was represented by Lynette Baisch and Kimberly Shely, attorneys at law. Also present for the District were Shannon Powell, Director of the Office of Student Support, and Ellen Cavanaugh, Assistant Director of the Office of Student Support.

STATEMENT OF THE CASE

Procedural History

On November 6, 2023, the Parent filed a Due Process Hearing Request (Complaint) stating that the request involved a special education disciplinary matter. The matter was assigned to ALJ Pamela Meotti. The District filed a response on November 16, 2023. Prehearing conferences were held on November 14 and 21, and December 14, 2023. Following briefing and argument, the ALJ determined that the matter did not raise issues that required an expedited timeline. *Order on Expedited Status, November 21, 2023; Order Denying Parent's Objection to Order on Expedited Status and Request for Reconsideration, December 12, 2023.* The ALJ granted the District's Motion for Partial Summary Judgment on January 10, 2024. *Order Granting Partial Summary Judgment, January 10, 2024; Order Denying Request for Reconsideration, January 12, 2024.*

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

Due Date for Written Decision

The deadline for a written decision in this matter was extended at the District's request to thirty (30) days after the record of the hearing closes. The record of the hearing closed on March 1, 2024, at 5:00 p.m., when the parties timely submitted post-hearing briefs. The due date for a written decision is March 31, 2024.

EVIDENCE RELIED UPON

Exhibits Admitted:

Joint Exhibits: J1 through J14.²

Parent Exhibits: P2 through P17.

Witnesses Heard (in order of appearance):

The Parent

Shannon Powell, Director of the Office of Student Support

Chris Clark, District Assistant Principal

Michael Holman, District Special Education Teacher

Bryant Mettler, District Special Education Teacher.

ISSUES

The issues for the due process hearing are:

- a. Whether the District violated the Individuals with Disabilities Education Act (IDEA) and denied the Student a free appropriate public education (FAPE) by:
 - i. Removing the Student from his current educational placement because of disciplinary actions for over ten consecutive school days and/or a series of removals that constituted a pattern;
 - ii. Failing to hold a manifestation meeting with the Parent and all relevant members of the Student's Individualized Education Program (IEP) team

² Citations to the exhibits of record are by party (P for the Parent; D for the District) and page number. For example, a citation to P6p1, refers to page 1 of Parent's Exhibit 6. Citations to the transcript of record are to "T" followed by the page number. For example, a citation to T214, refers to page 214 of the transcript.

within ten days of October 13, 2023, to determine whether the Student's actions were caused by conduct related to the Student's disability, or a direct result of the District's failure to implement the Student's IEP; and

- iii. Failing to follow proper procedures in modifying the Student's placement and IEP under the IDEA and applicable provisions of the Washington Administrative Code, when the Parent did not participate in the meeting or decision-making process.

Order Setting Due Process Hearing and Issues for Hearing, December 15, 2023.

The Parent's Complaint requested the following remedies:

- i. An order requiring the District to hold a manifestation determination meeting;
- ii. An order requiring the District to conduct a functional behavioral assessment (FBA) and create a behavior intervention plan (BIP), or review and modify the Student's existing BIP, as necessary, to address his behavior;
- iv. An order that the District evaluate the Student's academic needs and, if necessary, develop an IEP or modify the Student's existing IEP;
- v. An order returning the Student to the educational placement he attended prior to his disciplinary removal;
- vi. An order reversing the revocation of his enrollment in the District;
- vii. Or other equitable remedies, as appropriate.

Id. However, for the reasons set forth in the *Order Granting Partial Summary Judgment, January 10, 2024*, the ALJ determined that remedies seeking an order to reverse the revocation of the Student's enrollment in the District or to require the District to offer FAPE prospectively are not available.

FINDINGS OF FACT

Background

1. The Student has been eligible for special education services under the category of emotional behavioral disability (EBD) since February 2022, when he was in seventh grade. J1pp3, 6, 26-27.

2. [REDACTED]

T50.

3. At the time of the hearing, the Parent and Student resided in the Eatonville School District. T171. The Student was admitted to the District as a nonresident student for the 2022-2023 and 2023-2024 school years. T175-76; J3pp3, 17.

4. During the 2022-2023 school year, the Student was in eighth grade and attended Yelm Extension School (YES) in the District. J3p3.

5. In the fall of 2022, the District conducted a functional behavioral assessment (FBA) of the Student. J2. The Student's FBA team reviewed data related to his behavior and determined that the following target behaviors were significantly reducing his access to his education: elopement; refusal to comply; unexpected social behavior towards people; and verbal aggression. J2p29. The team determined it was necessary to develop a behavior intervention plan (BIP) to reduce the target behaviors. J2p29.

April 2023 IEP and BIP

6. On April 14 and 21, 2023, the Student's Individualized Education Program (IEP) team met to review his IEP and to develop a BIP. J3pp1, 3; J4pp13, 16; T390. The Parent attended and participated in both meetings. T391, 399-400. Bryant Mettler³ was the Student's case manager. J3p3; T389.

7. The April 2023 IEP provided the Student with the following services:

Services 04/17/2023 - 04/16/2024

Concurrent	Service(s)	Service Provider for Delivering Service	Monitor	Frequency	Location (setting)	Start Date	End Date
Special Education							
No	Behavior	Special Education Staff/ General Education Teacher	Special Ed Teacher	30 Minutes / Weekly	General Education	04/17/2023	04/16/2024
No	Social Emotional	Special Education Staff/ General Education Teacher	Special Ed Teacher	30 Minutes / Weekly	General Education	04/17/2023	04/16/2024

Total minutes per week of building instructional time available for this student (excluding lunch):

1500 minutes per week

Total minutes per week student is served in a special education setting:

0 minutes per week

Percent of time in general education setting:

100% in General Education Setting

³ Mr. Mettler is a certificated special education teacher, K-12, and general education teacher, K-8. T388. At the time of the hearing, Mr. Mettler served as a non-instructional case manager at Yelm High School, in addition to working with students at YES. T388.

8. The team also considered the Student's least restrictive environment (LRE) and selected placement in "80%-100% general education." J3p17. There is no evidence that the Parent expressed any disagreement with the April 2023 IEP. T170.

9. The team also developed a BIP that provided intervention strategies for each of the Student's target behaviors. Among these strategies, the BIP encouraged the Student to request a break as a replacement behavior for elopement, refusal to comply, unexpected social behavior toward people, and verbal aggression. J4pp3, 5, 7, 10. Verbal aggression included cursing at staff and peers and calling students names such as "`faggot,' `bitch,' or `retard.'" J4p9.

10. The BIP indicated that the Student could "request a break" and "access [a] break space (independently or when prompted by staff)." J4p3. The BIP did not place any restrictions on when the Student could request a break or how long the break would last. T343, 365. The BIP did not specify the location for breaks because the location could change depending on where the Student wanted to go to become regulated. T397. Additionally, the Student was going to be transitioning to a different school for ninth grade, and the BIP needed to be written so that it could be implemented in a different building. T397.

11. The team discussed the Student's break space and decided that the designated break spaces for the Student at YES were in the library or a space outside the counselor's office. T61-62, 397; J4p15. The Parent did not object to these spaces or indicate she did not want the Student to leave the classroom for breaks. T400.

Meeting

12. Near the end of the 2022-2023 school year, the Parent asked Mr. Mettler to schedule a meeting. T27. The Parent believed she was requesting an IEP team meeting to discuss what the Student would need to successfully transition to Yelm High School for ninth grade (2023-2024 school year). T26-27. However, Mr. Mettler believed the Parent was requesting a "change of location" meeting, rather than an IEP meeting. T401. A "change of location" meeting typically occurs when a student moves from one school building or location to another. T414-15.

13. The Parent did not respond to Mr. Mettler's email requesting dates and times to schedule the meeting. T401-402. Subsequently, via email sent on August 5, 2023,⁴ the Parent requested a meeting as follows:

⁴ Exhibit P2 does not list the email recipients. P2p2.

Hey team [Student]:

I know I was not able to get a meeting done before the end of last year so I wanted to reach out to see when we can get one before the beginning of the year.

T26; P2p2. The Parent considered this to be a request for an IEP team meeting. P2.

14. Christopher Clark, an assistant principal at Yelm High School who had worked with the Student at YES, responded to the Parent's email on August 7, 2023, and stated he would work with Michael Holman,⁵ the Student's case manager, to set up a meeting to support the Student. P2p1; T224. Mr. Clark generally holds meetings to discuss scheduling with special education students prior to the beginning of the school year. T227 He wanted the team to help the Student choose classes he had an interest in because he had been more successful at YES when he was in classes he liked, such as art. T226-27, 231.

15. A meeting was scheduled for August 28, 2023, but was rescheduled at the Parent's request. T30; P3p1; P4p1. Subsequently, an invitation to a meeting on September 1, 2023, was sent to the Parent; Mr. Holman; Mr. Clark; Brianne Knighton, a District behavior specialist; Sarah Williams, a District counselor; and Shannon Powell, Director of the Office of Student Support. P5p1; T32-33, 175, 228. A general education teacher was not invited and did not attend when the meeting took place on September 1, 2023. T33, 229.

16. At the September 1 meeting, the team discussed the Student's schedule. T74, 337. The team also discussed that the Student would use Mr. Holman's room, also known as the severe learning center and as room 334, when the Student needed to access a break space consistent with his IEP and BIP. T231, 278, 338.

17. The severe learning center, or room 334, is not a general education setting. T339. It is a special education room that provides support for students who need time and space to deescalate or if they are experiencing anxiety. The support in room 334 helps students "reestablish and get back to class." T216. There is no evidence in the record that Yelm High School has break spaces within general education classrooms. T278. Neither Mr. Clark nor Mr. Holman considered the use of room 334, where the Student could receive support to help him regulate and return to class, to be a modification to the Student's IEP or BIP. T330; 370-72. The Parent did not raise

⁵ Mr. Holman has a master's degree in education and is a certificated special education teacher. He has been employed by the District as a special education teacher for four years. T361.

concerns about the use of room 334 as the break room. T277, 284, 308. Nor did the Parent or anyone else raise concerns that the Student required different behavioral supports than those provided by the BIP. T329.

18. Most students were escorted to the break room when they chose to go there. However, during the September 1 meeting, the Student objected to being escorted there and the team agreed that teachers would instead call Mr. Holman's room to let him know when the Student was on his way. T256.

19. On September 1, 2023, the District issued a prior written notice (PWN) stating that the September 1 meeting was a "team check in" and was not an IEP team meeting. J5p3. The PWN stated that the purpose of the meeting was to "prepare for the start of high school, ensure [the Student] and his family know . . . his support people at Yelm High School (case manager, counselor, psych, behavior team support) and set him up for success and a fresh start at the building." J5p3.

20. The PWN reflected that the team discussed scheduling options, considered Parent and Student input regarding the Student's needs, discussed the Student's current IEP minutes, and discussed how District staff:

would conduct check ins to serve his SDI minutes, do a temperature check on how [the Student] is doing, and help support him and advocate for him during the course of the school day.

J5p3. A check-in, or temperature check, is a series of questions designed to see how the Student was doing and what he needed. T362, 375.

21. During the September 1 meeting, the Student stated he was not going to go to Mr. Holman's room to check in with him, despite encouragement from the Parent to do so. Ultimately, it was agreed that Mr. Holman would find the Student to check in and assess how he was doing. T283, 374.

2023-2024 School Year

22. On September 5, 2023, the Student started the 2023-2024 school year at Yelm High School.⁶ J14p1.

⁶ The school day at Yelm High School started at 7:10 a.m. and ended at 1:40 p.m. T215. Each period lasted between 45-50 minutes. T215. The Student was assigned to first lunch, which took place after third period. T298. At Yelm High School, there are 1,750 minutes in the school week. T342.

23. Mr. Holman delivered the SDI in the Student's IEP,

during checkups and when [the Student] would come to my room. So when Student gets off the bus, I would accommodate and meet them in the courtyard. During lunchtime, if they weren't in my classroom doing checkups, I would meet them outside at the school circle, and we would exchange greetings and whatever issues that the student may or may not have, or if they're doing pretty good and they're having a good day, then that was all that was required.

T374-75.

24. The Student was also assigned to Mr. Holman's room 334 for "Tornado Time," which was a 30-40-minute period on Wednesdays focused on social-emotional learning, mental health awareness, or "whatever the student may need at the time." T375. Instructions were tailored to each student in the class. T376; J12p1.

25. Room 334 was not used for purposes of disciplining the Student. T217, 219-20. The amount of time that the Student spent in room 334 was based on his needs. T340. The Student sometimes ate lunch in Mr. Holman's room. T353. The Student also deescalated in room 334 at times. T340. If the Student was escalated but was not registering on his own that he was escalated in language or actions, a teacher would guide him to room 334. T219-20, 256; J6p1 (entry for 9/25/23).

26. When the Student came to room 334 for a break, Mr. Holman would engage him to determine his needs by conducting a temperature check. The goal was to help the Student to regulate and return to class. T220. The length of the Student's stay in room 334 varied depending on the time he needed to regulate in order to be ready to return to class. T222. After 10 minutes, Mr. Holman would reengage with the Student to determine whether he needed an additional 10 minutes, or "whether they need food, drink, help with work, or they can return to class." T362, 375. Most of the time, the Student was able to deescalate and return to class. T364. The Student returned to class when he was ready; Mr. Holman never forced him to go back to class. T364.

27. The District used Google Classroom in room 334 to provide the Student and other students with access to their educational content. T221.

Attendance System and Discipline Log

28. Yelm High School moved to a new attendance system for the 2022-2023 school year. T285. Until mid-October 2023, the new attendance system did not have a code to reflect when the Student was not in class because he was taking a break in room

334. T286. The code “SP,” meaning “special services” was added in October 2023, and was used to record time in the break space. Subsequently, the District updated attendance data for all students. T286-87. Exhibit J13 contains the Student’s updated attendance data, which is more accurate than the data in Exhibit P15, which predates the update to the new attendance system.⁷ T287.

29. The updated attendance system included the following attendance codes:

ATTENDANCE TYPES	
A	ABSENT EXCUSED
O	ABSENT OTHER
T	TARDY
U	ABSENT UNEXCUSE
ATTENDANCE REASONS	
IS	IN-SCHOOL SUSPENSION
O	OFFICE
S	SUSPENSION
SP	SPECIAL SERVICES
U	UNEXCUSED

J13p2.

30. The Student’s attendance records from September 5 to October 13, 2023, are as follows:

Date	Day of the Week	402 - 0	402 - 1	402 - 2	402 - 3	402 - 4	402 - 5	402 - 6
10/13/2023	Friday		A - S	A - S	A - S	A - S	A - S	A - S
10/12/2023	Thursday		A - S	A - S	A - S	A - S	A - S	A - S
10/11/2023	Wednesday	A - S	A - S	A - S	A - S	A - S	A - S	A - S
10/10/2023	Tuesday					O - SP	O - SP	O - SP
10/09/2023	Monday				O - SP	O - SP	O - SP	
10/05/2023	Thursday		A - S	A - S	A - S	A - S	A - S	A - S
10/04/2023	Wednesday					O - SP	O - SP	O - O
10/03/2023	Tuesday					O - O		
10/02/2023	Monday					O - O		
09/29/2023	Friday		T - U					
09/28/2023	Thursday					U - U		
09/22/2023	Friday		A - S	A - S	A - S	A - S	A - S	A - S
09/21/2023	Thursday		A - S	A - S	A - S	A - S	A - S	A - S
09/20/2023	Wednesday					U - U	U - U	
09/19/2023	Tuesday			T - U				
09/18/2023	Monday			U - U		U - U		
09/15/2023	Friday		T - IS			O - IS	O - IS	T - IS
09/14/2023	Thursday		A - S	A - S	A - S	A - S	A - S	A - S
09/13/2023	Wednesday					O - SP	O - SP	O - SP
09/12/2023	Tuesday					O - SP	O - SP	
09/07/2023	Thursday					U - U		

⁷ The attendance data in P17 is identical to the attendance data in J13. Compare P17 with J13.

J13. When the Student took a break in Room 334, it was marked as “O-SP,” meaning “Absent-Other / Special Services.” T255. This code reflected that the Student was working with Mr. Holman in room 334 and exercising his BIP. T256. After 10 minutes, a student who is not in class is marked as “U-U,” to reflect an unexcused absence. T243-44, 354, 357.

31. The code “O-O” reflected time in the office and when Mr. Clark met with the Student. J13p2; T244, 297. Mr. Clark frequently tried to work with the Student to assess how he was doing and talked with him about not using hateful language. T265-66, 297. He tried to find time so that he was not pulling the Student from class. T297-98. Mr. Clark would meet with the Student at the beginning of class and have him regulate and return to class or tried to catch him after lunch or in between classes. T266, 297. If the meeting lasted more than ten minutes it would be recorded in the attendance records as “O-O,” for “Absent Other / Office.” T266; J13p2.

32. The District kept a log of disciplinary referrals made by teachers (discipline records). J6; T288. Not all disciplinary referrals resulted in the imposition of discipline. Entries marked “Informational Purposes” and “FYI” did not constitute discipline; they provided information to allow conversation with teachers, the Student, and staff. T259, 288-89. Dates and times listed in the discipline records reflect the date when incidents were added to the log, rather than when the incidents actually occurred. T312-13.

September and October 2023

33. On September 12, 2023, the Student chose to go to Mr. Holman’s room during lunch. The Student told Mr. Holman that he was frustrated with another student who shared the same lunch period. T363. Mr. Holman sent an email to the Parent informing her of the situation and that the Student was de-escalating in room 334. P6p1.

34. The Student’s attendance records for September 12, 2023, are marked “O-SP” for 4th and 5th periods. J13. Although the Parent believed the Student was removed from his placement during this time, Mr. Homan credibly testified that the Student chose to go to room 334 and was not required to stay in room 334 for those periods. T134, 364.

35. Via text message on September 13, 2023, at 1:04 p.m., Mr. Clark advised the Parent of an incident in class involving the Student calling other Student’s “faggots.” P7p1; J7p1. At 2:40 p.m., Mr. Clark stated the Student would need to stay home on September 14, while Mr. Clark investigated the incident, and could return to school on September 15, 2023. P7p1; T289-90.

36. The Parent believed that the Student was actually removed from his placement starting on September 13, 2023. T135. However, the text exchange with Mr. Clark does not refer to a removal on September 13, and states only that the Student would need to stay home the following day. P7; T290. Additionally, the Student's attendance records for September 13, 2023, are marked "O-SP" for 4th, 5th, and 6th periods. J13. This is consistent with Mr. Clark's testimony that he spoke with the Student after the incident and asked if needed to go to class, but the Student refused to return to class and remained in Mr. Holman's room for the remainder of the day. T318.

37. In a letter dated September 14, 2023, the District notified the Parent that the Student was placed on an emergency removal beginning that date. The letter stated the removal was "based upon the following alleged misbehavior or violation of school rules: [The Student] was calling students 'faggots', a fight ensued." J7p1.

38. The Student returned to school on September 15, 2023. His attendance records for September 15, 2023, are marked "T-IS" meaning "Tardy-In School Suspension" for periods 1 and 6, and "O-IS" meaning "Absent Other - In School Suspension" for 4th and 5th periods. J13p1; T234. The Student's discipline records contain an "FYI" entry on this date that states "Not going to class 4th, 5th, and 6th period." J6p2.

39. Based on the attendance and discipline records, the Parent believed the Student was placed on in-school suspension for September 15, 2023, as punishment for his refusal to go to class. T93. More weight is given to the testimony of Mr. Clark, who explained that on September 15, 2023, the Student refused to go to class and did not want to go to room 334. The Student was given the option to go to the in-school suspension area (ISS), also referred to as the "restorative center," instead of punishment. T233-34. The Student was not suspended on September 15, 2023, and was not required to stay in ISS; he had the opportunity to go to his general education classes or to room 334 at all times but did not want to do so. T236, 241, 271.

40. In the ISS space, the Student and other general education students had access to their general education materials through Google Classroom. T235-37; 241. It is unclear whether the Student accessed his general education materials while he was in ISS. T236-37.

41. Via email on September 19, 2023, the Student's English teacher, Kameron Franklin, informed the Parent that the Student had been using profanity toward another student and continued to do so after multiple warnings. P8p1. Mr. Franklin also noted the Student was leaving class during the final ten minutes, which was

against school policy,⁸ and was refusing to accept class materials or directions to take out required materials. P8p1. In responding, the Parent discussed that the Student had struggled since his father died in 2017 and had had a series of traumatic events in his life. P8p1.

42. At hearing, the Parent raised concerns that the Student was not being permitted to request breaks during the first and last ten minutes of class, even though his BIP did not impose any restrictions. T98-99. As noted in the Student's discipline records, the Student left the classroom during the incident discussed in Mr. Franklin's email. J6p1; T257.

43. Via text message on September 20, 2023, Mr. Clark informed the Parent that the Student continued to engage in behaviors including "continuing to call students faggots, or they should go kill themselves, wearing a bra on the outside of his [clothes]." P9p1.

44. The Parent believes the Student was removed from his placement during 4th and 5th periods on September 20 based on a text she received from Mr. Clark the following day. T138. The Parent's exhibit included only part of the text exchange: "The class after I met with [the Student] about his using the word faggot [h]e went to [his 5th period technology communication class] and used the language" P9p1. The incomplete nature of the text exchange limits the weight afforded to it.

45. More weight is given to Mr. Clark's testimony. Although his testimony regarding September 20 was somewhat confusing, he stated and affirmed that he met with the Student between 4th and 5th periods on September 20, which is consistent with the fact that attendance records do not contain an "O-O" code. T242, line 8; T244, line 5; J13. The Student's attendance records are marked "U-U" for 4th and 5th periods. J13. There is insufficient evidence in the record to establish whether the Student skipped these classes or arrived late to class.

46. In a letter dated September 21, 2023, the District notified the Parent that the Student was placed on short-term suspension beginning that date and returning to school on September 23, 2023. The Student was suspended for "the following alleged misbehavior or violation of school rules: Derogatory language -using the word faggot toward others." J8p1.

⁸ During the first ten minutes of class and the last ten minutes of class, students are supposed to be in class and are not supposed to request bathroom or water breaks or to leave the class. T257, 365.

47. On September 22, 2023, Mr. Holman sent the Parent an email that stated:

[The Student] has been doing well with physically being in class. He has 1 excessive tardy and one day of refusing to go to the [sic] 4th, 5th and 6th periods. Discipline (FYI teacher) referrals are 9 overall for mostly inappropriate language/profanity, 1 unexpected behavior, and using slurs. [The Student] is using room 334 as needed and was asked to take a break to room 334 one time.

In week 2, he used it for a total of 315 minutes, and in week 3, he used it for 210 minutes.

P10p1; T339.

48. After the Parent received Mr. Holman's email, she did not express concerns about the Student's use of room 334 as a break space or the amount of time he was spending in the break space, and did not request an IEP team meeting to discuss such concerns. T167, 364, 366.

49. In determining the Student's minutes in the break space, Mr. Holman included the Student's total time in room 334, including any lunch periods. T352-53. The Student's attendance records do not account for these lunch periods, leading to some discrepancies. T352. The evidence in the record does not establish how many lunch periods the Student spent in Mr. Holman's classroom. Therefore, with respect to actual class time spent in Mr. Holman's room, the attendance records are given more weight.

50. The Student's discipline records contain entries dated September 25 and 28, and October 2, 2023, that refer to the break room. The September 25 entry indicated the Student was escorted to room 334 after he was warned not to use profanity and continued to do so. The September 28 and October 2 entries indicated the Student said, "I can `Fu*****" take a break whenever I want and I am going to Mr. [Holman's] room. . ." and "I am going to Mr. Holman's room and you can't stop me . . . it's in my IEP," respectively. J6. It is unclear when the recorded conduct took place and there is no further evidence in the record regarding these incidents. There is insufficient evidence in the record to make a finding as to whether the Student actually went to Mr. Holman's room on these instances.

51. On October 2, 2023, Mr. Clark met with the Student briefly and returned him to class after approximately 10 minutes, which is reflected on the Student's attendance records with the marking "O-O" for 4th period. T246-47; J13. The Student's attendance

records are also marked “O-O” for 4th period on October 3, 2023, but there is no further evidence regarding this entry. J13.

52. On October 4, 2023, Mr. Clark informed the Parent that the Student had been involved in a physical altercation with another student, who was upset that the Student was making sexist jokes. The Student was “moved out of the room.” P11p1. The Parent responded “I’m on my way to pick up early. Do you want me to come in and see you?” P11p1.

53. In a letter dated October 4, 2023, the Parent was notified that the Student was placed on an emergency removal for allegedly “making sexist remarks to other students. He was asked to stop and continued. A significant altercation ensued between [the Student] and another student as a result.” J9p1.

54. The emergency removal began on October 4 and continued through October 5, 2023. J9p1. There was no school on Friday October 6, 2023, due to teacher training. J14. Mr. Clark informed the Parent that the Student could return to school on Monday, October 9, 2023. P11p3; J14.

55. On October 10, 2023, security had to stop some students from approaching the Student during lunch. P14p1. The Student went to room 334 on his own and told Mr. Holman his side of the story. T367. At 11:20 a.m., Mr. Holman notified the Parent and explained that the Student:

said he only said the N word once. When he was justifying why he said it, he couldn’t stop laughing and said it was their problem. He has also shared that the N word also means poor people.

Another topic that he brings up is that it is not racist to Hitler salute black people and that he doesn’t understand how it is racist towards Jewish people.

Our conversation entailed a detailed discussion on the inappropriacy [sic] of hate speech, and its implications in our social and professional interactions. [The Student] expressed his lack of understanding on the topic and disavowed any accountability.

He will be in 334 till [sic] at least the end of 5th period to avoid the other students as per Assistant Principal Wilkerson’s request. . . .

On a more positive note, his teachers are reporting better behavior in class when he is able to ask for a break in 334.

P14p1.

56. The Student's attendance records are marked "O-SP" for 4th, 5th, and 6th periods on October 10, 2023. J13. Based on Mr. Holman's email, the Parent believed the Student was required to stay in room 334 and was removed from his placement for disciplinary purposes. T117, 142. I give more weight to the testimony of Mr. Holman, who was present at school, drafted the email, and explained at hearing that the Student was encouraged to stay in room 334 during 5th period to avoid further interaction with the other students but was not required to stay in room 334 at any time. T367-69.

57. On Tuesday, October 10, 2023, Assistant Principal Ali Jacobson informed the Parent that she "was made aware of a situation that occurred yesterday [October 9] in class that spilled into more issues today." P13p1. She informed the Parent that the Student would need to stay home on October 11, 2023, until the investigation could be completed. P13p1.

58. The Student's discipline records state:

On 10/09/23, [the Student] called an African American student the 'N' word in 5th period. During this class he had a swastika on his hand and when brought to the front of the class made a gesture of nazi [sic] salute to class when pulled up at the teacher. He also used a racial slur of calling a student a beaner.

J6p1. The Student's discipline records refer to his suspension from October 12 to 16, 2023, and make no mention of any other removal. J6p1. The Student's attendance records for October 9 are marked "O-SP" for 3rd, 4th, and 5th periods, but there is no further evidence regarding these entries. J13.

59. On October 11, 2023, Mr. Clark informed the Parent that the Student would be removed for three days. P11p3.

60. In a letter dated October 12, 2023, the District notified the Parent that the Student was placed on a short term suspension for alleged "Discriminatory Harassment: [The Student] called an African American student the "N" word, when brought to front of class he made gesture of Nazi [sic] salute to class and used a racial slur of calling another student a beaner." J10p1. The letter stated the short term suspension started on October 11 and continued through October 13, 2023, and that the Student could return to school on October 16, 2023, which was a Monday. J10p1; J14.

Revocation

61. Via email on October 13, 2023, the Parent received a letter notifying her that:

the District is revoking [the Student's] acceptance as a nonresident transfer student. This revocation is effective immediately.

Your student's acceptance is being revoked because his discipline records demonstrate a history of disruptive behavior. The pattern of disruptive behavior has led to 16 disciplinary referrals⁹ since the start of the 2023-24 school year. This pattern of behavior is adversely affecting the ability of the [District] to educate your student. [The Student's] behavior, including the repeated use of derogatory slurs based on race or gender, is adversely affecting other students as well.

You will need to enroll your student in his resident school district or pursue other educational options.

J11p1; T126, 155, 202. The letter was signed by Shannon Powell, District Director of the Office of Student Support. J11p1; T123. The letter informed the Parent of her right to appeal the revocation to the Office of Superintendent of Public Instruction (OSPI) under RCW 28A.225.230(3). J11p1.

62. The Student was not enrolled in the District after October 13, 2023. T184. For some time, the Student's attendance records contained "Absent-Excused" entries for October 16 through 20, 2023, because the District's attendance clerk was out of the office and unaware that the Student was no longer enrolled in the District. P15; T288. Those entries were inaccurate and were subsequently updated. T288.

63. The Parent did not drive the Student to school on any school day between Monday, October 16, 2023, and Friday, October 27, 2023, and the Student did not use an alternate means of getting to school on those dates. T155-57.

64. On October 30, 2023, the Parent received an email from the address noreply@k12.wa.us, stating that the Student's choice transfer "has been rescinded (revoked) as of 10/30/23 in accordance with [District] policy for the following reason: Discipline records demonstrate a history of disruptive behavior." P16p1. Mr. Powell believed the email was sent by an employee in the District Superintendent's Office, but

⁹ The discipline records contain 16 referrals, with the first referral dated September 14, 2023, and the final referral dated October 9, 2023. Eight entries are marked "Informational Purposes." J6pp1-2.

he did not know why the letter had been sent. T383. The email advised that the failure to enroll and attend in the Student's home school district could conflict with attendance laws, and provided an enrollment contact in the Student's home school district. P16p1.

65. There is no evidence in the record as to whether the Student has been enrolled in his resident District, or regarding efforts made by the Parent to enroll him there.

66. The Parent was permitted to make an offer of proof regarding Mr. Powell's authority to revoke the Student's acceptance as a nonresident transfer Student. Mr. Powell has been granted such authority by the District Superintendent. T184.

67. At the time of the hearing, there was no evidence that the Parent had appealed the revocation under RCW 28A.225.230(3).

68. By mid-October 2023, the Student had made some progress toward his social/emotional goal on using tools for self-regulation, including breaks. J3p11; T354. The Student was using breaks appropriately and was able to prioritize how he wanted to self-regulate. T354. There is insufficient evidence to determine whether the Student made progress toward his behavior goal to improve his engagement in learning. J3p12.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

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

2. The burden of proof in an administrative hearing under the IDEA is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). The Parent is seeking relief and bears the burden of proof in this case. The U.S. Supreme Court and Washington courts have generally held that the burden of proof in an administrative proceeding is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91, 102 (1981); *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 797 (1999); *Hardee v. Dep't of Social & Health Services*, 172 Wn.2d 1, 4 (2011). Therefore, the Parent's burden of proof in this matter is preponderance of the evidence.

The IDEA and FAPE

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

4. In *Rowley*, the U.S. Supreme Court established both a procedural and a substantive test to evaluate a state's compliance with the IDEA. The first question is whether the state has complied with the procedures set forth in the IDEA. The second question is whether the individualized education program developed under these procedures is reasonably calculated to enable the child to receive educational benefits. “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” *Rowley*, 458 U.S. at 206-07.

5. Procedural safeguards are essential under the IDEA, particularly those that protect the parent’s right to be involved in the development of their child’s educational plan. *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 882 (9th Cir. 2001). Procedural violations of the IDEA amount to a denial of FAPE and warrant a remedy only if they:

(I) impeded the child’s right to a free appropriate public education;

(II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or

(III) caused a deprivation of educational benefits.

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

6. “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.” *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017). The determination as to whether an IEP is reasonably calculated to offer a student FAPE is a fact-specific inquiry. As the U.S. Supreme Court has made clear, “[a] focus on the particular child is at the core of the IDEA,” and an IEP must meet a child’s unique needs. *Id.* The “essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Id.* Accordingly, an IEP team is charged with developing a comprehensive plan that is “tailored to the unique needs of a particular child.” *Id.* at 1000. Additionally, the

Student's "educational program must be appropriately ambitious in light of his circumstances . . ." *Id.*

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

(Issues 1 and 2) The Parent has not shown that the Student was removed from his educational placement because of disciplinary actions for over ten consecutive school days or for a series of removals that constituted a pattern; therefore, the Parent has not shown that the District was required to hold a manifestation meeting.

8. The Parent claims the Student was removed from his placement for disciplinary purposes for more than ten consecutive school days between October 11 and 30, 2023. She also contends the Student was removed from his placement for disciplinary reasons because he was subject to a series of removals that constituted a pattern and totaled more than ten school days. The Parent argues these removals triggered the requirement to hold a manifestation determination meeting and that the District violated the IDEA and denied the Student a FAPE by failing to hold one.

9. WAC 392-172A-05145(2)(a) permits school personnel to "remove a student eligible for special education services who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten consecutive school days to the extent those alternatives are applied to students without disabilities . . . and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change of placement under WAC 392-172A-05155." 34 CFR §300.530.

10. Under WAC 392-172A-05155,

(1) For purposes of removals of a student eligible for special education services from the student's current educational placement, because of disciplinary removals, a change of placement occurs if:

(a) The removal is for more than ten consecutive school days; or

(b) The student has been subjected to a series of removals that constitute a pattern:

(i) Because the series of removals total more than ten school days in a school year;

(ii) Because the student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the student has been removed, and the proximity of the removals to one another.

(2) The school district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

(3) The determination regarding a disciplinary change of placement is subject to review through due process and judicial proceedings.

34 CFR §300.536.

11. Within ten school days of any decision to change a student's placement because of a violation of a code of student conduct, a school district must conduct a manifestation determination meeting. WAC 392-172A-05146. A manifestation determination is not required until "ten school days have been missed either consecutively or in a pattern of removals." *Avila v. Spokane Sch. Dist. #81*, No. CV-10-00408-EFS, 2018 U.S. Dist. LEXIS 14152 *38 (E.D. Wash. Jan. 29, 2018).

12. "School day" means any day or partial day that students are in attendance at school for instructional purposes." WAC 392-400-025(13). For purposes of determining the number of disciplinary removal days, an in-school suspension is not counted if the following three factors are met:

the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement.

71 Fed. Reg. 46715 (August 14, 2006).

13. The IDEA does not define the term "discipline." In Washington state, Chapter 392-400 WAC, which sets out discipline rules applicable to all students, defines "Discipline" as "any action taken by a school district in response to behavioral violations." WAC 392-400-025(4). Similarly, the U.S. Department of Education (DOE)

recently published guidance that defines “discipline” as “the consequences a school imposes on a child who violates a school’s code of conduct or rules as determined by school personnel,” for purposes of that publication. *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA’s Discipline Provisions, Question B-1*, 122 LRP 24161 (OSEP 2022). Although DOE guidance is not binding, it is instructive in analyzing the Parent’s claim.

14. In its guidance, DOE stated that behavioral actions that “result in denials of access to, and significant changes in, a child’s educational program could all be considered as part of the 10 days of suspension and also could constitute an improper change of placement.” *Id.* at Question C-1. Such actions could include shortening a student’s school days or prohibiting a student from attending an elective due to behavioral concerns. These types of actions are generally considered disciplinary removals unless the three factors that pertain to in-school suspensions are met. *Id.*

15. DOE guidance further noted that “[f]requent use of short-term disciplinary removals or informal removals of children with disabilities may indicate that the child’s IEP does not appropriately address their behavioral needs, which may result in a denial of FAPE.” *Id.* at Question C-3.

16. Although the IDEA does not define “informal removal,” DOE’s guidance defined the term as:

action taken by school personnel in response to a child’s behavior that excludes the child for part or all of the school day, or even an indefinite period of time. These exclusions are considered informal because the school removes the child with a disability from class or school without invoking the IDEA’s disciplinary procedures. Informal removals are subject to IDEA’s requirements to the same extent as disciplinary removals by school personnel using the school’s disciplinary procedures. Informal removals include administratively shortened school days when a child’s school day is reduced by school personnel, outside of the IEP Team and placement process, in response to the child’s behavior.

Id. at Appendix I, p. 52.

17. In this case, the District does not dispute that the Student was removed from his educational placement for disciplinary purposes for 7.5 days (September 14 and 21-22, 2023, and October 4 (half-day), 5, and 11-13, 2023). October 4 must be

counted as a full day, which brings the disciplinary removal count to eight days. WAC 392-400-025(13).

18. The Parent contends that the Student was subject to additional disciplinary removals on September 13, 15, and 20, 2023, and on October 2, 9-10, and 16-30, 2023. *Parent's Closing Brief*, pp. 14-15.

19. The Parent's first argument is that the Student was removed from his current educational placement for more than ten consecutive days between October 11 and 30, 2023. This claim is premised on the Parent's contention that Mr. Powell lacked authority to revoke the Student's acceptance to the District as a nonresident student, making the October 13, 2023, notice of revocation improper. It is also based on the claim that the Student could not enroll in his resident school district until revocation occurred. *Parent's Closing Brief*, p. 13.

20. The Parent has not met her burden with respect to this claim. She does not dispute that she received a letter on October 13, 2023, notifying her that "the District is revoking [the Student's] acceptance as a nonresident transfer student. This revocation is effective immediately." Consistent with this letter, the Parent did not bring the Student to Yelm High School, or otherwise arrange for him to attend, at any point after October 13, 2023. The Parent offered no evidence whatsoever regarding efforts, if any, to enroll the Student in his resident district. Nonetheless, the Parent contends that the Student's acceptance as a nonresident was not revoked until October 30, 2023, when she received a second notification letter. The fact that the Parent received a second notification letter does not change the fact that she was already aware that the Student's acceptance had been revoked as of October 13, and that he was no longer enrolled in the District.

21. The Parent asks the ALJ to determine that the District's first letter did not actually revoke the Student's acceptance because it was signed by Mr. Powell rather than the District Superintendent, and thus failed to comply with District policy and rules set out in Chapter 392-137 WAC governing choice transfer applications. As discussed at length in previous orders,¹⁰ RCW 28A.225.230(3) is the sole process for appealing a school district's decision to deny or revoke an application for nonresident Student transfer. Moreover, a notice of appeal must be received by OAH "as a condition precedent to exercising jurisdiction" under chapter 392-137 WAC.

¹⁰ *Order Granting Partial Summary Judgment, January 10, 2024; Order Denying Request for Reconsideration, January 16, 2024; Order on Expedited Status, November 21, 2023.*

22. As of the date of the hearing, the Parent had not filed a notice of appeal challenging the District's revocation of acceptance, even though the October 13 notice of revocation advised the Parent of her appeal rights, and even after the ALJ issued three orders concluding that RCW 28A.225.230(3) provided the sole mechanism to appeal the revocation. Because the Parent has not filed a notice of appeal under RCW 28A.225.230(3), the ALJ lacks jurisdiction to decide that issue and the unchallenged revocation remains in effect. *Order Granting Partial Summary Judgment*.¹¹

23. The Parent has not shown that the Student was enrolled in the District after October 13, 2023; therefore, the Parent has not shown that he was removed from his educational placement for disciplinary purposes at any point after October 13, 2023. Accordingly, the Parent has not met her burden to show that the Student was removed from his educational placement for disciplinary purposes for more than ten consecutive days.

24. The Parent next contends that the Student was subject to a series of disciplinary removals that constituted a pattern totaling more than ten days. In addition to the eight undisputed disciplinary removal days, the Parent argues that disciplinary removals occurred on September 13, 15, and 20, 2023, and on October 2, 9, and 10, 2023. *Parent's Closing Brief*, pp. 14-15. The first step in addressing the Parent's claim is to determine whether removals on these dates were disciplinary in nature. See *Woodland School Dist.*, SECC No. 22-61, 122 LRP 46609 (July 1, 2022).

25. The Parent argues that disciplinary removals occurred during periods marked "O-SP" in the Student's attendance records on September 13 and October 9 and 10, 2023, indicating that the Student was in room 334. With respect to September 13, the Parent claims that the Student was removed from his placement for disciplinary purposes because his use of the break space followed an incident that ultimately led to his suspension. The evidence does not support this claim. Via text message, Mr. Clark notified the Parent of the incident and that the Student would need to stay home on September 14. There is no mention of a removal on September 13. Additionally, when Mr. Clark spoke with the Student after the incident, he asked the Student if he needed to go to class. The Student refused to return to class and remained in Mr. Holman's room, where he had access to his general education materials, for the remainder of the day. The Student's decision to use the break space as permitted by his BIP cannot be considered discipline because it did not result from the actions of District staff. WAC 392-400-025(4). Moreover, it is clear that the Student had the

¹¹ As stated in previous orders issued in this case, nothing in this order precludes the Parent from appealing the revocation decision under RCW 28A.225.230(3).

opportunity to go to his general education classes and declined to do so. Therefore, the Parent has not shown that the Student's time in room 334 on September 13 constituted a disciplinary removal from his educational placement.

26. Likewise, the Parent has not proven that a disciplinary removal occurred on October 9, 2023. The Student's discipline records describe an incident that occurred on that date, but refer only to his suspension on October 12-16, 2023, and do not mention removal on October 9. The fact that attendance records are marked "O-SP" for three periods on October 9 is not sufficient to establish a disciplinary removal because it is undisputed that the Student's IEP and BIP permitted him to request a break. To the extent that the Parent now argues that the Student's IEP did not identify room 334 as the break space, that argument does not establish that the Student's time in room 334 was disciplinary in nature. Without more, the use of the coding "O-SP" does not constitute evidence that District staff required the Student to go to room 334 or to stay there.

27. On October 10, 2023, the Student chose to go to room 334 following an incident. Mr. Holman notified the Parent of the incident and stated that the Student would be present in room 334 through 5th period at Ms. Wilkerson's request. Although the Parent believes the Student was removed from his educational placement on this date, I gave more weight to Mr. Holman's testimony that the Student was encouraged to stay in room 334 during 5th period to avoid further interaction with the other students involved in the incident, but he was not required to remain there and could have returned to his general education classes if he chose to do so. Again, the evidence does not support a conclusion that the Student's removal was disciplinary in nature because the Student chose to go to room 334 and was not required to stay there.

28. Similarly, the Parent has not shown that the Student was placed on in-school suspension on September 15, 2023. Mr. Clark's credible testimony establishes that the Student was refusing to go to class and did not want to access room 334. The Student was not suspended but was given the option to use the ISS space and chose to do so. He could have returned to his general education classes at any time but chose to remain in the ISS space. In that space, the Student had access to his general education materials, like other general education students who were present. The Parent has not met her burden to show that District staff removed the Student from his placement for disciplinary purposes on September 15, 2023.

29. The next question is whether Mr. Clark's conversations with the Student on September 20 and October 2, 2023, constituted a disciplinary removal from the Student's educational placement. As found above, on September 20, Mr. Clark met with the Student between 4th and 5th periods and was not removed from class. On

October 2, Mr. Clark met with the Student briefly and returned him to class after approximately 10 minutes. Although DOE guidance indicates that administrative actions, such as shortening a school day, can constitute disciplinary removals, the facts of this case do not warrant such a conclusion. Not only were Mr. Clark's meetings with the Student brief, but Mr. Clark used meeting times with the Student to work with him on not using hateful language. Under the particular facts of this case, the Parent has not shown that disciplinary removals occurred on September 20 and October 2, 2023.

30. Finally, although the Parent suggests that the Student was removed for disciplinary purposes on other dates, she has not addressed those dates specifically in her closing brief. Based on a review of the evidence, it is concluded that the Parent has not shown that additional disciplinary removals occurred.

31. It is concluded that the Student was removed from his educational placement for disciplinary purposes for eight days (September 14, September 21-22, October 4-5, October 11-13). Disciplinary removals did not occur on any other dates. Accordingly, the Parent has not met her burden to demonstrate a change of placement under WAC 392-172A-05155, which was necessary to trigger the requirement to hold a manifestation determination meeting. WAC 392-172A-05146; *Avila v. Spokane Sch. Dist. #81*, at *38. Given that there was no change of placement under WAC 392-172A-05155, the District was not required to hold a manifestation determination meeting.

32. In conclusion, the Parent has not demonstrated that the District violated the IDEA or denied the Student a FAPE by changing the Student's placement under WAC 392-172A-05155 and failing to hold a manifestation determination meeting.

(Issue 3) Whether the District failed to follow proper procedures in modifying the Student's placement and IEP under the IDEA and applicable WACs when the Parent did not participate in the meeting or decision-making process.

33. The Parent next claims that the District unilaterally modified the Student's placement to include substantial time in the special education setting without the Parent's participation. The District argues that the Parent was involved in the development of the IEP and BIP in April 2023, and that the District did not modify the Student's IEP by designating a break space to implement the IEP.

34. While the Parent has not demonstrated a change of placement under the IDEA's disciplinary rules, the question of whether the District has modified the Student's educational placement and IEP raises a distinct question.

35. The IDEA does not define the term “educational placement.” WAC 392-172A-02060, which pertains to placements, provides in part:

(1) When determining the educational placement of a student eligible for special education including a preschool student, the placement decision shall be determined annually and made by a group of persons, including the parents, and other persons knowledgeable about the student, the evaluation data, and the placement options.

(2) The selection of the appropriate placement for each student shall be based upon:

(a) The student’s IEP;

(b) The least restrictive environment requirements contained in WAC 392-172A-02050 through 392-172A-02070, including this section;

(c) The placement option(s) that provides a reasonably high probability of assisting the student to attain his or her annual goals; and

(d) A consideration of any potential harmful effect on the student or on the quality of services which he or she needs.

36. The Ninth Circuit has examined the terms “educational placement” and “change in educational placement” and has concluded that “educational placement means the general educational program of the student.” *N.D. v. State Dep’t of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). In *N.D.*, the Court concluded that a “change in educational placement” occurs when a student is moved from one type of program to another type, and can also result when there is a significant change in the student’s program even if the student remains in the same setting. *Id.*

37. A change in the location in which a student’s special education services are provided does not necessarily constitute a change of placement. *R.M. v. Gilbert Unified Sch. Dist.*, 768 Fed. Appx. 720 (9th Cir. 2019) (unpublished) (change in elementary school a student attends does not constitute a change in placement); However, the determination as to whether a change in placement has occurred must be made on a case-by-case basis. If the change “substantially or materially alters” the educational program and services provided to the student, then a change in placement occurs. *Letter to Fischer*, 21 IDELR 992 (OSEP 1994).

38. In *Letter to Fisher*, the Department of Education’s Office of Special Education Programs (OSEP) explained that there are three components to an educational placement:

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

In determining whether a “change in educational placement” has occurred, the public agency responsible for educating the child must determine whether the proposed change would *substantially or materially alter the child’s educational program*. In making such a determination, the effect of the change in location on the following factors must be examined: whether the educational program set out in the child’s IEP has been revised; whether the child will be able to be educated with nondisabled children to the same extent; whether the child will have opportunities to participate in nonacademic and extracurricular services; and whether the new placement option is the same option on the continuum of alternative placements.

Id. (Italics added). A change in educational placement triggers the IDEA’s prior written notice (PWN) requirements. *Id.* The Ninth Circuit Court of Appeals has held that “[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 822 (9th Cir.2007). Although *Van Dyne* speaks in terms of a material failure and the OSEP letter discusses a material alteration, there is no reason to conclude that the meaning is any different.

39. The Parent contends that the Student’s IEP called for him to be served entirely in the general education setting, meaning that any time spent in Mr. Holman’s room, including for breaks, was a departure from his IEP and educational placement.¹² As set forth above, however, in order to demonstrate a change in placement, the Parent

¹² The Parent has not claimed that the District changed the Student’s placement when it revoked the Student’s admission to the District as a nonresident student. Moreover, the Parent did not introduce any evidence related to enrollment in the Student’s resident district or his IEP placement there. Accordingly, it is not possible to make any determination as to whether the change in location constituted a substantial or material change to the Student’s educational program and services so as to constitute a change in placement. *Letter to Fischer*, 21 IDELR 992.

must show a substantial or material alteration to the Student's educational program. *Letter to Fischer*, 21 IDELR 992. It is clear that the Student's IEP and BIP permitted him to take a break and placed no limit on how often he could request a break or how much time he spent in the break space. The Student's attendance records indicate he used the break space for part of the day on five of the twenty-eight school days he was enrolled in the District during the 2023-2024 school year. On most occasions, the Student went to the break space on his own initiative. He was never required to stay there. When the Student was in room 334, the goal was to provide support so that he could regulate and return to class as soon as possible. In other words, it was focused on supporting participation in the general education setting. While in the break space, the Student had access to his general education curriculum. To the extent that Mr. Holman provided the Student with SDI in the break space, the Parent has not established how much. Additionally, the limited time spent in Mr. Holman's room for Tornado Time cannot be considered more than a minor discrepancy from the Student's IEP. In conclusion, the Parent has not met her burden to prove a substantial or material change to the educational program required by the Student's IEP; therefore, she has not demonstrated a change of placement.

40. Even if the Student's time in the special education setting constituted a change of placement, however, it is clear that the Parent was involved in the decision-making process. She participated in the IEP team's initial adoption of the IEP and BIP in April 2023, and raised no concerns about permitting the Student to request breaks without limitation or his use of a break space outside of the general education classroom. The Parent also participated in decisions regarding the Student's break location, schedule, and the delivery of his SDI, at the September 1 meeting. The Parent had an opportunity to provide input and for meaningful participation but raised no concerns about the use of Mr. Holman's room as a break space or about the behavioral supports in the Student's BIP. She encouraged the Student to go to Mr. Holman's room for check ins and there is no evidence she objected to the Student going to Tornado Time in Mr. Holman's room. Additionally, after the Parent received Mr. Holman's email on September 22, 2023, discussing the Student's use of his room as a break space, she still did not raise concerns. Accordingly, the Parent has not shown that the District made decisions regarding the Student's placement without her participation.

41. To the extent the Parent argues her participation was impeded because the District should have held a formal IEP team meeting on September 1 instead of a change of location meeting, that does not negate the fact that the Parent had an opportunity to provide input and for meaningful participation. The District contends the Parent did not expressly raise this as an issue for hearing. WAC 392-172A-05100(3) (A party requesting a due process hearing may not raise issues during a due process

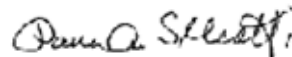
hearing that were not raised in the complaint unless the other party agrees). Even if considered, however, the Parent has not demonstrated that any procedural violation in failing to hold an IEP team meeting rather than a change of location meeting resulted in a denial of FAPE. The Parent has not demonstrated that her right to participation was significantly impeded; she has not identified any concerns that she could not raise or that could not be addressed because the meeting was not an IEP team meeting. The Parent offered no evidence that the full IEP team, with a general education teacher present, would have made different decisions regarding the Student's break space, schedule, or the delivery of his SDI. Therefore, the Parent has not demonstrated that the failure to hold a formal IEP team meeting, rather than a change of location meeting, resulted in lost educational opportunity or denied the Student FAPE.

42. The Parent's closing brief also alleges, for the first time, that the District violated the procedural requirements of the IDEA by failing to send PWN and/or failing to send timely PWN. *Parent's Closing Brief, p. 18*. The Parent did not raise this issue in her Complaint. Because the parties filed simultaneous post-hearing briefs, the District was unaware of this allegation and could not have agreed to include it within the issues for hearing. WAC 392-172A-05100(3). Even if this claim is considered, the Parent has not demonstrated that any failure to send PWN, or any delay in sending PWN, resulted in a denial of FAPE so as to warrant a remedy. WAC 392-172A-05105(2).

ORDER

The Parent has not proven that the District violated the IDEA and denied the Student a FAPE.

SERVED on the date of mailing.



Pamela Meotti
Administrative Law Judge
Office of Administrative Hearings

Right To Bring A Civil Action Under The IDEA

Pursuant to 20 U.S.C. 1415(i)(2), any party aggrieved by this final decision may appeal by filing a civil action in a state superior court or federal district court of the United States. The civil action must be brought within ninety days after the ALJ has mailed the final decision to the parties. The civil action must be filed and served upon all parties of record in the manner prescribed by the applicable local state or federal rules of civil procedure. A copy of the civil action must be provided to OSPI, Legal Services, PO Box 47200, Olympia, WA 98504-7200. To request the administrative record, contact OSPI at appeals@k12.wa.us.

DECLARATION OF SERVICE

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

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Dated March 28, 2024, at Olympia, Washington.

Representative
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cc: Administrative Resource Services, OSPI